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S. N. Das
Advocate High Court

S. N. DAR, B.A.C
SRINAGAR

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33	...	"	801
36	...	"	809
37	...	"	765
38	...	"	763
39	...	"	804
45	...	"	811
47	...	"	813
49	...	"	815
52	...	"	818
55	...	"	978
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61	...	"	843

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81	...	"	363
85	...	"	353
87	...	"	355
92	...	"	305
95	...	"	374
98	...	XIII	380
99	...	XV	423
101	...	"	482
101	...	"	485
102	...	"	425
104	...	"	429
106	...	"	431
107	...	"	492
108	...	"	433
111	...	"	981
113	...	"	984
116	...	"	945
123	...	XVI	83
125	...	XV	959
127	...	XVI	87
129	...	XV	994
133	...	"	996
137	...	"	1000
140	...	XVI	90
143	...	XVII	824
155	...	"	902
156	...	"	906
157	...	"	909
159	...	"	911
161	...	"	913
162	...	"	915
163	...	"	916
164	...	"	926
165	...	"	930
166	...	"	918
167	...	"	900
169	...	"	954
170	...	"	956
171	...	"	962
173	...	"	951
175	...	"	800
191	...	"	811
193	...	"	853
199	...	"	860
205	...	XVI	188
207	...	"	188
211	...	"	70
221	...	XVIII	105
233	...	"	144
234	...	"	181
235	...	"	187
236	...	"	183
239	...	XVII	813
255	...	"	868
268	...	"	878
269	...	"	898
271	...	XVIII	481
277	...	"	500
281	...	"	505

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46	...	"	653
48	...	XV	990
49	...	"	492
50	...	"	981
52	...	"	366
53	...	"	353
55	...	"	959
57	...	"	984
60	...	XVII	930
61	...	"	911
62	...	"	824
74	...	"	900
75	...	"	906
77	...	XVIII	466
85	...	XV	945
88	...	XVII	902
89	...	XV	996
93	...	XVII	860
98	...	"	954
100	...	"	800
116	...	"	926
117	...	XVI	83
118	...	XVIII	187
119	...	XVI	70
123	...	XVIII	476
127	...	"	658
129	...	XVII	813
142	...	XVI	87
144	...	XIX	2
146	...	XVIII	500
150	...	XVI	188
152	...	XVIII	481
158	...	"	510
160	...	XIX	167
164	...	XVIII	497
166	...	"	505
167	...	XIX	85
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108	...	"	915
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114	...	XII	191
123	...	XV	985
125	...	"	919
134	...	"	992
136	...	XVIII	669
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84	...	XI	997
87	...	"	67
104	...	"	417
119	...	XV	65
138	...	XIV	991
141	...	XII	32
146	...	XIII	243
150	...	XII	833
157	...	"	297
164	...	"	273
220	...	XI	939
227	...	"	884
232	...	XIII	331
238	...	XIV	768
241	...	XIII	193
245	...	"	577
265	...	XII	151
278	...	"	161
284	...	"	723
298	...	"	163
304	...	"	147
311	...	"	596
319	...	XI	872
341	...	XIV	823
344	...	XV	1007
348	...	XIII	925
353	...	"	353
377	...	"	993
393	...	XV	925
395	...	"	886
403	...	XIII	1002
409	...	XIV	641
418	...	XIII	344
439	...	"	513
453	...	"	518
456	...	"	913
463	...	XIV	201
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506	...	XV	551
510	...	„	497
513	...	XIII	698
522	...	XVI	327
527	...	XIV	496
560	...	XIII	1000
563	...	„	690
568	...	„	705
582	...	XIV	17
587	...	„	4
598	...	„	682
606	...	„	753
615	...	XIII	965
663	...	XIV	701
669	...	XVI	153
682	...	XIV	205
687	...	„	67
696	...	XV	219
704	...	„	427
711	...	XIII	695
739	...	XVII	500
754	...	XV	441
766	...	„	59
774	...	XIII	1007
781	...	XIV	314
789	...	XV	279
802	...	XVII	973
810	...	„	976
822	...	XVIII	69
828	...	XV	287
834	...	XIV	317
839	...	XV	256
843	...	XIV	147
848	...	„	124
855	...	„	195
862	...	XII	609
881	...	XV	176
885	...	XVII	408
887	...	XIV	142
896	...	XV	481
903	...	„	620
906	...	XIV	724
915	...	XV	659
925	...	XIV	299
931	...	XVII	71
933	...	XVI	110
953	...	„	501
968	...	„	171
981	...	„	821
995	...	XVIII	61
1005	...	XV	284
1010	...	XIV	227
1016	...	„	540
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17	...	„	440
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68	...	„	304
69	...	„	331
72	...	„	269
78	...	„	257
80	...	„	1004
82	...	XI	255
83	...	X	880
88	...	XIII	944
89	...	„	265
97	...	VII	427
110	...	XIII	118
114	...	IX	806
120	...	XIII	900
122	...	„	912
123	...	VIII	22
128	...	VI	414
132	...	XIV	368
137	...	XI	464
138	...	XIV	377
142	...	XIII	898
145	...	„	193
147	...	XIV	380
151	...	XIII	993
160	...	VII	775
162	...	XIV	458
167	...	VIII	77
170	...	XIV	453
172	...	XIII	344
180	...	XIV	463
184	...	XI	592
186	...	„	593
187	...	XIV	456
191	...	„	461
194	...	XIII	513
203	...	„	518
204	...	„	23
211	...	„	509
215	...	„	529
217	...	X	355
219	...	IX	623
220	...	XIII	606
224	...	XIV	208
225	...	„	478
227	...	XIII	596
228	...	XII	609
239	...	XIII	605
241	...	„	377
251	...	„	702
254	...	X	898
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270	...	XIII	976
276	...	XIV	475
281	...	„	609
305	...	V	395
308	...	VI	121
510	...	„	206
312	...	XIV	981
323	...	„	667
325	...	XI	591
327	...	XV	177
332	...	XIV	820
334	...	„	823
335	...	„	808
337	...	XIV	755
339	...	XI	102
344	...	XIV	1000
352	...	XIII	695
360	...	„	161
369	...	„	698
376	...	XIV	677
382	...	XIII	690
384	...	XII	593
388	...	XIII	487
391	...	II	85
396	...	XIII	913
399	...	„	925
401	...	XV	1007
403	...	XIII	844
408	...	X	894
410	...	„	525
411	...	XIV	496
423	...	„	839
428	...	„	177
432	...	XII	669
436	...	XIV	219
439	...	XIII	128
443	...	X	463
446	...	XIV	845
451	...	XIII	326
453	...	X	359
457	...	XIV	980
458	...	X	560
461	...	XV	219
466	...	„	222
468	...	„	196
475	...	XIV	629
483	...	XV	659
488	...	„	441
494	...	XIV	682
498	...	„	1006
500	...	XV	452
501	...	XIV	230
505	...	XV	455
507	...	„	458
509	...	XIV	201
512	...	„	195
515	...	XV	656
517	...	XVI	257
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665	...	XIV	540
672	...	XIII	364
675	...	XIV	93
678	...	XIII	88
683	...	„	694
684	...	XV	911
689	...	„	909
690	...	XI	382
692	...	XIV	607

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9	...	XV	453
14	...	XVI	349
19	...	XIII	498
20*n*	...	XVI	457
24	...	„	467
26	...	„	351
28	...	XIII	184
30	...	XI	368
34	...	XVI	443
38	...	XI	74
41	...	XVI	447
45	...	„	386
47	...	„	92
53	...	„	98
60	...	XV	673
67	...	XVI	935
71	...	XIV	701
74	...	XVI	937
77	...	„	940
83	...	„	966
85	...	„	970
86	...	XVI	345
89	...	X	382
93	...	„	312
96	...	XVI	975
98	...	„	974
101	...	„	972
103	...	XIV	33
107	...	„	147
111	...	„	56
116	...	XVII	99
119	...	XIII	637
124	...	XVII	111
127	...	„	115
131	...	XV	430
133	...	XVII	129
135	...	„	121
139	...	„	125
141	...	„	126
144	...	XV	476
148	...	XVII	45
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174	...	XIII	63
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185	...	XVI	825
194	...	XVII	162
197	...	"	165
202	...	XVI	365
209	...	XVII	168
211	...	"	170
212	...	XIV	166
217	...	XVII	180
225	...	"	173
231	...	XVI	501
245	...	"	188
250	...	"	171
259	...	XVII	224
264	...	XVI	246
271	...	XVII	227
279	...	XV	885
282	...	XVI	742
288	...	"	414
296	...	XVII	177
301	...	"	171
304	...	XVI	817
311	...	XVII	257
318	...	"	263
322	..	XVI	376
328	...	XVII	266
335	...	"	276
339	...	"	279
342	...	"	283
349	...	XVI	927
354	...	XVII	284
360	...	"	343
366	...	XVI	425
371	...	"	575
375	...	"	963
379	...	XVII	207
381	...	"	917
383	...	"	919
385	...	"	921
394	...	"	927
401	...	"	931
404	...	"	936
412	...	XV	291
417	...	XVII	966
422	...	XVI	929
427	...	XVIII	197
431	...	XVII	969
436	...	XVI	440
437	...	"	131
440	..	XVII	1001
453	...	"	993
467	...	XVIII	149
508	...	"	207
515	...	XIV	760
517	...	XV	719
520	...	"	689
524	...	XVI	41
527	...	XVII	957
537	...	XIV	515
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542	...	"	436
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552	...	XIV	713
555	...	XV	614
557	...	XVI	235
559	...	XV	601
561	...	"	906
564	...	"	572
566	...	"	668
569	...	XVIII	176
571	...	XVI	58
573	...	"	223
575	...	XVII	963
578	...	XVI	255
581	...	XVII	972
582	...	XVI	795
586	...	XV	735
591	...	"	897
596	...	XVI	250
606	...	"	210
613	...	"	197
620	...	"	821
629	...	XVII	396
634	...	XVI	328
640	...	XVII	441
642	...	XVI	70

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132	...	XII	70
137	...	XI	713
143	...	XIII	781
145	...	"	721
217	...	"	269
225	...	"	481
227	...	"	403
231	...	XII	593
235	...	XI	30
237	...	"	997
238	...	XIII	783
241	...	XII	482
247	...	XIII	879
251	...	XI	637
252	...	XII	149
256	...	XIII	118
259	...	"	785
263	...	"	826
265	...	"	577
288	...	X	117
289	...	XIII	868
294	...	"	193
297	...	"	673
299	...	"	23
304	...	"	513
311	...	XI	239
313	...	XII	459
317	...	X	376
322	...	XIII	941
325	...	"	943

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329	...	XII	596
332	...	"	65
336	...	XIII	1002
338	...	"	976
346	...	"	603
347	...	X	41
351	...	XI	465
356	...	XIII	509
360	...	"	529
362	...	"	965
383	...	"	349
384	...	"	830
386	...	XV	72
394	...	VI	300
395	...	XIII	604
396	...	"	424
398	...	XI	164
402	...	"	417
409	...	XIV	1000
417	...	XV	398
418	...	XIII	596
420	...	"	192
421	...	"	487
424	...	XIV	627
426	...	XIII	844
431	...	XV	77
433	...	"	177
440	...	XIV	17
444	...	XIII	898
447	...	XIV	380
451	...	"	641
455	...	"	205
458	...	XIII	344
466	...	XV	184
471	...	XIV	598
472	...	"	682
475	...	XIII	698
480	...	XIV	31
482	...	XV	219
489	...	"	222
493	...	XIII	702
496	...	XIV	817
498	...	XIII	694
499	...	"	913
503	...	"	925
505	...	XIV	496
516	...	"	4
519	...	XII	609
529	...	XIV	475
534	...	"	215
536	...	X	139
540	..	XI	729
549	...	XV	1006
550	...	"	1008
551	...	"	1007
553	...	"	659
558	...	XIV	230
561	...	"	145
564	...	"	152
567	...	XIII	606
570	...	XIV	67
574	...	IX	6
577	...	XIV	629
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593	...	XIII	705
600	...	XV	650
603	...	XIV	463
606	...	"	540
612	...	XIII	653
618	...	"	364
620	...	"	912
621	...	XIV	124
623	...	"	201
625	...	XIII	695
634	...	XIV	212
636	...	"	133
639	...	XIII	123
641	...	XIV	297
643	...	XV	554
645	...	XIII	1007
649	...	XVI	110
658	...	XIV	299
662	...	XIII	690
664	...	XVI	118
666	...	XIV	720
669	...	XV	987
675	..	"	673
683	...	"	691
693	...	"	701
696	...	XIV	320
697	...	XVI	147
701	...	XIV	568
704	...	XI	438
710	...	XIV	166
715	...	"	515
717	...	"	715
721	...	"	173
725	...	"	729
730	...	"	719
731	...	XV	23
733	...	XIV	576
736	...	XIII	365
742	...	XIV	707
745	...	XVI	92
747	...	XV	955
753	...	XI	820
762	...	XIV	218
763	...	"	290
766	...	XV	56
768	...	XIV	317
769	...	XVI	98
774	...	XIV	292
777	...	VII	919
779	...	XV	30
783	...	"	657
785	..	"	961
793	...	XVI	830
798	...	"	453
802	...	XIV	227
804	...	"	728
805	...	X	90
811	...	XVI	176
812	...	XIV	753
817	...	XIII	353
831	...	XIV	349
834	...	XIII	611
838	...	XV	427

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71084	XXXVI 2868
71087	VIXIV 61078
71088	XXVII 70178
71094	XXV 60828
71097	XXXVII 34886
10806	VXXVI 7082
10805	IX 6208
10875	VIXXV 6388
10887	XXV 6888
10890	VIII 7808
10893	Lew JXIWal 6688
10895	XVIXVI 4088
11860	XXVI 23807
12804	XIIV 40804
12807	Tel XVIII 40808
12903	IXIV 78708
12904	XIX 40888
12907	XXVI 62828
12908	XXIV 60888
12909	XXXIVI 30808
13880	XIXXVI 78808
13881	XXXIV 60888
13884	XXXVI 70888
13887	XXXIII 40888
13890	XIXXVI 78808
13893	XIIXVII 78808
13895	XVIII 60888
13898	XXIV 60888
13901	XXXVII 40888
13904	XIXXIV 78808
13907	IXXVII 60888
13908	XVII 60888
13909	XIXVI 60888
13910	XXXVII 60888
13913	XXXVI 60888
13914	XXXIV 60888
13917	XXXIII 60888
13918	XXXVII 60888
13921	XXXIV 60888
13924	XXXIV 60888
13927	XXXIV 60888
13928	XXXIV 60888
13931	XXXIV 60888
13934	XXXIV 60888
13937	XXXIV 60888
13938	XXXIV 60888
13941	XXXIV 60888
13944	XXXIV 60888
13947	XXXIV 60888
13948	XXXIV 60888

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212	...	XIII	463
217	...	XIV	394
219	...	XIII	71
221	...	XII	765
225	...	XIII	788
228	...	"	795
231	...	"	458
240	...	"	344
247	...	"	453
251	...	"	831
253	...	XIV	396
257	...	XIII	471
260	...	"	870
265	...	"	866
270	...	XIV	418
276	...	"	965
284	...	"	823
309	...	"	383
321	...	XIII	475
333	...	"	833
354	...	XIV	511
355	...	"	669
357	...	XV	79
360	...	XIV	475
364	...	XV	206
375	...	"	213
377	...	XIV	157
379	...	"	270
393	...	"	1007
394	...	"	285
395	...	"	209
404	...	XV	365
406	...	XIV	189
409	...	XV	367
411	...	"	223
413	...	XIV	255
419	...	"	205
439	...	XV	369
441	...	"	371
445	...	"	376
447	...	"	378
451	...	"	393
453	...	"	308
456	...	"	388
457	...	"	177
462	...	XIV	1000
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119	...	XV	711
131	...	XVI	209
134	...	"	225
161	...	"	458
162	...	XV	257
165	...	"	100
168	...	"	17
177	...	XVI	147
181	...	"	947
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215	...	"	70
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282	...	XVI	542
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479	...	XVII	158
487	...	"	437
493	...	"	422
496	...	XVI	895
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511	...	"	419
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519	...	"	914
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535	...	XVII	417
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539	...	XVI	962
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676	...	"	762
677	...	"	763
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21	...	"	286
23	...	"	278
24	...	"	216
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32	...	XIII	831
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53	...	XIII	453
56	...	XIV	389
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71	...	XI	17
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157	...	"	906
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160	...	"	651
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296	...	"	965
301	...	"	255
305	...	"	189
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312	...	XV	354
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316	...	"	196
325	...	XIV	254
327	..	"	270
337	...	XV	219
344	...	XIV	629
255	...	"	168
361	...	XV	659
367	...	XIV	305
380	...	XII	169
383	...	XIV	277
384	...	"	303
385	...	"	286
390	...	"	259
391	...	"	593
393	...	"	524
403	...	XV	678
404	...	XIV	600
405	...	"	597
405	...	XV	682
407	...	"	688
407	...	"	800
409	...	XIV	544
416	...	"	659
424	...	"	741
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171	...	"	501
183	...	XV	97
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207	...	XVII	4
211	...	XVI	30
215	...	XVII	14
218	...	XVI	53
224	...	"	947
229	...	XVII	342
230	...	XVI	139
240	...	XVII	347
245	...	XV	412
259	...	XVII	251
260	...	XVI	486
261	...	XVII	253
262	...	XVI	587
264	...	"	405
266	...	"	18
269	...	"	225
288	...	"	428
292	...	XVII	308
293	...	XV	17
299	...	XVI	400
300	...	"	438
301	...	"	433
305	...	"	616
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309	...	"	45
311	...	XVII	242
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315	...	XVI	601
325	...	"	710
330	...	"	694
332	...	XVII	278
333	...	"	281
335	...	XVI	520
337	...	XVII	284
338	...	XVI	250
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439	...	XVII	65
448	...	"	441
449	...	XVI	70
458	...	"	914
467	...	XVII	422
469	...	XVI	971
472	...	"	239
482	...	"	830
484	...	XVII	837
491	...	XVI	962
493	...	XVII	442
496	...	"	444
497	...	"	429
499	...	XVI	939
500	...	XVII	445
528	...	"	139
530	...	"	597
534	...	"	602
535	...	"	337
538	...	"	605
539	...	"	489
541	...	XV	871
547	...	XVII	609
556	...	XVI	571
561	...	XVII	353
571	...	XVIII	49
579	...	XVII	987
585	...	"	473
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594	...	"	894
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610	...	"	619
613	...	"	339
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37	...	"	203
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39	...	"	205
41	...	"	182
42	...	"	799
42	...	"	278
44	...	"	133
45	...	"	791
47	...	"	831
49	...	"	781
49	...	"	486
50	...	"	777
50	...	"	788
53	...	"	453
56	...	"	795
59	...	"	458
65	...	"	463
68	...	"	467
69	...	"	780
70	...	"	489
72	...	"	469
73	...	XIV	463
77	...	XIII	344
84	...	"	832
85	...	"	927
85	...	XII	184
87	...	XIII	471
89	...	"	475
97	...	"	828
99	...	"	802
100	...	XIV	655
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117	...	"	394
119	...	XIII	819
125	...	XIV	418
136	...	XIII	833
150	...	"	860
152	...	"	599
158	...	"	595
158	...	XII	412
161	...	"	170
163	...	XIII	651
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201	...	XIV	475
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311	...	XV	177
316	...	XIII	659
324	...	XIV	1000
332	...	"	823
348	...	"	965
353	...	XV	206
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361	...	XIII	642
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367	...	XIV	496
378	...	XV	313
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380	...	"	357
381	...	"	359
382	...	"	369
383	...	"	365
384	...	"	218
386	...	XIV	480
393	...	XV	378
395	...	"	317
396	...	"	306
397	...	"	383
400	...	XIII	832
400	...	XV	362
401	...	"	360
401	...	"	224
402	...	"	223
403	...	"	397
404	...	"	310
405	...	"	308
407	...	"	406
409	...	"	388
410	...	"	367
411	...	"	408
412	...	"	370
413	...	"	382
414	...	"	221
415	...	XIII	315
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417	...	"	196
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492	...	XIV	189
494	...	"	259
495	...	"	681
496	...	"	261
499	...	"	305
512	...	"	283
513	...	"	836
515	...	XV	403
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519	...	"	209
523	...	XIII	71
524	...	XIV	279
528	...	"	597
529	...	XVI	164
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532	...	"	295
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535	...	XIV	303
536	...	"	593
537	...	XVI	107
538	...	"	166
539	...	XV	487
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541	...	"	571
542	...	XVI	103
545	...	XIV	603
546	...	XV	688
546	...	XII	719
547	...	"	351
549	...	XIV	896
641	...	XV	673
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652	...	XIV	184
657	...	XIII	965
669	...	XV	146
683	...	"	72
691	...	XVI	98
696	...	XV	723
703	...	"	257
707	...	"	97
712	...	XIV	270
721	...	XV	738
725	...	"	85
728	...	"	100
754	...	XIV	580
756	...	"	326
758	...	XVI	493
760	...	"	501
771	...	XV	594
781	...	XVI	188
786	...	"	947
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870	...	"	53
879	...	"	438
880	...	XVII	253
881	...	XVI	589
881	...	"	520
882	...	"	30
887	...	"	542
888	...	XVII	293
889	...	XV	576
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901	...	"	573
902	...	"	457
903	...	XVII	308
904	...	"	261
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908	...	XVI	428
912	...	"	839
915	...	XVII	273
917	...	XVI	587
918	...	XV	682
919	...	XVI	601
930	...	XVII	256
932	...	XVI	689
934	...	XV	574
935	...	XVI	250
943	...	XVII	284
944	...	"	64
944	...	XVI	210
951	...	"	584
954	...	"	400
956	...	XVII	389
956	...	XVI	692
957	...	XVII	389
959	...	"	251
959	...	XVI	411
960	...	"	934
962	...	"	486
963	...	"	328
967	...	XVII	513
972	...	"	347
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993	...	"	405
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997	...	XV	852
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1108	...	XIX	207
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1112	...	"	4
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1130	...	XVII	437
1135	...	XVI	803
1136	...	XVII	242
1138	...	"	422
1140	...	XVI	239
1150	...	"	830
1152	...	XVII	420
1154	...	"	65
1162	...	XVI	971
1164	...	XVII	429
1166	...	XVI	939
1168	...	XVII	837
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1193	...	"	353
1204	...	"	48
1204	...	"	139
1206	...	"	569
1207	...	"	580
1208	...	"	583
1212	...	"	894
1217	...	"	337
1220	...	"	527
1222	...	"	185
1223	...	XVI	710
1227	...	XVII	748
1229	...	"	605
1231	...	"	308
1232	...	"	431
1233	...	XVI	178
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18	...	"	904
20	...	"	1005
22	...	"	909
29	...	"	982
34	...	XIV	684
36	...	"	786
39	...	"	788
42	...	"	673
44	...	"	685
50	...	XV	562
51	...	"	565
53	...	"	567
57	...	"	642
62	...	"	570
65	...	"	970
68	...	"	890
73	...	"	895
76	...	"	899
82	...	"	933
84	...	"	975
91	...	"	938
92	...	"	935
97	...	XVI	555
107	...	"	449
113	...	XVII	101
123	...	"	129
128	...	"	133
133	...	"	138
136	...	"	141
139	...	"	144
147	...	XVII	370
150	...	"	363
154	...	"	366
159	...	"	378
161	...	"	616
163	...	"	606
169	...	"	621
172	...	"	624
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91	...	XV	385
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117	...	XIII	566
122	...	"	495
127	...	XV	747
153	...	XIV	301
159	...	XIII	609
170	...	"	554
177	...	XV	967
183	...	"	972
192	...	XVI	344
202	...	XIV	731
211	...	XV	5
223	...	XVI	471
234	...	XV	523
239	...	XVI	476
244	...	XV	616
253	...	"	250
257	...	XVII	81
263	...	"	72
270	...	XVI	92
271	...	"	197
278	...	XVII	396
285	...	XVI	78
289	...	XVII	420
291	...	"	424
294	...	"	430
295	...	XV	857
301	...	XVI	876
304	...	"	592
311	...	XVII	464
314	...	"	466
317	...	"	469
319	...	"	470
321	...	XVIII	641
345	...	XV	244
351	...	XVIII	653
364	...	XIV	339
373	...	XV	439
380	...	XVIII	977
381	...	XIX	38
386	...	"	170
389	...	XVI	800
397	...	"	882

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1	...	XII	576
2	...	"	605
3	...	"	530
4	...	"	532
5	...	"	625
6	...	"	616
7	...	"	617
8	...	"	623
	...		623

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10	...	XII	624
11	...	"	515
12	...	XIII	344
13	...	"	405
14	...	"	6
15	...	"	20
16	...	"	32
17	...	"	27
18	...	"	28
19	...	"	50
20	...	"	109
21	...	"	58
22	...	"	62
23	...	"	167
24	...	"	171
25	...	"	172
26	...	"	68
27	...	"	18
28	...	"	92
29	...	XIV	494
30	...	XIII	305
31	...	XIV	799
32	...	XIII	960
33	...	XIV	674
34	...	XIII	957
35	...	XIV	793
36	...	XIII	955
37	...	"	924
38	...	"	330
39	...	"	348
40	...	"	326
41	...	"	177
42	...	XII	871
43	...	XIV	604
44	...	XIII	180
45	...	XII	857
46	...	XIII	220
47	...	"	877
48	...	XII	859
49	...	"	850
50	...	XIII	72
51	...	"	298
52	..	"	73
53	...	"	77
54	...	XV	467
55	...	XII	595
56	...	XIII	209
57	...	"	873
58	...	XV	469
59	...	XIII	930
60	...	"	928
61	...	"	511
62	...	XIV	468
63	...	XV	478
64	...	XIV	758
65	...	XIII	812
66	...	XV	314
67	...	"	316
68	...	"	318
69	...	XIII	312
70	...	"	433
71	...	"	421
72	...	"	343
73	...	"	401
74	...	XIV	510

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76	...	"	624
77	...	XIII	444
78	...	XIV	479
79	...	XIII	319
80	...	XIV	463
81	...	"	477
82	...	XIII	859
83	...	"	824
84	...	"	816
85	...	"	863
86	...	XIV	492
87	...	XIII	861
88	...	XIV	495
89	...	"	351
90	...	XV	507
91	...	XIII	647
92	...	"	650
93	...	"	408
94	...	"	409
95	...	"	427
96	...	"	428
97	...	"	430
98	...	"	316
99	...	"	571
100	...	"	539
101	...	"	447
102	...	"	448
103	...	"	526
104	...	XII	862
105	...	XIII	790
106	...	XIV	247
107	...	XIII	714
108	...	"	665
109	...	XV	195
110	...	"	192
111	...	"	92
112	...	"	307
113	...	"	95
114	...	"	88
115	...	XIII	927
116	...	XV	309
117	...	XIII	998
118	...	XIV	284
119	...	XIII	719
120	...	"	720
121	...	"	621
122	...	"	711
123	...	"	563
124	...	XIV	45
125	...	XIII	782
126	...	"	667
127	...	"	482
128	...	"	709
129	...	XVI	116
130	...	"	119
131	...	"	122
132	...	"	125
133	...	XV	62
134	...	XIII	445
135	...	"	549
136	...	XIV	16
137	...	"	789
138	...	XIII	852
139	...	XIV	779

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140	...	XIII	855
141	...	XIV	751
142	...	"	66
143	...	"	47
144	...	XIII	857
145	...	"	561
146	...	XIV	1008
147	...	XV	979
148	...	XIII	559
149	...	XV	404
150	...	XIII	953
151	...	"	661
152	...	XV	721
153	...	XIV	783
154	...	XVI	127
155	...	XIV	335
156	...	XV	725
157	...	XIV	486
158	...	XVI	867
159	...	"	889
160	...	XIV	562
161	...	"	523
162	...	"	561
163	...	XVI	891
164	...	XIV	532
165	...	"	232
166	...	XVI	769
167	...	"	855
168	...	XIII	695
169	...	XVI	834
170	...	XVII	223
171	...	XVI	838
172	...	"	842
173	...	XV	866
174	...	"	559
175	...	"	83
176	...	XVII	254
177	...	XVI	844
178	...	XV	658
179	...	"	555
180	...	XVI	847
181	...	"	851
182	...	"	24
183	...	"	884
184	...	XVII	245
185	...	XVI	29
186	...	"	886
187	...	XVII	216
188	...	XVI	80
189	...	XV	845
190	...	XVII	243
191	...	XV	563
192	...	XVII	235
193	...	XVI	527
194	...	"	528
195	...	"	528
196	...	XVII	214
197	...	XVI	232
198	...	*Not reportable.*	
199	...	"	
200	...	"	
201	...	"	
202	...	XV	122
203	...	*Not reportable.*	
204	...	XV	708

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205	...	XV	734
206	...	*Not reportable.*	
207	...	XV	839
208	...	XVII	503
209	...	"	208
210	...	XVI	463
211	...	"	466
212	...	"	475
213	...	"	468
214	...	XVII	251
215	...	XVI	254
216	...	"	270
217	...	"	247
218	...	XVII	36
219	...	XVI	775
220	...	"	779
221	...	"	772
222	...	"	777
223	...	*Not reportable.*	
224	...	XVII	406
225	...	XV	407
226	...	"	272
227	...	"	917
228	...	"	25
229	...	"	28
230	...	"	83
231	...	XIV	535
232	...	XVII	395
233	...	XV	12
234	...	"	187
235	...	"	266
236	...	"	928
237	...	"	275
238	...	XIV	752
239	...	XVIII	883
240	...	XIV	379
241	...	XV	939
242	...	*Not reportable.*	
243	...	XVII	54
244	...	XV	494
245	...	XVI	521
246	...	XVII	390
247	...	XVI	752
248	...	"	797
249	...	"	21
250	...	XVII	21
251	...	XV	930
252	...	XIV	375
253	...	*Not reportable.*	
254	...	XVII	58
255	...	XIV	737
256	...	*Not reportable.*	
257	...	XVII	392
258	...	"	543
259	...	XVI	804
260	...	XIV	426

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1	...	XV	708
2	...	"	102
3	...	"	106
4	...	"	108
5	...	"	116
6	...	"	140
7	...	XVI	488

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2	...	XI	523
3	...	XIII	873
4	...	XI	35
5	...	XII	595
6	...	"	453
7	...	XI	708
8	...	X	141
9	...	XI	404
10	...	XIV	510
11	...	X	207
12	...	XIV	624
13	...	X	236
14	...	XIV	486
15	...	XI	76
16	...	XIV	492
17	...	"	495
18	...	"	512
19	...	XIII	27
20	...	X	130
21	...	XI	443
22	...	"	880
23	...	XIV	776
24	...	XIII	180
25	...	"	177
26	...	"	167
27	...	XIV	779
28	...	"	782
29	...	XIII	316
30	...	"	343
31	...	XIV	783
32	...	VIII	666
33	...	XIV	787
34	...	"	789
35	...	XI	317
36	...	XIII	28
37	...	XV	402
38	...	XIII	50
39	...	"	405
40	...	"	409
41	...	XV	404
42	...	XVI	127
43	...	XIII	430
44	...	"	427
45	...	"	421
46	...	"	482
47	...	"	526
48	...	"	561
49	...	"	549
50	...	"	539
51	...	"	564
52	...	XIV	71
53	...	XIII	665
54	...	XIV	78
55	...	XIII	568
56	...	XV	930
57	...	"	507
58	...	XIII	662
59	...	"	621
60	...	XIV	468
61	...	XV	934
62	...	XIII	719
63	...	XIV	23
64	...	"	40
65	...	XIII	571

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66	...	XIII	559
67	...	"	667
68	...	XVI	463
69	...	"	475
70	...	XIV	45
71	...	XVI	466
72	...	XIV	70
73	...	"	252
74	...	"	232
75	...	XVI	468
76	...	XIV	523
77	...	"	122
78	...	"	247
79	...	XVI	772
80	...	XIV	328
81	...	"	239
82	...	XVI	775
83	...	XV	347
84	...	XIV	566
85	...	"	532
86	...	XVI	777
87	...	XIV	240
88	...	XVII	36
89	...	XVI	779
90	...	XVII	21
91	...	XIV	751
92	...	"	749
93	...	"	737
94	...	XV	275
95	...	"	161
96	...	"	773
97	...	"	62
98	...	"	106
99	...	"	941
100	...	XVI	21
101	...	XV	845
102	...	"	839
103	...	XVI	80
104	...	"	24
105	...	"	29
106	...	XVII	857
107	...	"	901
108	...	"	864
109	...	XV	463
110	...	XVII	907
111	...	XV	12
112	...	XVII	903
113	...	XIV	752
114	...	XIV	558
115	...	XV	140
116	...	"	559
117	...	XVI	491
118	...	XVIII	528
119	...	"	529
120	...	"	532
121	...	XVII	208
122	...	XVI	983
123	...	X	512
124	...	XV	285
125	...	XVII	388
126	...	XIII	344

Criminal.

1	...	XIII	924

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3	...	XIII	209
4	...	"	782
5	...	XIV	194
6	...	"	197
7	...	XVII	54
8	...	XVI	521
9	...	XVIII	265
10	...	"	886

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2	...	XV	925
3	...	"	937
4	...	"	942
5	...	XVII	979
6	...	"	991
7	...	XVIII	56

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2	...	"	863
3	...	"	859
4	...	"	816
5	...	"	861
6	...	"	344
7	...	"	405
8	...	"	857
9	...	"	852
10	...	"	855
11	...	"	850
12	...	"	314
13	...	"	947
14	...	"	953
15	...	"	28
16	...	XIV	375
17	...	"	379
18	...	XIII	68
19	...	"	77
20	...	"	92
21	...	"	167
22	...	"	180
23	...	"	58
24	...	"	445
25	...	"	955
26	...	"	957
27	...	"	960
28	...	"	6
29	...	"	171
30	...	"	62
31	...	"	877
32	...	"	50
33	...	"	930
34	...	"	73
35	...	XIV	468
36	...	XIII	20
37	...	"	172
38	...	XIV	463
39	...	XIII	27

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41	...	"	479
42	...	XI	523
43	...	XIII	32
44	...	"	873
45	...	"	401
46	...	XI	35
47	...	XIII	348
48	...	"	298
49	...	"	447
50	...	"	695
51	...	"	312
52	...	"	408
53	...	"	539
54	...	XIV	352
55	...	XIII	647
56	...	XIV	495
57	...	XIII	448
58	...	XIV	624
59	...	XIII	720
60	...	"	319
61	...	"	665
62	...	"	709
63	...	XIV	247
64	...	XIII	719
65	...	XIV	512
66	...	XIII	714
67	...	"	511
68	...	"	428
69	...	"	621
70	...	"	427
71	...	XV	195
72	...	XIII	650
73	...	XV	192
74	...	XIII	430
75	...	"	444
76	...	"	561
77	...	"	661
78	...	"	433
79	...	"	409
80	...	XIV	335
81	...	"	1008
82	...	XIII	559
83	...	XV	721
84	...	"	725
85	...	XIII	421
86	...	XIV	782
87	...	XV	187
88	...	XIV	783
89	...	XIII	556
90	...	XIV	789
91	...	"	45
92	...	"	751
93	...	"	776
94	...	XV	876
95	...	"	877
96	...	XIV	486
97	...	"	749
98	...	XIII	711
99	...	XVI	116
100	...	"	119
101	...	"	122
102	...	"	125
103	...	XIII	549

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105	...	"	66
106	...	XV	62
107	...	XIV	73
108	...	XV	122
109	...	XIV	332
110	...	XV	878
111	...	"	560
112	...	XIV	674
113	...	"	40
114	...	XIII	316
115	...	"	326
116	...	XIV	16
117	...	XV	404
118	...	XIV	799
119	...	"	252
120	...	"	284
121	...	XV	941
122	...	XIV	78
123	...	XVI	127
124	...	XV	556
125	...	XIII	177
126	...	XVI	488
127	...	XIV	150
128	...	XVI	491
129	...	XIV	70
130	...	XV	402
131	...	XIII	318
132	...	XV	285
133	...	XIII	343
134	...	XVI	495
135	...	XV	266
136	...	"	463
137	...	XIV	566
138	...	XVI	684
139	...	XIII	564
140	...	XIV	492
141	...	"	523
142	...	XV	478
143	...	XIV	561
144	...	XIII	812
145	...	"	526
146	...	XVI	855
147	...	"	867
148	...	XIV	232
149	...	XVI	889
150	...	XIV	562
151	...	XVI	891
152	...	XIV	532
153	...	XVI	29
154	...	"	884
155	...	"	886
156	...	"	24
157	...	"	80
158	...	XV	845
159	...	"	161
160	...	"	866
161	...	"	507
162	...	XIV	752
163	...	XVII	223
164	...	XIV	737
165	...	XVII	235
166	...	XV	116
167	...	XVII	243

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169	...	XVII	245
170	...	XV	347
171	...	XVII	254
172	...	"	504
173	...	XIV	60
174	...	XVII	247
175	...	XV	25
176	...	XVII	251
177	...	XIV	71
178	...	XV	275
179	...	"	102
180	...	XIII	482
181	...	XVII	270
182	...	XV	272
183	...	XVII	232
184	...	XIII	330
185	...	XV	934
186	...	XIV	328
187	...	XVII	254
188	...	XIV	236
189	...	"	244
190	...	"	331
191	...	XV	140
192	...	XVI	468
193	...	XIV	240
194	...	XVI	463
195	...	XIV	56
196	...	"	47
197	...	XVII	208
198	...	XIV	558
199	...	"	122
200	...	XVI	466
201	...	XV	407
202	...	XVI	475
203	...	XIV	537
204	...	"	465
205	...	XV	170
206	...	XIV	409
207	...	*Not reportable.*	
208	...	XIV	19
209	...	XIII	571
210	...	XV	658
211	...	"	559
212	...	"	734
213	...	"	839
214	...	"	555
215	...	XVIII	218
216	...	XIV	539
217	...	XVI	772
218	...	XV	563
219	...	XVI	775
220	...	XIV	535
221	...	XV	773
222	...	XIV	23
223	...	"	239
224	...	XV	12
225	...	XVI	777
226	...	XV	108
227	...	XVI	779
228	...	XV	99
229	...	"	57
230	...	XVII	36
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233	...	XV	106
234	...	XVI	847
235	...	XIV	330
236	...	XVI	844
237	...	XIII	550
238	...	XVI	21
239	...	XVIII	750
240	...	XIII	662
241	...	XVIII	746
242	...	XIII	568
243	...	"	670
244	...	XVII	214
245	...	XV	930
246	...	"	469
247	...	XIII	563
248	...	XVII	216
249	...	"	379
250	...	XIV	516
251	...	XVII	388
252	...	XIV	513
253	...	XVII	392
254	...	XIV	494
255	...	XIII	667
256	...	XVI	983
257	...	XV	708
258	...	XVII	510
259	...	XVI	797
260	...	XVII	508
261	...	XVI	752
262	...	XVII	21
263	...	XVI	838
264	...	XVI	959
265	...	"	804
266	...	XVII	149
267	...	XIV	510
268	...	XVII	581
269	...	"	196
270	...	"	187
271	...	XVI	842
272	...	"	834
273	...	"	769
274	...	"	865
275	...	"	967
276	...	"	979
277	...	"	961
278	...	"	995
279	...	"	950
280	...	"	957
281	...	"	987

Criminal.

1	...	XIII	824
2	...	*Not reportable.*	
3	...	XIII	928
4	...	XV	314
5	...	XIV	758
6	...	XV	318
7	...	"	316
8	...	"	95
9	...	XIII	209
10	...	XV	88
11	...	XIII	782

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13	...	XIII	109
14	...	XV	92
15	...	XIII	924
16	...	XV	309
17	...	XIV	604
18	...	XV	979
19	...	XIII	998
20	...	XV	966
21	...	XIII	927
22	...	XV	971
23	...	XV	983
24	...	XIV	197
25	...	XVI	162
26	...	"	169
27	...	XIV	194
28	...	XVI	520
29	...	XIII	220
30	...	XV	83
31	...	"	494
32	...	XVI	526
33	...	"	527
34	...	"	528
35	...	"	528
36	...	XVII	543
37	...	XVI	521
38	...	XVII	406
39	...	"	54
40	...	"	575
41	...	*Not reportable.*	
42	...	XVII	58
43	..	"	49
44	...	XVIII	265

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1	...	XIII	815
2	...	"	865
3	...	XV	927
4	...	"	914
5	...	XIII	18
6	...	XV	937
7	...	"	925
8	...	"	942

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122	...	"	214
123	...	"	210
125	...	"	234
129	...	"	215
130	...	XII	987
131	...	"	986
133	...	XIII	217
135	...	"	219
136	...	"	220
137	...	"	222
140	...	"	237
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The only cases in which, apart from questions of breach of contract, express or implied, a remedy for a wrongful act can be pursued against the estate of a deceased who has done the act, are those in which the property or proceeds or the value of property belonging to another have been appropriated by the deceased person and added to his own estate or moneys.

An action for damages for distraint illegally levied by a person on certain moveables belonging to the plaintiff, some of which either perished or deteriorated owing to the negligence of the defendant's servants while the rest were misappropriated by the servants, is not in the nature of a suit for the recovery of specific moveables appropriated by the defendant or their value.

To such an action the maxim '*actio personalis moritur cum persona*' applies, in the absence of any statutory provision to the contrary.

Section 2 of Act XII of 1855 has no application to a suit instituted against the wrong-doer himself in his life-time. Such a suit abates on the death of the wrong-doer. SARAT CHANDRA ROY *v.* RATUBUDDIN, 16 C. L. J. 271 **227**

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The liability of fixed-rate tenants in respect of the rent of their holding is joint and several. Where a suit is brought against fixed-rate tenants for recovery of rent and one of them dies during the pendency of an appeal against them and no attempt is made to bring the legal representatives of the deceased on the record, the appeal abates only as far as the deceased respondent tenant is concerned and the liability of the others is not affected. ABDUL AZIZ *v.* BASDEO SINGH, 10 A. L. J. 183; 34 A. 604 **89**

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——— ——— ———*Co-sharers — Hindu Law—Joint family property—One co-sharer in possession for all—Alienation by co-sharer in possession—Continuance of alienor in possession—Knowledge of exclusion—Limitation Act (XV of 1877), Sch. II, Arts.* 127, 144.

A. and *B.* were members of a joint Hindu family. *A.* held possession on behalf of himself and his co-parcener till 1880, when *A.* sold the property to a stranger *C.* *A.*, however, continued in possession and passed a rent-note in favour of his vendee, *C.* There was nothing in the circumstances to put *B.* on notice that any change of possession had occurred or that his title was in any way imperilled.

In 1906, *B.* sued for possession of his share by partition:

Held, (1) that the suit was not barred by limitation;

(2) that before the alienation, the possession of *A.* was more or less of a fiduciary character and it was the possession of all the co-sharers; it could not begin to be adverse without intimation by the co-parcener in possession conveyed to the other co-parcener that he intended to exclude him.

Per *Chandavarkar, J.*—The question of adverse possession between co-parceners *inter se* is governed by Article 127 of the Limitation Act. Article 144 applies where the question is as between a co-parcener in a joint Hindu family and a stranger to it.

If a co-parcener has alienated property belonging to the family, so as to exclude other co-parceners from it, adverse possession in favour of the alienee begins to run from the date of alienation and the consequent exclusion of the co-parceners.

The law is that the Court is always too loth to hold adverse possession proved where the possession is equivocal in character.

Per *Batchelor, J.*—To constitute an adverse possession against the real owner, possession must be in some way or other ostensibly adverse. MALKAPPA DOD CHANBASAPAGOWDA *v.* MUDKAPPA BASAPPA MUDIGAVDAR, 14 BOM. L. R. 931; 37 B. 84 657

Adverse possession—concld.

——— ——— ———*Plea of limitation—Onus on plaintiff to prove that his suit is within time—Auction-purchaser—Symbolical possession—Limitation to run from date of symbolical possession.*

When a suit for possession is met by a plea of adverse possession during the limitation period, the question of limitation becomes a question of title and the plaintiff must first, *prima facie*, furnish proof of subsisting title at the date of the commencement of his suit before the defendant is required to establish his adverse possession.

Where an auction-purchaser at a Court sale has obtained symbolical possession, he or his assigns may sue the judgment-debtor for actual possession within 12 years from the date of obtaining such symbolical possession. *Musammat* SUNDAR *v.* SARASWATI 518

Agra Tenancy Act (II of 1901), s. 4 656

——— ——— ———**ss. 77, 167, 193**—*Appeal to District Judge—Limitation—Limitation Act (IX of 1908), s. 29 (b), Sch. I, Art. 152.*

The period of limitation for an appeal to the District Judge under Agra Tenancy Act, 1901, is thirty days.

Such an appeal is governed by the procedure prescribed by the Code of Civil Procedure and by the limitation prescribed under Article 152 of the Limitation Act. RAM LAL *v.* AMAR CHAND, 10 A. L. J. 535 653

——— ——— ———**s. 94**—*Co-sharers declining to join as co-plaintiffs for recovery of rent—Maintainability of suit by one co-sharer alone.*

Under the Agra Tenancy Act, one of the several joint co-sharers can bring a suit for the recovery of rent to the extent of his share on the refusal by the other co-sharers to join him as co-plaintiffs. FATEH BAHADUR *v.* LALTA PERSHAD 488

——— ——— ———**s. 95**—*Suit between rival claimants to occupancy holding—Jurisdiction—Civil or Revenue Court.*

The question of title to a tenancy arising between rival claimants to that tenancy is a question which is cognizable by a Civil Court.

Such a question is not a matter which can be determined under section 95 of the Tenancy Act. JAGAR NATH *v.* AJUDHYA SINGH, 10 A. L. J. 408; 34 A. 14 376

——— ——— ———**s. 164**—*Practice—Burden of proof—Suit by co-sharer against* lambardar *for share of profits—North-Western Provinces Rent Act (XII of 1881), s. 209.*

In a suit by a co-sharer for his share of profits against the *lambardar* under section 164 of the Agra Tenancy Act, the burden of proof is, in the first instance, on the plaintiff, who is required to produce some general evidence of negligence on the part of the *lambardar*, such as evidence that a very large percentage of the rent has remained uncollected.

If this is proved, it is then for the *lambardar* to explain why so large a percentage has remained uncollected and, in the absence of a satisfactory explanation, the burden of proving the real profits of the property is shifted on to him.

Where it is proved that a very large percentage of the rent remained uncollected, and the *lambardar* admitted he had kept no accounts and had not had all

Agra Tenancy Act—concld.

the collections entered in the *patwari's siaha*, the burden of proof is shifted on to the *lambardar* to show why so large a sum remained uncollected.

The practice in this respect has been the same under the Agra Tenancy Act as it was under the old Rent Act. The meaning of section 164 of the former Act is practically the same as that of section 209 of the Rent Act. MITHAN LAL *v.* MIZAJI LAL, 10 A. L. J. 529 **914**

——— ——— ——— ——— **ss. 167, 193 653**

——— ——— ——— ——— **s. 202**—*Defendant to civil suit establishing his tenancy in Revenue Court, during the pendency of civil suit--Civil Court bound by decision of Revenue Court*—Sir, *whether it loses its character as such by planting groves thereon.*

A defendant to a civil suit pleaded tenancy and, while the civil suit was still pending, got his tenancy determined by the Revenue Court by means of a separate suit:

Held, that the decision of the Revenue Court was binding on the Civil Court.

The planting of trees on a *sir* holding does not necessarily mean that the land loses its character as such. SHIAM LAL *v.* ANANT RAM **302**

——— ——— ——— ——— **s. 202, scope of**—*Procedure—Question not material—Mortgage unregistered.*

A. brought a suit for redemption of a particular plot of land mortgaged by an unregistered mortgage-deed. The sum secured under the mortgage was Rs. 100. The defendant pleaded that he was an occupancy-tenant of the land and not a mortgagee.

Held, that in view of the fact that the mortgage was an unregistered one and could not, therefore, be enforced, section 202 of the Agra Tenancy Act had no application. GAURI RAI *v.* MANOHAR TELI, 10 A. L. J. 513 **520**

Agriculturist, definition of **670**

Alienation. *See* CUSTOM—ALIENATION; HINDU LAW—ALIENATION; HINDU LAW—JOINT FAMILY; HINDU LAW—WIDOW.

——— ———*Invalid alienation--Right of alienee to sue for possession.*

An alienee, who obtains no valid rights under his alienation, cannot maintain a suit for possession of the property. KOOLAPPA ROWTHAR *v.* APPU ASARI **736**

Allahabad General Civil Courts Rules, 1911, Ch. XXI, r. 37 539

Allahabad High Court Rules, Ch. XV, r. 25 539

Alteration, material—Pro-note **281**

——— ——— **of decree.** *See* DECREE, ALTERATION OF.

Amendment of decree. *See* DECREE, AMENDMENT OF.

——— ——— **of plaint.** *See* PLAINT, AMENDMENT.

——— ——— **of record** after dismissal of appeal **279**

Ancestral property—Burden of proof **392**

Animal—Damages done to crops by cattle—Liability of owner—Negligence—Property adjoining highway—Fencing **899**

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——— ——Appellate Court—Conflicting evidence—Ground of appeal **898**

———Appointment of official liquidator—Wishes of creditors — Discretion--Powers of Appellate Court **853**

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———Court's order under section 49, Land Acquisition Act **117**

———Discharge or removal of Receiver—Inherent power of Court—Execution by Appellate Court Practice **583**

———Direction by Court to Receiver to pay money to mortgagor to prefer appeal from mortgage-decree--Order of Court, whether justifiable—Order, whether appealable **849**

——— dismissed in absence of both parties--Restoration **292**

———Extension of time fixed by pre-emption decree **912**

———Hindu widow withdrawing appeal—Subsequent suit by reversioners—Effect on question of *res judicata* **866**

——— ——Land Acquisition award—Claim of objector absurdly exorbitant—*Ad valorem* fee **901**

——— in land acquisition case—High Court's decision **952**

———No appeal unless given by Law—Order setting aside award **902**

———Order granting review **661**

———Order to furnish security and submit account **361**

———Passing decree in terms of award before expiry of period of 10 days from submission thereof **431**

———Plaintiff's suit dismissed by Assistant Collector as not proved **836**

——— ——Plea not raised before the first Court—Plea raised but not put in issue by first Court—Point not taken in grounds of appeal **232**

——— ——Pleader's fee—Preliminary decree adjudicating a party as agriculturist—Appeal to High Court **964**

——— ——Power of Court to make order of remand in appeal **891**

———Power of High Court to direct re-trial of appeal **49**

——— Provision in decree for payment of purchase-money within certain time—Payment not made **868**

——— *Res judicata*—Object of doctrine—Cross suits —Appeal from decision in one suit only **860**

Appeal—contd.

——— ——Sentence of one month's imprisonment under more sections than one—Sentences to run concurrently—Appeal, whether lies to Sessions Court **813**

———Sentence of 6 months' imprisonment on each of two counts by Presidency Magistrate—Sentences to run concurrently **531**

——— ——Suit found time-barred—Pleadings **638**

——— ——Summons returned unserved—Time given to appellant to take further steps—No steps taken within time—Power of Court to proceed to decide appeal **294**

——— —— to District Judge—Limitation **653**

———Trial of several accused by Magistrate first class—Some acquitted, others convicted—Appeal by convicts to Sessions Judge—Power of Sessions Judge to direct commitment of acquitted persons for murder on same facts—Commitment under direction **54**

———*Memorandum of appeal not accompanied by copy of decree appealed against, though decree was in existence when appeal filed—Copy of decree given to Vakil but not filed—Subsequent death of Vakil—Appeal ordered to be admitted after time—Sufficient cause—Limitation Act (XV of 1877), s. 5.*

The omission to file a copy of the decree appealed against, along with the memorandum of appeal, is a fatal defect, and the Court has no power under the Code to exempt the appellant from producing a copy.

Where an appellant obtained a copy of the decree to be appealed against and made it over in proper time to a Vakil who filed the appeal, but by mistake, the precise nature of which could not be explained as the Vakil had since then died, the copy was not filed with the memorandum, the High Court, at the time of the hearing of the appeal, accepted the copy of the decree by extending the time for filing the appeal under section 5 of the Limitation Act. PROSONNO KUMARI DEBI *v.* RAM CHANDRA SINGHA, 17 C. L. J. 66 **155**

———*Memorandum of appeal not accompanied by copy of decree appealed against, though decree in existence when appeal was filed—Mis-statement at foot of memorandum of appeal—Civil Procedure Code (Act XIV of 1882), ss. 541, 590—Probate and Administration Act (V of 1881), s. 86—Limitation Act (XV of 1877), s. 5.*

A decree was made in a Probate case by a District Judge on August 9th, 1899. On August 14th, the decree was drawn up. On November 30th a memorandum of appeal, without a copy of the decree, was filed in the High Court but there was a note by the appellant's Vakil that no decree had been prepared. The appeal was admitted by the High Court in consequence of the statement of the Vakil:

Held, that the memorandum of appeal was bad as the provisions of section 541, read with section 590 of the Civil Procedure Code and section 86 of the Probate and Administration Act, 1881, had not been complied with, because a copy of the decree appealed against was not filed with the memorandum of appeal, and that there was no appeal which could be properly entertained by the High Court, and as no sufficient cause was shown for extending the time for appealing under section 5 of the Limitation Act, the appeal was dismissed. HEM CHANDRA BAKSHI *v.* JADUB CHANDRA BAKSHI, 16 C. L. J. 116 **99**

———*Memorandum of appeal not accompanied by copy of decree appealed against, though decree was in existence when appeal was filed—Mis-statement in memorandum of appeal—Civil Procedure Code (Act V of 1908), O. XLI, r. 1 (1).*

Where a copy of the decree appealed against was not attached to the memorandum of appeal as required by Order XLI, rule 1 (1) and the Vakil for the appellant stated that the decree had not been drawn up, although, as a matter of fact, the decree was in existence when the appeal was filed:

Held, that the memorandum of appeal must be rejected. BINAPANI DEBI *v.* SHASHIBHUSHAN SINHA, 16 C. L. J. 133 **119**

———*Order determining valuation of immoveable property to be entered in sale proclamation, if appealable—Civil Procedure Code (Act V of 1908), ss. 2, 47, O. XXI, r. 66.*

An order determining the value of the immoveable properties, to be entered in the sale proclamation by the executing Court, under Order XXI, rule 66 of the Civil Procedure Code, is not appealable. PANCH DUAR THAKAR *v.* MANI RAUT, 16 C. W. N. 970 **88**

Appeal, Second. *See* SMALL CAUSE SUIT.

——— ——— ——— ———Declaratory suit—Power to interfere with discretion of lower Courts **315**

——— ——— ———Decision settling fair rent **587**

——— ———New plea **243**

——— ——— ———Order allowing or rejecting application for setting aside sale **884**

——— ——— ———Question of law or fact—Proof of *wakf* **303**

——— ——— ———*Question of fact—Reasonable compensation.*

The question as to what is reasonable compensation is a question of fact and cannot be interfered with in second appeal by the High Court. SAMPAT RAI *v.* RAM PERSHAD **517**

——— ——— ———*Small Cause suit—Suit for recovery of rent with incidental prayer for declaration of right.*

Where in a suit for the recovery of rent, there is a prayer for a declaration of right, but no separate Court-fee is paid therefor, such prayer should be treated as merely incidental to the prayer for rent.

Such a suit is of Small Cause nature and no second appeal lies in the case. VEERA RAGHAVA IYENGAR *v.* VELLAI MOOPPAI, 23 M. L. J. 517 **704**

——— ——— ———*Title suit—Finding of lower Appellate Court that plaintiff's suit is not barred—Sufficiency of finding—Remand by sigle Judge—Appeal coming on for hearing before Division Bench—Disposal of appeal by Division Bench.*

In a suit for possession of land, the lower Appellate Court said on the question of limitation: "It does

Appeal—concld.

not appear that the plaintiff's claim for possession is barred." On appeal to the High Court, a single Judge held that a mere statement of this sort was not sufficient, but that the lower Appellate Court was bound to give some reasons for the finding. He, therefore, remanded the issue so that a proper finding might be arrived at on the question of limitation, and the appeal was kept on the file of the High Court. On remand, the lower Appellate Court found that the plaintiff was not in possession within 12 years before the suit. The appeal then came on for hearing before the same lerned Judge who referred it to the Division Bench for disposal:

Held, that the first finding of the lower Appellate Court on the question of limitation was sufficient, and that the remand order should not have been made. HIATUNNESSA BIBI *v.* KAILASH CHANDRA SAHA, 16 C. L. J. 259 **224**

Approver. *See* CRIMINAL PROCEDURE CODE, s. 337.

Arbitration. *See* ARBITRATION ACT; CIVIL PROCEDURE CODE, 1908, SCH. II.

——— ———Award—Separable parts of award—Void and valid portions—Court discovering before decree its incompetency to try suit—Dismissal of suit—Amount of compensation—Apportionment—Estoppel **684**

——— ———Reference for minor to arbitration—Superseding arbitration **388**

——— ———, *agreement to refer to—Arbitrators appointed but unwilling to act—Reference to other arbitrators—Award inoperative—Specific Relief Act (I of* 1877), *s.* 21—*When bars suit.*

Certain matters in dispute were referred to three named arbitrators, two of whom were unwilling to act: the agreement to refer to arbitration contained no provision to appoint arbitrators in the room of those unwilling to act:

Held, that the agreement was inoperative and of no effect. JAITUM BI *v.* NABI SAHEB, 12 M. L. T. 346; (1912) M. W. N. 957; 24 M. L. J. 15 **389**

——— ———*Award of arbitrators made out of Court—Filing of award—Absence of reference in award to a matter in dispute—Duty of Court to remit award—Acting in excess of jurisdiction—Right of arbitrators to ignore any matter—Abandonment of claim.*

Per *Sadasiva Aiyar, J., (confirming the order of the lower Court).*—An award of arbitrators is not a reasoned judicial decision and the arbitrators need not give reasons for their decision, and may even ignore any position advanced by the parties.

Arbitrators are not bound to decide a point, if the parties showed by their conduct that they did not want a formal decision thereon.

The Court, in filing an award wherein the arbitrators have failed to give a decision on any matter, the subject of dispute, cannot be deemed to have exercised a jurisdiction not vested in it by law, or to have failed to exercise a jurisdiction vested in it by law.

Per *Sundara Aiyar, J.*—Arbitrators are bound to decide all matters in dispute in their award and their failure to do so cannot be condoned because the Court, on the merits, does not sustain the contention which was not dealt with by them.

Arbitration—contd.

The Court, in filing an award, wherein a subject of dispute has not been decided, acts with material irregularity and fails to exercise a jurisdiction vested in it to remit the award.

If the parties abandon any claim before the arbitrators, that need not appear in the award; the award would not be vitiated by absence of reference thereto, but it may be proved by the evidence of the arbitrators. PURUSHOTAMA DAS PRAGJI SAIT *v.* JETA BHAI NAGJI, (1912) M. W. N. 1076 **33**

——— ———*Award—Decree—based on award if appealable on ground that there was no valid award—Application to set aside award—Period of limitation, if Court can extend—"If an application has been made to set aside award," meaning of—Civil Procedure Code (Act XIV of* 1882), *s.* 522—*Limitation Act (IX of* 1908), *s.* 5, *Sch. I, Art.* 158.

A decree based upon an award is not open to appeal on the ground that there was no award valid in law.

Under section 5 of the Limitation Act, the Court has no authority to receive an application to set aside an award after the time prescribed by Article 158 of the Act. It is not competent to the Court to extend the time prescribed by that Article.

The expression "if no application has been made to set aside the award" in section 522 of the Civil Procedure Code is comprehensive enough to recover the case of an application to set aside the award on the ground that there was no award valid in law, and refers to a contingency other than the remission of an award. SURYA NARAIN JHA *v.* BANWARI JHA, **7**

——— ———*Award made within time fixed but reaching Court late—Arbitration superseded before receipt of award—On receipt of award supersession order set aside*—Sarpanch, *meaning of—Award invalid if not made by all arbitrators—Illegal and void award—Judicial notice by Court of illegal award—Civil Procedure Code (Act V of* 1908), *Sch. II, cl.* 8—*Limitation Act (IX of* 1908), *Sch. I, Art.* 158.

An order of supersession, under paragraph 8 of Schedule II to the Civil Procedure Code, cannot be passed where an award has already been made and completed or, in other words, signed and delivered by arbitrators within the time fixed by the Court, though it may reach the Court afterwards, inasmuch as it is not necessary to the validity of such award that it should actually reach the hands of the Court within such period.

Therefore, where an order of supersession was passed on the date fixed but the award reached the Court the same day after the passing of the order:

Held, that the Court would be justified in setting aside *suo motu* its order of supersession as erroneous.

On a reference to several arbitrators together, where there is no clause providing for an award made by less than all being valid, each of them must act personally in performance of the duties of his office, as if he were the sole arbitrator; for as the office is joint, if one refuse or omit to act, the others can make no valid award.

The word '*Surpanch*' might indicate either an umpire or referee in case of difference of opinion among the arbitrators, or might imply a chief or head arbitrator like the senior Judge of any other tribunal.

Arbitration—concld.

Where a matter was referred to the arbitration of three persons, two of whom were described as *panches* and the third as *Surpanch* :

Held, that this did not mean that the two *panches* alone were to decide the matter and that the third person was to be approached only in case of difference of opinion.

Where an award is illegal and void *ab initio* and the illegality is apparent on the very face of it, the Court should take judicial notice of it; it is not necessary that parties should file objections to the award within the time prescribed under Article 158 of the 2nd Schedule of the Limitation Act. LALA *v.* ABDUS SAMED **320**

——— ——— ———*Reference—Resiling from agreement to refer—Sufficient cause—Delay in commencing arbitration proceedings, whether sufficient cause.*

Where a person has agreed with another that all matters in controversy between them should be referred to arbitration, it is not open to that person to resile from the agreement unless for good and sufficient cause.

Delay of six months in commencing the arbitration proceedings, where it is not shown that a party made any effort at all to push forward the proceedings before the arbitrators and that he was not himself responsible for the delay, is not good and sufficient cause for the party to withdraw from the agreement to refer.

Therefore, under section 21 of the Specific Relief Act, the party is not entitled to sue in respect of a debt which he had contracted to refer. RAM CHANDRA PAL *v.* KRISHNA LAL PAL, 17 C. W. N. 351 **600**

Arbitration Act (IX of 1899), s. 11 (2)—*Award—Appeal from order setting aside award—Civil Procedure Code (Act V of* 1908), *ss.* 104 (1) (*f*), 89, 4.

No appeal lies unless it is given by law. There is no provision in the Arbitration Act giving an appeal from an order setting aside an award. Section 89 of the Civil Procedure Code especially excepts the procedure of the Code from arbitrations under the Arbitration Act and section 4 does the same generally. Section 104 (1) (*f*) applies only to arbitrations under the Code. RIPLEY *v.* NAHAPIET, 5 BUR. L. T. 155; 6 L. B. R. 88 **902**

Arms Act (XI of 1878), ss. 13, 19 (e)—*Arms — Possession — Servant fetching gun for licensed master.*

Mere temporary possession, without a license, of arms for purposes other than their use as such is not an offence within the meaning of section 19 of the Arms Act.

A., who was licensed to keep a gun, went to a village with his servant, *B.* From there, they came back but *A.* left his gun behind him. He sent *B.* to bring back his gun from the village. While *B.* was bringing back the gun, he was arrested and convicted of an offence under section 19 (*e*) of the Arms Act for going armed in contravention of section 13 of the Act:

Held, that the accused was not guilty under section 19 (*e*). EMPEROR *v.* KOYA HANSJI, 14 BOM. L. R. 964; 13 CR. L. J. 860 **796**

Arms Act—concld.

——— ——— **s. 19 (c)**—*Offence when complete—Particular intention if necessary.*

Under section 19 (*c*) of the Arms Act, the offence of possessing arms unlawfully by a person entering British India is complete the moment he enters with the arms in his possession. No particular intention in the mind of the offender is requisite.

M. landed in India from Penang: between the landing stage and the Customs Shed, he was detected in the act of handing a parcel to a third person: on inspection, the parcel was found to contain a revolver and 36 cartridges:

Held, that, technically, *M.* had committed an offence under section 19 (*c*) of the Arms Act. MAHOMED ISMAIL ROWTHER, *In re*, 35 M. 596; 13 CR. L. J. 776 **408**

Army Act (44-45 Vic. C. 58), s. 136 **13**

Assignee from lessee—Liability for rent—Apportionment—Privity of estate **933**

——— ——— of holder of Succession Certificate cannot sue for recovery of debt **486**

Assignment—After-acquired property—Covenant to replace goods sold by other goods—Lien—License—Equitable mortgage **31**

——— ——— by lessor of his reversion—*Kattakonam*, whether can be set-off—Assignor or assignee liable for *kattakonam* **623**

——— ——— of actionable claim. *See* TRANSFER OF PROPERTY ACT, s. 110.

——— ——— **of decree.** *See* DECREE, ASSIGNMENT OF.

——— ——— ——— ———Attachment of decree for mesne profits—Assignment of decree after attachment—Part consideration intended to benefit assignor and defeat creditors—Fraudulent assignment—Right of assignee to execute decree—Determination of equities between assignee and attachers in execution—Assignee entitled to charge for consideration paid by him—Rights of attachers where attachment not made by Court passing decree—Attachment of decree by judgment-debtor—Right to execute **323**

——— ——— ———Limitation—Execution of decree—Petition by transferee decree-holder to enter up satisfaction **617**

——— ——— of insurance policy by writing **627**

——— ——— ———*Right of third parties to impeach—Admissibility of oral evidence—Colourable transaction—Evidence Act (I of* 1872), *s.* 92—*Merger in decree—Fraud.*

Where an assignment is impeached on the ground that it is colourable and has the effect of defeating the rights of third parties, such third parties have the right to produce evidence to show the real nature of the transaction. Section 92 of the Evidence Act is no bar to the production of oral evidence by such third parties. It makes no difference that the transaction has merged in a decree, for decrees only bind the parties thereto or persons claiming under them.

An assignment can be assailed by third parties on the ground of fraud.

Fraud is an extrinsic and collateral act which vitiates the most solemn proceedings of Courts of Justice. PARUMAL *v.* MAHOMEDALI, 6 S. L. R. 107 **39**

Attachment. *See* CIVIL PROCEDURE CODE, s. 10; CRIMINAL PROCEDURE CODE, s. 87; EXECUTION OF DECREE; MAINTENANCE.

——— ——— of decree by judgment-debtor—Right to execute decree **323**

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Auction-purchaser's right to recover purchase money is a substantive right **437**

——— ——— ———Symbolical possession **518**

——— ——— **sale.** *See* SALE-IN-EXECUTION.

Award. *See* ARBITRATION.

——— ———Notice of filing to parties essential **430**

Bailment—Bailee working as warehouseman and merchant—Pledge of deposited goods—Pledgee having no knowledge of bailor's claim—Return of goods to pledgor—Notice **663**

Benami mortgage—Burden of proof **216**

——— ——— transaction, allegation of—Position of active confidence—Burden of proof **363**

——— ——— **sale**—*Suit for possession—Fraud against creditors.*

A. sued to recover possession from *B.* of certain property under a deed of sale which was found to have been executed in favour of *A.* by *B.* "*benami*" and with a view to defraud the creditors of the vendors:

Held, that *A.* was not entitled to recover possession and that it did not matter whether the object of the fraudulent transfer was actually effected or not.

Obiter dictum.—The fraudulent grantor or giver loses his right to claim the aid of law in recovering his property only if the contemplated fraud has been carried out. MANDAYA *v.* MA E, 5 BUR. L. T. 166 **918**

——— ———*Purchase of property by husband in wife's name—Presumption—Passing of consideration.*

There is no presumption that the purchase of property by a husband in his wife's name was *benami* for the former. The true test of ownership is, who paid the consideration for the purchase. CHILLAMUTHU *v.* MUTHUDAYAR SERVAI **740**

Bengal Rent Recovery Act (X of 1859), s. 105 **165**

Bengal Tenancy Act (VIII of 1885), s. 5 **227**

——— ——— ——— **s. 51** **111**

——— ——— ——— **ss. 52 cl. (c), 74**—*Abatement of rent—Land left uncultivated for embankment—Payment of rent in full—Abatemen to be claimed in subsequent years—Stipulation for presents and free labour besides rent, illegality of*—Abwab.

A claim for abatement of rent does not come within the purview of section 52, clause (c), of the Bengal Tenancy Act, where the remission is claimed not on account of land not found in the possession of the tenant, but on account of land which, though included in his tenure, he was obliged to leave uncultivated on account of the necessity of having to erect embankments to protect other land, and remission for land so left out is provided for in the written contract between the parties.

Bengal Tenancy Act—contd.

Prima facie, the tenant is entitled to remission for all the years for which the land had been so left uncultivated. But when the tenant has paid the rent in full without any abatement for a certain period, he is not entitled to remission for that period, but is entitled to abatement only in respect of the subsequent years for which rent has been claimed by the plaintiff.

In a *kabuliat*, the fixed rent mentioned was Rs. 360. Then there was an additional item under the heading of "price of presents and unpaid labour" amounting to Rs. 17-4. These two sums were added together and put down as amounting to Rs. 377-4 under the heading of "total rent." The *kabuliat* then provided :—

"Besides, I shall every year, at the time of the Durga Puja, give you four goats as presents and shall supply you labour without wages for five days, which if I fail to do, I shall have no objection to your realising the sum of Rs. 17-4, the price of the said presents and labour, in addition to the amount of rent."

Held, that the sum of Rs. 17-4, which was the money equivalent of the presents and labour, was in the nature of an imposition in addition to the actual rent within the meaning of section 74 of the Bengal Tenancy Act, and could not be recovered. SREE KANTA PERSHAD *v.* IRSHAD ALI SARKAR, 16 C. L. J. 225 **173**

——— ——— ——— ——— **s. 74** **173**

——— ——— ——— ——— **s. 74**—Abwab—*Illegal cess—Construction of* kabuliat—*Claim whether part of rent.*

Whether a sum claimed by the landlord is or is not an illegal cess, must depend upon the construction of the contract before the Court. If upon a fair interpretation of the terms of the contract, the sum claimed can be deemed part of the actual rent, the tenant is bound to pay it; if it can only be regarded as an imposition in addition to the actual rent, the stipulation for its payment is void.

Where throughout a lease, the yearly rent was described a certain sum assessed at a certain sum per *bigha*, upon the area demised, and at end of the lease, in a clause, entirely distinct from the one wherein the rent was assessed a provision was made for delivery of certain articles or in default their value:

Held, that the articles or their value were in the nature of an illegal cess and not recoverable from the tenant. MATHURA PRASAD *v.* TOTA SINGH, 16 C. L. J. 296 **177**

——— ——— ——— **s. 75**—*Limitation, special—"Exacted," meaning of—Suit for refund of excess amount realised by landlord without claiming penalty—Limitation applicable to suit—Limitation Act (XV of 1877), Sch. II, Art. 14—Patni Regulation (VIII of 1819), s. 14—Collector's power to determine summarily rent of tenure then payable—No power to determine rent payable in future.*

The plaintiffs alleged that they held a *patni taluq* on payment of certain money rent to the defendants, but that the latter took proceedings under the Patni Regulation for realisation of the value of certain paddy rents which, they said, were payable for the *taluq*, and the plaintiffs, in order to save their tenure from sale, deposited the amount claimed by the defend-

ants. The plaintiffs accordingly sued for a declaration that the *taluq* bore money rent and not paddy rent, and for refund of the amount realised from them in excess of the proper rent:

Held, (1) that the suit was not barred by the special limitation prescribed by section 75 of the Bengal Tenancy Act, as that section had no application to the suit: *first*, because the excess rent realised from the plaintiff in proceedings under the Patni Regulations could not be said to have been exacted by the *zemindars* within the meaning of the section, which evidently contemplated exactions by means other than process of law; and *secondly*, because the section did not take away the right of a person, from whom rent had been realised in excess, to recover such excess amount from the landlord, apart from the provisions of the section, within the ordinary period of limitation;

(2) that the suit was not barred under Article 14 of the Limitation Act, because under section 14 of the Patni Regulation the Collector could make only a summary investigation if the *talukdar* contested the *zemindar's* demand for any arrear, that the determination of what was the rent payable for the tenure in future was beyond the scope of the Collector's power, and that the plaintiffs did not require to set aside any act or order of the Collector.

Section 75 merely enables a tenant to recover from his landlord certain penalty in addition to the amount or value of what is exacted, if the suit is brought within six months from the date of exaction, and the limitation provided by the section does not bar a suit to recover the excess amount where no penalty is claimed. NAGENDRA LAL CHOWDHURY *v.* RAJA BIBI, 17 C. W. N. 374 **504**

——— ——— ——— ——— **s. 76** **115**

——— ——— ——— ——— **ss. 86, 87 (6), (7)** **682**

——— ——— ——— ——— **s. 104-H** **919**

——— ——— ——— ——— **s. 104-H**—*Scope of section—Relief to be granted—By whom to be instituted—Who should be made defendant—Necessary and proper party, distinction between—Person indirectly or remotely interested, whether necessary party—Secretary of State and under-tenants, whether necessary parties.*

The only relief which the plaintiff in a suit under section 104-H can claim, is the alteration of an entry of the rent settled or the insertion of an entry as to the amount of rent to be settled. No doubt, the Court, with a view to determine the question, whether the entry of the rent as settled is erroneous or whether there ought to be an entry of settled rent, must incidentally examine the ground assigned by the plaintiff as set out in the six clauses of sub-section 3. But the Court cannot be called upon, in a suit under section 104-H, to make an express declaration upon any of the six matters mentioned in that sub-section.

The plaintiffs are not competent to seek in a suit under section 104-H a declaration that part of the lands is *nij jote* or that certain specific tenants have not acquired rights of occupancy therein.

A suit under section 104-H may be instituted either by the landlord or by the tenant, according as the one or the other considers himself aggrieved by the entry in the Record of Rights.

The suit should have as defendant only the person benefited by the rent-entry or by the omission to make a rent-entry, as the case may be. The Secretary of State for India is the proper party to be made defendant. The under-tenants are not necessary parties in the determination of the one question directly in issue, namely, whether the rent-entry showing the amount of rent payable by the plaintiffs to the Secretary of State, is or is not correct. The under-tenants are not necessary parties for as far as the entry relates to their status as under-tenants, it cannot be altered as the result of this suit.

There is a well founded distinction between necessary parties and proper parties to a suit. Two conditions must be satisfied in order that a party may be considered a necessary party defendant, namely, *first*, there must be a right to some relief against him in respect of the matter involved in the suit; and *secondly*, his presence is necessary in order to enable the Court effectually and completely to adjudicate upon and settle all questions involved in the suit.

In each case, it must be determined whether a particular person is or is not a necessary party, that is, necessary for the determination of the question raised by the plaintiff and for the grant of the relief he claims. But it may be laid down as a general rule that a person who is only indirectly or remotely interested, is not a necessary party. JOGENDRA NATH SINGH *v.* SECRETARY OF STATE **921**

——— ——— ——— ——— **s. 105**—*Proceeding may be instituted whether rent is or is not fixed by contract.*

A proceeding, under section 105 of the Bengal Tenancy Act, can be instituted not only when there is no rent payable by the tenant to the landlord under the terms of a contract between the parties, but also when rent is fixed by a contract. ACTOWLI *v.* TARAK NATH GHOSE, 16 C. L. J. 328 **266**

——— ——— ——— ——— **ss. 105, 109A, 157**—*Record of Rights—Person settled as* raiyat *by trespasser—Recorded as* raiyat *in Record of Right—Settling fair rent—Relationship of landlord and tenant—Whether consent of both parties essential—Decision of Special Judge in s.* 105, *Bengal Tenancy Act, case, declining jurisdiction—Decision settling fair rent—Second appeal.*

A person, who is settled on a certain land as a *raiyat* by a trespasser, does thereby become a *raiyat* of some kind, and, therefore, when the *zemindari* is transferred by operation of law from one *zemindar* to another, he remains a *raiyat* on the land; and if he is recorded by the Settlement Authorities in the Record of Rights as a *raiyat* on the land, the *zemindar* is entitled to treat him as a *raiyat* and to ask the Revenue Court to settle a fair rent with him.

In order that the relationship of landlord and tenant might be established between two parties, the consent of both parties is not essential under the law in this country, though it may be so under the English law.

A decision by a Special Judge that he had no jurisdiction as a Revenue Court to fix a fair rent in respect of lands held by the defendants, inasmuch as the latter were trespassers, and that the *zemin-*

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dar's only remedy was by the institution of a suit, under section 157 of the Bengal Tenancy Act, is not a decision settling rent, and a second appeal from that decision is not barred by section 109A. KALI PROSANNA DAS *v.* BHAGABAN MALI, 17 C. W. N. 348 **587**

——— ——— ——— **s. 108A, scope of**

—*Power of Settlement Officer—Correction of* bona fide *mistake—Mistake of party—Inherent power of Court to correct obvious errors in record—Amendment of record after dismissal of appeal.*

Section 108A of the Bengal Tenancy Act applies only to Revenue Officers specially empowered by the Local Government in that behalf. The section entitles the Settlement Officer to correct the record where there has been a *bona fide* mistake; such mistake need not necessarily be the mistake of the Settlement Officer; it may very well be a mistake made by one of the parties concerned. The section in substance authorises a Settlement Officer to re-consider the matter on the merits.

A Settlement Officer, in the exercise of a power inherent in every Court to correct obvious errors or incidental slips in its own record, may correct a clerical or an arithmetical error in the Record.

After the final publication of a Record of Rights, fair and equitable rent was settled in a proceeding under section 105 of the Bengal Tenancy Act, at the rate of one rupee per *bigha*. The tenant's appeal to the Special Judge was dismissed. Subsequently, it was discovered that the area had been erroneously recorded as 5 *bighas*, 17 *cottahs* instead of 7 *bighas*, 5 *cottahs*. Accordingly, the Settlement Officer amended the record, and a consequential alteration was made in the entry relating to the rent payable. Before the Special Judge on appeal, no question was raised as to the area:

Held, that the Settlement Officer had authority to correct the record. RAJ MOHAN GUHA *v.* ALAM GAZI PATWARI, 16 C. L. J. 339 **279**

——— ——— ——— **s. 109A** **587**

——— ——— ——— **s. 148A** **207**

——— ——— ——— **s. 157** **587**

——— ——— ——— **s. 158A** **207**

——— ——— ——— **s. 188** **115**

——— ——— ——— **Sch. III, Art. 2 (b)** **343**

——— ——— ——— **Art. 6** **207**

Berar Land Revenue Code, 1896, ss. 205 to 209, 211 (d)—*Pre-emption—Decree for foreclosure against mortgagor's representative—Representative also co-occupant—Subsequent suit for pre-emption.*

The right of pre-emption arising in respect of a mortgage under the Berar Land Revenue Code is quite independent of any obligation to redeem the mortgage which may fall on the pre-emptor as a representative of the mortgagor.

A. owned a certain survey number. He partitioned the field equally between his two sons, *B.* and *C.*, reserving no share for himself. Subsequently, *A.* and *B.* mortgaged the half share of *B.* to *D.*, who sued *A.* and *B.* for foreclosure of the mortgage. A decree *nisi* was passed in the usual form. Before it became absolute, *A.* died and *C.* was brought on the record in his place. No redemption took place, and the decree for foreclosure was made absolute. *C.*, thereupon, sued to enforce his right of pre-emption under the Berar Land Revenue Code:

Held, that the decree for foreclosure was no bar to the suit for pre-emption by *C.* AGYA RAM *v.* DEORAO, 8 N. L. R. 161 **616**

——— ——— ——— **ss. 206, 207, 208, 209, 211 (d)** **616**

Bhagdari tenure, *nature of*—Bhagdari *village—Right of* bhagdar *to village site—Land forming roadway—Bombay Land Revenue Code (Bom. Act V of* 1879), *s.* 37.

Land forming road-ways through the village site of a *bhagdari* village is the property of the Government.

All the land forming the village site of a *bhagdari* village is not the property of the *bhagdars*.

The *bhagdari* tenure is nothing more than a particular system of collecting the revenues for the Government.

A *bhagdar* is entitled only to those village fields which are assigned to him, and to that portion of the village site which is assigned to him for residence.

A *bhagdar* has no higher title to his assigned land in the village site than he has to his assigned land in the village fields. He cannot make any claim to the proprietorship of such lands, as he is liable to pay rent or assessment to the Government for these lands. UMAR AMNAJI MIAJI *v.* SECRETARY OF STATE, 14 BOM. L. R. 934; 37 B. 87 **659**

Bombay Abkari Act (V of 1878), ss. 32, 67—*License to sell liquor—Collector's order cancelling license—Collector honestly believing licensee guilty of bribing officials—Suit against Government—Limitation—Protection in statutory duties.*

If any public or private body charged with the execution of a statute honestly intends to put the law in motion and really and not unreasonably believes in the existence of facts, which, if existent, would justify his acting and acts accordingly, his conduct will be in pursuance of the statute and will be protected.

Where a license for sale of liquor granted to a person was revoked by the Collector under the *bona fide* belief that the licensee had bribed the Collector's Head Clerk though there was no actual conviction of the licensee:

Held, (1) that the act of the Collector must be regarded as done in pursuance of the statute;

(2) that a suit brought against the Government in respect of the act would be barred if brought after the expiry of four months from the date of the act, even though the licensee unsuccessfully appealed to the Commissioner and the Local Government against the Collector's order of revocation. DHONDU DAGDU PATIL *v.* SECRETARY OF STATE, 14 BOM. L. R. 949; 37 B. 101 **673**

——— ——— ——— **s. 43 (a)** **534**

——— ——— ——— **s. 67**—Limitation—Suit against Government—Collector's order cancelling license to sell liquor **673**

Bombay City Municipal Act (III of 1888), s. 394—*Keeping bullocks for hire—Bullocks kept by tenants in huts and in open—Liability of owner.*

A. was joint owner of a place, part of which was let out to several tenants. The tenants kept bullocks on the place, some in huts and some in the open. The bullocks were plied for hire but the place was not licensed by the Municipal Commissioner under section 394 of the Bombay Municipal Act. A. knew that the bullocks were kept on the land and allowed it:

Held, that A. was guilty of an offence under section 394 of the Bombay Municipal Act, whether the bullocks were kept upon leased land or on waste land not leased out. IMPERATOR *v.* TYEBALI CURIMJI, 14 BOM. L. R. 885; 13 CR. L. J. 785 **529**

——————— **s. 394**—*Keeping bullocks for hire by tenant with owner's knowledge—Liability of owner.*

A. let out certain premises to B. For several years, to the knowledge of A., the premises were used by B. or his sub-tenants for the purpose of stabling bullocks used for hire in contravention of section 394 of the Bombay Municipal Act. In the lease given by A. to B, there was a clause restraining B. from putting the land to any use not sanctioned by Municipal Regulations:

Held, that A. was guilty of an offence under section 394 of the Act, as despite the terms of the lease, he allowed the unwarranted use of the premises. EMPEROR *v.* DADABHAI, 14 BOM. L. R. 882; 13 CR. L. J. 788 **532**

Bombay Civil Courts Act (XIV of 1869), s. 32—*Court of Wards Act (I of 1905), s. 3 (c)—Jurisdiction—Suit against Collector as Court of Wards.*

A suit brought against a Collector, appointed Court of Wards under section 3 (c) of Bombay Act I of 1905, is a suit against an officer of Government sued in his official capacity and as such is triable only by the District Court by virtue of the provisions of section 32 of Act XIV of 1869. MISS M. J. D'SILVA *v.* MISS D. J. S. MINIZIS, 14 BOM. L. R. 1207 **972**

Bombay Court of Wards Act (I of 1905), s. 2 **670**

——————— **s. 3 (c)** **972**

——————— **ss. 4, 25, 32** **670**

Bombay District Municipal Act (IV of 1890), ss. 51, 68 (a) **64**

Bombay High Court, Appellate Side Rules, r. 65 **964**

——————— **Rules, r. 725** **739**

Bombay Land Revenue Code (V of 1879), s. 37 **659**

Bombay Regulation (XII of 1827), s. 27 **60**

Bombay Vatan Act (V of 1886), effect of **746**

Bond—*Construction—Interest to be paid at certain sum per month—Compound interest at end of every six months to be added to principal—Whether interest to be paid on whole sum per month or per cent., per month.*

In a bond the debtor agreed to pay, on the principal amount of Rs. 2,000, interest at the rate of Rs. 1-9 per month. There was a further provision to this effect: "We shall pay the interest every six months. If we fail to do so, the interest and compound interest shall at the end of every six months be added to the principal and we shall go on paying interest thereon at the aforesaid rate:"

Held, that the interest was to be payable at the rate of Rs. 1-9 per cent. per month. INDRO DEB SARKAR *v.* AZIZUR RAHMAN SARCAR, 16 C. W. N. 957 **9**

British India—*Wadhwan Civil Station—Bombay Abkari Act (Bom. Act V of 1878), s. 43 (a)—Importation of* bhang *from Wadhwan Civil Station to Viramgam.*

Wadhwan Civil Station is not a part of British India.

The importation of *twenty* tolas of *bhang* from Wadhwan Civil Station into Viramgam is an importation of *bhang* from foreign territory into Presidency of Bombay and is, therefore, punishable under section 43 of the Bombay Abkari Act. EMPEROR *v.* CHIMANLAL JAGJIVAN, 14 BOM. L. R. 876; 13 CR. L. J. 790 **534**

Buddhist Law—Hnapazon *property—Widow's right to alienate—Burden of proving necessity lies on mortgagee.*

A widow's interest in *hnapazone* property is one half with a life-interest in the remainder.

Any mortgage by a widow of such property will be valid to the extent of half of it unless there is evidence to show that the mortgage was for the necessities of the family and the burden of proof of such necessity lies on the mortgagee. CHAN THA U *v.* NAW BI, 5 BUR. L. T. 170 **956**

Burden of proof—Alienation of ancestral property—Necessity **666**

——————— Ancestral property **392**

——————— *Benami* mortgage **216**

——————— Drunkenness—Intention—Knowledge **800**

——————— Excavation of tank—Improvement **115**

——————— Lease by mortgagor in ordinary course of management **1**

——————— Plea of limitation—Plaintiff to prove his suit within time **518**

——————— Position of active confidence—Allegation of *benami* transaction **363**

——————— Production of document with endorsement of payment **396**

——————— Right of private defence **1001**

——————— Suit for alluvial land—Burden of proving title and possession within limitation—Nature of proof—Presumption—Settlement Records, entries in **94**

Burden of proof—concld.

——— ——— ——— ———Suit for profits against *lambardar* **914**

——— ——— ——— ———Undue influence **309**

——— ——— ——— ———*Occupancy rights—Transfer—Transferee in possession—Suit for declaration—Defendant admitting transfer by lease—Plaintiff pleading sale—Evidence Act (I of 1872), ss.* 101, 102, 110, 114.

A. transferred certain occupancy rights in unalienated land in Berar to *B.*, who was put in possession. *B.* sued *A.* for a declaration that he was entitled to be the registered occupant as *A.* had sold the occupancy rights to him. *A.* denied the sale, alleging that the occupancy rights were only leased to *B.* for a term of years:

Held, that the burden of proving that the transfer was a sale and not a lease, lay on *B.* KASHIBAI *v.* LADURAM, 8 N. L. R. 185 **889**

——— ——— ——— ———*Possession—Mortgagor and mortgagee.*

The burden of proof as to the nature of the transaction by which the person in possession obtained that possession is on the person who is out of possession.

This rule, however, is inapplicable when the original relation of the parties was that of mortgagor and mortgagee. It is then on the party who alleges that the said relation has ceased to prove it.

For the purpose of placing the burden of proof, it is immaterial whether possession was given under the original mortgage or not until the time of the subsequent transaction in dispute. MAUNG CHIT TON *v.* MAUNG AUNG GYAW, 5 BUR. L. T. 161 **913**

Burma Land and Revenue Act (II of 1876), ss. 37, 44, 80 **878**

Burma Laws Act (XIII of 1898), s. 13 **954**

Caste, *ex-communication from—One section refusing to invite plaintiff without his undergoing some expiatory ceremonies, but not outcasting him—Cause of action—Civil Procedure Code (Act V of 1908), s. 9.*

An allegation that defendants insisted that the plaintiff should undergo certain expiatory ceremonies, required to be performed by members of a caste after pollutions of certain kinds, before he could be invited to certain functions in defendant's houses, affords no cause of action against the defendants.

Refusal to invite the plaintiff and his friends to auspicious occasions would not in itself give the plaintiff a cause of action, provided his enjoyment of right as a member of the caste has not been obstructed. COOPOOSAMI CHETTY *v.* DURAISAMY CHETTY, (1912) M. W. N. 1220 **527**

Cause of action—Contract to transfer negotiable instrument—Failure to perform—Measure of damages **721**

——— ——— ——— ———Ex-communication from caste **527**

——— ——— ——— ———Recovery of money by person with knowledge of cessation of right **205**

——— ——— ——— ———Will by widow—Suit by reversioner to set aside **586**

Cause of action—concld.

——— ——— ——— ———Wrongful breaking through mine and carrying away coal—Covenant to keep barrier between lessor and lessee—Privity of contract between lessor and sub-lessee—Suit for damages for erection of buttresses **500**

——— ——— ——— *Right to sue—Custom*—Vatandar Joshi—*Suit to recover fees paid to usurper—Liability of* yajman—*Action against person procuring breach of contract.*

A *vatandar joshi* is entitled to sue for the recovery of fees paid by his *yajman* to a usurper of the functions of the *Joshi*.

Both the *yajman* and the intruder are jointly and severally liable to the *Joshi* for the amount of his fees.

An action lies not only against a person who breaks a contract but also against any one who wilfully and with notice procures a breach of the contract to the detriment of the plaintiff. PANDURANG *v.* NAGOJI, 8 N. L. R. 133 **138**

Central Provinces Courts Act (II of 1904), s. 8 (1) (c), rules under **624**

——— ——— ——— — **ss. 13, 15** **886**

Central Provinces Court of Wards Act (XXIV of 1899), ss. 10, 12, 26, 27—*Suit pending against defendant—Death of defendant—Representative ward of Court—Continuance of suit—Civil Procedure Code (Act V of 1908), O. XXII, rr.* 1, 4 *Interpretation of statutes—Statute imposing restrictions—Superfluity.*

Section 12 of the Central Provinces Court of Wards Act has no application to a claim already submitted to the arbitrament of a Civil Court before publication of a notification under section 10 and still awaiting the Court's adjudication on the expiry of six months from the date of that publication.

Section 26 of the Act does not apply to a suit already filed against the predecessor-in-title of a Government ward and continued against the ward as legal representative of the original defendant in accordance with Order XXII, rule 4, Civil Procedure Code.

Statutes imposing restrictions upon the subject's right of suit should be construed strictly and such restrictions should not be extended beyond what the words used actually cover.

There is always a presumption against superfluity in a statute.

A restricted sense is the right one to give to words which cut down existing remedies.

The jurisdiction of a Civil Court is not to be construed as excluded in any case beyond the clearly expressed will of the Legislature. GANESHLAL *v.* DHONDIBA, 8 N. L. R. 169 **621**

——— ——— ——— ——— **ss. 12, 26, 27** **621**

Central Provinces Land Revenue Act (XVIII of 1881), ss. 136-R, 136-S *Revenue partition Date of effect Sanction by Commissioner Previous private partition Hindu law.*

A revenue partition, under the provisions of the Central Provinces Land Revenue Act, does not take effect from the date on which it is sanctioned by the Commissioner but from the first day of the agricul-

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tural year next after the Deputy Commissioner has published a notification of the Commissioner's sanction under section 136-S. (1) of the Act.

A private partition was effected between two Hindu brothers and the share of each was ascertained. Subsequently, there was a revenue partition between the brothers which was sanctioned by the Commissioner on 9th April 1894. The notification of sanction was published after 1st June 1894:

Held, (1) that the revenue partition did not take effect till 1st June 1895;

(2) that the revenue partition could only take effect according to Revenue law and the rule of Hindu law that partition dated from ascertainment of shares did not apply to the revenue partition. RATANLAL *v.* BHASKAR, 8 N. L. R. 139 **144**

——————— **s. 136 S** **144**

Central Provinces Tenancy Act (IX of 1883), s. 38 (1)—*Central Provinces Tenancy Act (XI of 1898), s. 41 (1) — Absolute occupancy-holding—Widow's estate, nature of—Hindu Law*—Mitakshara—*Alienation—Necessity—Marriage of divided nephew of husband.*

An alienation by a Hindu widow of her deceased husband's estate in order to provide the expenses of his divided nephew's marriage is not binding on her husband's reversioners, as such expenses do not constitute legal necessity.

A Hindu widow, upon whom the absolute occupancy-holding of her husband has devolved under section 38 (1) of the Central Provinces Tenancy Act, 1883, or section 41 (1) of the Central Provinces Tenancy Act, 1898, obtains an interest therein analogous in all respects to the estate of a Hindu widow in land inherited by her from her husband subject only to the provisions of the statute as to surrender and alienation. BHURA *v.* RAMRAO, 8 N. L. R. 154 **366**

——————— **s. 38 (2)**—*Occupancy holding—Intention to mortgage, notice of—Criterion for determining necessity for notice—Interest—Calculation—Interpretation of statutes—Object of statute.*

The criterion for determining whether a landlord is entitled to notice under section 38 (2) of the Central Provinces Tenancy Act, 1883, of an intention to mortgage an occupancy holding, is the annual rent of the entire holding if the entire holding is to be transferred; if only a part of the holding is to be transferred, then only so much of the annual rent as corresponds with that part.

The provisions of a statute should not be evaded by shift or contrivance. To carry out effectually the object of a statute, it must be so construed as to defeat all attempts to do or avoid in an indirect or circuitous manner that which it has prohibited or enjoined.

The mere fact that re-payment in full of mortgage-money is contemplated within a period shorter than five years should not be looked upon as limiting the calculation of interest to that period when applying to the transaction the test prescribed by section 38 (2) of the Tenancy Act. The whole interest payable on the principal during the five years immediately succeeding the mortgage should be taken into consideration. MADHO *v.* UMRAO, 8 N. L. R. 147 **370**

Central Provinces Tenancy Act—concld.

——————— **s. 42** does not apply to mortgages **129**

——————— **(XI of 1898), s. 39** **606**

——————— **s. 41 (1)** **366**

——————— **s. 44** **606**

——————— **s. 45 (6)** **129**

——————— **s. 62 (1)** **606**

Charge against accused framed before cross-examination of prosecution witnesses—Subsequent cross-examination—Cancellation of charge, if legal **406**

——————Document executed by Company, incomplete—Creation of charge **976**

——————— **to Jury.** *See* JURY.

Charitable Trust. *See* CIVIL PROCEDURE CODE, 1882, s. 539; CIVIL PROCEDURE CODE, 1908, s. 92.

Charter Act (24 & 25 Vic. C. 104), s. 15—Jurisdiction of High Court to revise proceedings under s. 145, Criminal Procedure Code **65**

Chota Nagpur Encumbered Estates Act (VI of 1876 B. C.), *whether applicable to land outside Chota Nagpur—Scope and effect of Act.*

The Chota Nagpur Encumbered Estates Act has no application to land lying outside of Chota Nagpur; and, consequently, the privilege enjoyed by a mortgagee from the proprietor in respect of such land to enforce his rights in a Court of ordinary Civil Jurisdiction, has not been abrogated or struck at by any of the provisions of the statute.

Per *Mookerjee, J.*—The scope of the Act is limited by political or administrative considerations which underlie it. The effect of the statute is to confer special privileges upon a particular class of persons, who are described as holders of land in Chota Nagpur. One of these privileges is that the question of liability for their debts and the mode of their satisfaction is determined not by the regular Courts, but by the Manager. A statute of this description, which abridges the jurisdiction of the Civil Courts, must be strictly construed, and in the absence of a statutory provision, which expressly or by necessary implication, lays down that the Act applies to all lands in British India owned by holders of land in Chota Nagpur, the statute should not be given such extensive an application. BHICHA RAM *v.* BISHAMBHAR NATH, 16 C. L. J. 527 **957**

Chota Nagpur Tenancy Act (VI B. C. of 1908), ss. 81 cl. (n), 91—*Suit by* zemindar *against* jagirdar *for possession—Whether suit barred by section 91—Section 81 cl. (n) whether includes coal in mine not opened—Minerals lying on surface of soil—Scope of suit referred to in clause (b) of section 91—Jurisdiction of Civil Court, presumption to be made in favour of—Dismissal of suit under section 91, whether necessary—Stay of suit till final publication of Record of Right—Section 91, sub-section (1) Proviso, relief to be obtained under—No relief by appointment of Receiver or by grant of injunction.*

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The first eight defendants were *jagirdars* under the plaintiff. Defendant No. 9 was the manager of their estate under the Chota Nagpur Encumbered Estates Act of 1876. The remaining defendants had obtained a prospecting lease from the manager to open up mines and quarries. The plaintiff, stating that the *jagirdars* were incompetent to grant a lease in respect of mines and quarries as they had no underground rights, sued for recovery of possession and injunction.

No written statement was filed, but the defendants took exception to the competency of the suit on the ground that it was barred under section 91 of the Chota Nagpur Tenancy Act of 1908.

Held, that the suit was not barred by section 91; that clause(*a*) of the section was not applicable, *first* because as the defendants had not yet filed their written statement, it was impossible to ascertain what matters were in issue between the parties to the suit, and *secondly*, because none of the questions covered by clause (*n*) of section 81 arose directly or indirectly for determination in the suit as framed; that clause (*b*) of section 91 was not applicable, because the suit could not be deemed as one for alteration of the rent or the determination of the status of any tenant.

Clause(*n*) of section 81 does not include coal contained in a mine which has not yet been opened, it refers to minerals lying on the surface of the soil which may be taken by any person, tenant or not. Clause (*b*) of section 91 does not refer to a suit where the question of the status of the tenant arises only indirectly for consideration.

Every presumption should be made in favour of the jurisdiction of a Civil Court, and it should not be taken away except by express words or by necessary implication.

Section 91 does not mean that the suit, if instituted, shall be dismissed; the proper course to follow in such a contingency is to adjourn the trial of the suit till the final publication of the Record of Rights.

A plaintiff can, under the proviso to sub-section (1) of section 91, obtain relief only when waste or damage had been actually committed. He is entitled merely to prohibit the continuance of waste or damage: he cannot demand a prohibition of the commission of the waste or damage, and under the proviso, no relief can be granted either by the appointment of a Receiver or by the grant of a permanent injunction. RAM NARAYAN SINGH *v.* KRISHNA CHANDRA GHOSE, 17 C. W. N. 408; 17 C. L. J. 239 **490**

——————— **s. 91** **490**

Civil Procedure Code (Act XIV of 1882), s. 2 **884**

——————— **s. 13** — Compromise decree **434**

——————— **ss. 13, 244**—Res judicata—*Partition suit—Decree declaring right to partition—Actual partition not effected—Execution of decree barred—Subsequent suit for partition.*

Where a decree declaring a right to partition has not been given effect to by the parties proceeding to partition in accordance with it, it is competent to the parties or any of them, if they still continue to be interested in the joint property, to bring another suit for partition in case their right to partition is called in question at a time when, by reason of limitation or otherwise, they cannot put into effect the decree first obtained.

Such a decree amounts to nothing more than an inchoate partition insufficient to change the character of the property, which continues a joint estate until there has been an actual partition by metes or bounds, or a division of title. JAGU BABAJI VARANG *v.* BALU LAXMAN VARANG, 14 BOM. L. R. 1198 **955**

Civil Procedure Code—(1882)—contd.

——————— **s. 43**—Parties different **434**

——————— **ss. 244** **884, 955**

——————— **s. 268**—Attachment of debt due to judgment-debtor **420**

——————— **ss. 275, 276, 295**—*Execution of decree—Attachment—Private alienation after attachment—Subsequent attachment by another creditor—Debtor declared insolvent—First attachment raised by satisfaction of decree—Claim enforceable under attachment—Validity of private alienation—Civil Procedure Code (Act V of 1908), s. 64.*

A. obtained a decree against *B.* and attached the right, title and interest of *B.* in certain property. On 6th January 1896, *B.* assigned the whole of his right, title and interest in the property to *C.* In 1898, *D.* obtained a decree against *B.* In 1903, *B.* was adjudged an insolvent, and in 1904, *D.* levied an attachment on the same property as was already attached by *A.* In 1907, the judgment-debt due to *A.* was paid and his attachment raised. In 1910, *C.* got an order raising the attachment of *D.*

Held, (1) that the assignment to *C.* was not void as against *D.*;

(2) that as no assets were realized by sale or otherwise in execution of decree which could be divided rateably between the creditors, *D.* was not the possessor of a claim enforceable under section 295, Civil Procedure Code, or as a consequence enforceable under the attachment within the meaning of section 276. JETHA BHIMA AND CO. *v.* LADY JANBAI, 14 BOM. L. R. 904 **625**

——————— **s. 275A** **936**

——————— **s. 276, 295** **625**

——————— **s. 295**—*Rateable distribution—"Money decree"—Mortgage decree expressly exempting from personal liability—Collusion—Corrupt bargain—Right of decree-holder to prove.*

A mortgage-decree for sale of the mortgaged property, expressly exempting the defendant from personal liability, is not a money decree within the meaning of section 295 of the Civil Procedure Code, 1882.

A decree-holder is entitled to prove that a decree, obtained by another decree-holder claiming rateable distribution, against the judgment-debtor was obtained in collusion with the latter or as a result of a corrupt bargain between the parties. The Court will not allow rateable distribution if it is satisfied of the collusion or the corrupt bargain. SURYA NARAYANA JAGAPATI RAJU *v.* GOPALA SURYA RAO, 23 M. L. J. 699; 12 M. L. T. 660 **940**

Civil Procedure Code—(1882)—contd.

——————— **s. 311** **242**

——————— **s. 314**—Application for delivery of possession three years after confirmation of sale **242**

——————— s. 315—*Auction-purchaser's right to recover purchase money—Substantive right—Civil Procedure Code (Act V of 1908), O. XXI, r. 93, effect of—Limitation Act (IX of 1908), Sch. I, Arts. 62 and 120.*

Per *Ayling, J.*—Under section 315 of the Code of Civil Procedure, 1882, a suit lies by an auction-purchaser to recover the sale price from the decree-holder when it is found on a third party's suit that the judgment-debtor had no title whatever to the property sold by the Court.

There is nothing in the present Code (Act V of 1908) which would have the effect of taking away the right of suit which had accrued before it came into force.

Quære:—Whether a similar right of suit exists under the present Code.

Per *Napier, J.*—Section 315 of the Code of Civil Procedure, 1882, gave a substantive right to recover money paid to a judgment-creditor and that right could be exercised either by suit or by petition in execution proceedings.

Under the present Code (Act V of 1908), the right is no longer a substantive right entitling the auction-purchaser to recover his money, but he has a right to get an order in execution proceedings for re-payment if he discovers the absence of interest before the confirmation of the sale.

Per *Ayling* and *Napier, JJ.*—The claim for recovery of sale-money is governed by Article 120 of Schedule I of the Limitation Act and not by Article 62. MOHIDEEN IBRAHIM *v.* MAHAMED MEERA LEVAI, 12 M. L. T. 431; 23 M. L. J. 487; (1912) M. W. N. 1130 **437**

——————— **s. 317** **434**

——————— **s. 323** **887**

——————— **ss. 325-A, 323**—*—Void transfer—Collector leasing property for premium satisfying decree—Subsequent disposal of property by judgment-debtor—Civil Procedure Code (Act V of 1908), Sch. III, para. 11.*

Where a party seeks to have a transfer of property declared void under section 325-A of the old Code, or paragraph 11, Schedule III, of the present Code, he is bound to show that on the date of such transfer, the Collector was exercising or performing in respect of such property some power or duty conferred upon him by the Code for the purpose of executing a decree which was still unsatisfied on that date.

The incompetency created by the section exists only for the period during which the execution of the decree remains in the Collector's hands.

Where the Collector gives a lease of the property on payment of a premium sufficient to satisfy the decree forthwith and satisfaction in full is certified to the Civil Court, the judgment-debtor can dispose of the property subject to the lease. SONBA *v.* GANESHA, 8 N. L. R. 182 **887**

Civil Procedure Code—(1882)—contd.

——————— **ss. 351, 356, 503** —*Civil Procedure Code (Act V of 1908), O. XL, r. 1 (d)—Provincial Insolvency Act (III of 1907), s. 20 (d)—Receiver's power to sue.*

A Receiver, appointed under section 351 of the Civil Procedure Code of 1882, has no *locus standi* to institute a suit, even with the previous sanction of the Court which appointed him Receiver.

As a general rule, a Receiver is a person appointed by the Court to receive and there is no vesting of any cause of action in him.

The power to sue or the liability to be sued is not *necessarily* incidental to the general powers of a Receiver, who has the right to institute or defend a suit only with the express permission of the Court. BADRI PERSHAD *v.* CIVIL NAZIR, AMBALA **751**

——————— **ss. 356, 503** **751**

——————— **s. 521** **684**

——————— **s. 522** **7, 684**

——————— **s. 539**—*Public charity—Endowment—Scheme confirmed by High Court—Amendment of scheme—Jurisdiction of District Court—Directions necessary to carry out scheme—Income of endowment uncertain—Audit to be frequent—Committee of management—Person having pecuniary interest in endowment properties or creditor of endowment, whether should serve on Committee.*

Where in a suit under section 539 of the Civil Procedure Code of 1882, a scheme for the administration of a public charity has been framed by the District Court and confirmed by the High Court, an application for modification of the scheme can be entertained only by the High Court, but the District Court is at liberty to give such directions as may be necessary to carry out the modified scheme.

Where the income of a public endowment is of an uncertain and variable character, it is extremely desirable that audits should be fairly frequent and searching.

No one, who has any pecuniary interest in the endowment properties or is a creditor of the endowment, should serve on the Committee of management of the endowment. UMESHANANDA DUT JHA *v.* RAVANESHWAR PROSAD SINGH, 16 C. L. J. 431 **969**

——————— **s. 539, scope of**—*Suit against trespasser.*

Section 539 of the Civil Procedure Code, 1882, is applicable only in cases of an express or constructive trust created for a public charitable purpose.

The section applies only to a suit *against* a trustee and not to a suit against a trespasser. ARUNACHELLA CHETTY *v.* MUTHU CHETTIAR, 23 M. L. J. 347 **586**

——————— **s. 539, scope of**—*Right to sue—Founder's representatives suing for preventing abuse of trust—Suit in ejectment against trespasser by worshipper—Religious endowment—"Interested", meaning of—Adverse possession*—Pujari—*Limitation Act (XV of 1877), Sch. II, Arts. 47, 144.*

Section 539 of the Civil Procedure Code, does not repeal or affect the right of a private individual to institute a suit to enforce the proper observance of a religious endowment.

Civil Procedure Code—(1882)—concld.

The representatives of a person, who endowed the property for a religious endowment, are entitled to institute proceedings for the purpose of having abuses in the trust rectified.

Where a religious endowment is founded for carrying on the sectional religious worship of the sect of the founder, persons of the same sect and form of worship as the founder are persons interested in the due performance of the religious worship by a duly qualified person and are entitled to ask for the ejectment of an intruder.

The possession or enjoyment of a *Pujari* for the time being cannot become adverse to the worshipper.

In the case of a sale of the endowed property, the possession becomes adverse to a worshipper or the representative of the founder from the date of the sale-deed.

Article 47 of the Limitation Act, 1877, can be no bar to a person who was no party to the criminal proceedings which terminated in the order. KADAMBI SRINIVASACHARLU *v.* DURLABHA SUBUDDHI, 23 M. L. J. 348 **589**

——— ——— ——— **s. 541** **99**

——— ——— ——— **s. 564** **891**

——— ——— ——— **s. 583**—*Assignment of decree—Assignee realising amount from judgment-debtor—Restitution*—Lis pendens—*Party—Pleadings—Practice—Party not allowed to set up procedure successfully objected by him.*

Where the assignee of a decree has realised the decretal amount from the judgment-debtor in execution, the judgment-debtor, in the event of the decree being reversed on appeal, is entitled to recover back the money, even though the assignee was not brought on the record on appeal.

A judgment-debtor wishing to appeal against the decree is not bound to make the assignee of the decree a party to his appeal. In the absence of fraud, the assignee of the decree is bound by the order of the Appellate Court.

The doctrine of *lis pendens* applies to an intermediate assignment of the original decree. The fact that the assignment was made before the appeal was filed cannot make any difference in this respect nor the fact that the judgment-debtor had knowledge of the assignment before he lodged his appeal.

A party cannot be heard to say that a procedure, to which he himself successfully objected in a former proceeding between himself and his adversary, was the proper procedure to be adopted by the latter. GOVINDAPPA *v.* HANUMANTHAPPA, 23 M. L. J. 513; (1912) M. W. N. 1152 **420**

——— ——— ——— **s. 588** **884**

——— ——— ——— **s. 590** **99**

Civil Procedure Code (Act V of 1908), s. 2 **88**

——— ——— ——— **ss. 2, 47, 104, 121, O. XLIII, r. 1**—*Decree—Sale in execution—Order allowing or rejecting application for setting aside sale—Appeal, second—Limitation Act (IX of 1908), Sch. I, Art. 166—Starting point—Date of sale*

Civil Procedure Code—(1908)—contd.

—*Civil Procedure Code (Act XIV of* 1882), *ss.* 2, 244, 588.

No order, appealable as such, under section 588 of the former Civil Procedure Code, or under Order XLIII, rule 1, of the present Code, is a decree even though it may be an order which also falls within the purview of section 244 of the former, or section 47 of the latter Code, or is otherwise within the general definition of a decree contained in section 2 of either Code.

No second appeal lies from an appellate order passed on appeal from an order allowing or rejecting an application for setting aside a sale in execution.

Under Article 166 of the Limitation Act, time begins to run from the date of sale and not from the date of the confirmation of sale. WASUDEO *v.* HIRALAL, 8 N. L. R. 177 **884**

——— ——— ——— **ss. 2, 115**—*Preliminary decree—Decision on issues relating to misjoinder, limitation and jurisdiction—Suit for mesne profits—Refusal to draw up preliminary decree—Material irregularity—Appeal—Revision.*

In a suit for mesne profits, the trying Judge first gave a decision on some issues relating to misjoinder, limitation and jurisdiction, and after finding on these issues, he directed the parties to adduce evidence on the remaining issues, which were issues of accounts. He was then asked to draw up a preliminary decree in accordance with his findings but he declined to do so:

Held, (1) that in so declining, the Judge committed a material irregularity in the exercise of his jurisdiction;

(2) that the decision of the issues conclusively determined the rights of parties regarding some matters in controversy so far as his Court was concerned; consequently, the decision on each of those issues was sufficient to constitute a preliminary decree;

(3) that the Judge should be forthwith directed to draw up a preliminary decree upon the questions decided and that an appeal would then lie against the decision.

A party has a right to appeal from a decision of the Court amounting to a preliminary decree but he can only appeal if the decree is existent in formal shape.

It is the duty of the Court, where it is applied to after the passing of a preliminary decree, to have the decree drawn up so as to enable the party aggrieved to appeal. SIDHANATH DHONDDEV GARUD *v.* GANESH GOVIND GARUD, 14 BOM. L. R. 916; 37 B. 60 **637**

——— ——— ——— **s. 3** **676**

——— ——— ——— **s. 4** **89**

——— ——— ——— **s. 9**—Ex-communication from caste **527**

——— ——— ——— **s. 11**—*Landlord and tenant—Suit for rent for a certain* fasli—*Issue as to propriety of* patta *tendered—Adjudication—Subsequent suit for rent for another* fasli—*Issue as*

to extent of holding—Res judicata—*Madras Rent Recovery Act (VIII of* 1865).

In a suit by a landlord against a tenant for rent for a certain *fasli* under the Madras Rent Recovery Act, the defendant pleaded that the *patta* tendered was not proper and that the extent of defendant's *jeroyati* land had been very much overstated. The Court found that the terms of the *patta* did not contain any objectionable matter and that the *patta* was a proper one. In a suit for rent by the same plaintiff against the defendant for a subsequent *fasli*, the defendant pleaded that the extent of the land referred to in the *patta* was incorrect:

Held, that the question of the extent of defendant's holding was *res judicata* by reason of the decision in the previous suit as to the propriety of the *patta*, as it was an available ground of attack in the previous suit, and the judgment in the previous suit must be taken to be an adjudication that the terms of the *patta* were correct *in every respect*.

Scope of section 11 of the Civil Procedure Code, 1908, and the doctrine of *res judicata* discussed.

Case-law on the subject commented upon. BOMMIDI BAYYAN NAIDU *v.* BOMMIDI SURYANARAYANA, 12 M. L. T. 500; 23 M. L. J. 543; (1913) M. W. N. 1 **445**

——————— **S. 11**—Res judicata—*Object of doctrine—Cross suits—Appeal from decision in one suit only.*

The main object of the doctrine of *res judicata* is to prevent multiplicity of suits and interminable disputes between litigants. The rule of *res judicata* is not limited to the Courts of first instance but it applies equally to the procedure of the first and second Appellate Courts and indeed even to miscellaneous proceedings. The doctrine, so far as it relates to prohibiting the re-trial of an *issue*, refers not to the date of the commencement of the litigation, but to the time when the Judge decides the issue.

Where there are two cross-suits and a certain issue is common to both suits and no appeal is brought against the decision in the one suit, the finding on the issue cannot be attacked in an appeal from the decision in the other suit.

A decision on a point which is not substantially in issue in a suit cannot operate as *res judicata* in any later suit in which it may be substantially in issue. RAMAN CHETTY *v.* MUTHUVEERAPPA CHETTY, 5 BUR. L. T. 199; 6 L. B. R. 93 **860**

——————— **S. 11**—Res judicata—*"Ought"—Under-proprietary rights in Oudh, meaning of—Oudh Rent Act (XXII of* 1886*), s.* 3, *cl.* 6—*Proprietary rights, claim as to, does not affect under-proprietary rights—Pleas in defence which ought to be raised—Inconsistent pleas when barred.*

A. sued *B.* for the recovery of the estate of a deceased *Talukdar C.* and obtained a decree for possession of the estate. In execution of his decree, *A.* obtained possession of the said property. *B.* objected that the under-proprietary rights in the property were held by *A.* and *B.* under previous Settlement Court decrees and that these rights were not affected by the decree for the proprietary rights obtained by *A.* On this ground, *B.* claimed restitution of the property. In the decree obtained by *A.* against *B.*, no reservation was made in respect of the under-proprietry rights in favour of *B.*; no question was in issue as to under-proprietary rights in the suit:

Held, (1) that the decree related to the proprietary rights of *C.*'s estate and did not affect the under-proprietary rights held by *A.* and *B.* jointly and independently of *C.*;

(2) that the under-proprietary rights were no part of the property of *C.*;

(3) that as *A.* and *B.* litigated as rival claimants to the estate of *C.*, under a title different from the one claimed as under-proprietors, section 11 of the Civil Procedure Code could have no application.

A party may join two or more alternative claims for relief based on inconsistent allegations but is not bound to join them in a claim unless such joinder is possible without confusion or embarassment and without impleading others as additional parties. The word "ought" in explanation IV, section 11, Civil Procedure Code, should be interpreted with reference to the array of parties to the previous litigation and the nature of the estate or claim then claimed or set up.

Under-proprietary rights are independent and distinct from proprietary rights. They do not form a part and parcel of *talukdari* rights. An under-proprietor has as complete an ownership over his land as that possessed by a superior proprietor, subject only to the payment, in certain cases, of rent or *malikana* to the superior proprietor. An under-proprietor can deal with his property as freely as a superior proprietor can deal with his, and an under-proprietor's interests are heritable and transferable. The main distinction between a proprietor and an under-proprietor, is that the former is not only the owner or part-owner of the *mahal*, but is also entitled to engage directly with Government for land revenue, while the latter, though owner of the land within the *mahal* is not entitled to engage directly with Government but pays his assessment to the proprietor of the *mahal*. SURAJ BIKRAM SINGH *v.* CHANDRABHAN SINGH **334**

——————— **S. 11**—Res judicata—*Suit for possession—Defence of adoption set up—Finding that adoption not established—Subsequent suit by alleged adopted son.*

A. sued *B.*, *C.* and *D.* for possession of land mortgaged to *C.* by one *E.* The defence set up, *inter alia*, was that *B.* had been adopted by *E.* The Court found the adoption not established and decreed the claim. *B.* thereupon sued *A.*, *C.* and *D.* for possession on the ground that he was the adopted son of *E.*:

Held, that the suit was barred by section 11 of the Civil Procedure Code, as in the previous suit the question of adoption was directly and substantially in issue between *A.* and *B.* and in that suit there was a real adjudication of the question of title as between the parties. UTTAM SINGH *v.* HIRA **365**

——————— **S. 11**—Res judicata—*Hindu widow representing estate of her husband in first suit—Heirs of her husband bound in subsequent litigation—Withdrawal of appeal in first suit—Effect on question of* res judicata.

Civil Procedure Code—(1908)—contd.

On the death of one *A.*, his widow brought a suit against his brother for possession of the property on the allegation that it was the separate property of her husband. The principal issue in the suit was whether the property was the joint property of *A.* and his brother, or whether it was his separate property. The Court held upon the evidence that it was the joint property of the two brothers, but that the widow of *A.* was entitled to remain in possession during her life-time in virtue of her right to maintenance as the widow of a deceased co-parcener. From that decree, the widow appealed. But instead of prosecuting the appeal, she withdrew from it.

Subsequently, the son of the said brother of *A.* sued the daughter of *A.* for possession of the same property. The daughter of *A.* pleaded that the property was the separate property of her father and not joint as alleged by the plaintiff:

Held, that the previous decision operated as *res judicata* as it was given against widow as representing the estate of *A.* and the mere withdrawal of the appeal by the widow was not sufficient to deprive the decision of its operative character in law. GHELABHAI *v.* BAI JAVER, 14 BOM. L. R. 1142 **866**

——— ——— ——— **ss. 11, 66, O. II, r. 2**—Res judicata—*Compromise decree—Parties different.*

Section 13 of the Code of Civil Procedure which deals with the rule of *res judicata* is not strictly applicable to compromise suits. Its provisions apply in terms to what has been heard and finally decided by a Court.

Section 43 of the Civil Procedure Code of 1882 (Order II, rule 2 of the Code of 1908) has no application where the parties to the two suits are not the same.

Section 317 of the Civil Procedure Code, 1882, (section 66 of the Code of 1908), has no application to cases where the manager of a Hindu family or a tenant-in-common makes a purchase with funds belonging to himself aad the other members of the family or other tenant-in-common. GOPALASAMI VASTAD *v.* GOWINDASAMI VASTAD, (1912) M. W. N. 1071 **434**

——— ——— ——— **s. 16 cl. (d)**—*Declaration that mortgage is invalid—Mortgaged property situate beyond local limits of Court.*

A suit for a declaration that the mortgage of immoveable property is invalid as against plaintiff is governed by clause (*d*) of section 16 of the Code of Civil Procedure. A Court, within the limits of whose jurisdiction the property affected by the mortgage is not situate, has no jurisdiction to try the suit. ARUNACHELLA CHETTIAR *v.* MUTHIAH CHETTIAR **758**

——— ——— ——— **s. 24 (4)**—*Provincial Small Cause Courts Act (IX of 1887), s. 33—Court invested with Small Cause Court powers, whether a Small Cause Court—Transfer from such Court to Court not invested with—Small Cause Court powers—Further transfer to another similar Court—Decree of latter, whether appealable—Direction by transferring Court to try as original suit, effect of.*

In section 24 (4), Civil Procedure Code, the expression "a Court of Small Causes" means not only a Court constituted as a Small Cause Court under Act IX of 1887 but also a Court invested with Small Cause jurisdiction. The mere investiture of a Court with Small Cause powers makes it a Small Cause Court for the purposes of the section. Therefore, as soon as a case is transferred from a Court invested with Small Cause Court powers to a Court not so invested, the latter becomes a Small Cause Court for the purposes of the suit, and if the suit is further transferred to another Court, this third Court also is a Small Cause Court for the purposes of the suit and no appeal would lie against its decree in the suit.

Per *Sundara Aiyar, J.*—If a District Court in transferring a Small Cause suit from a Court invested with Small Cause Court powers, to a Court not so invested, directs the latter to try the suit as an original suit, the direction is invalid, though it does not affect the validity of the order of transfer itself. SANKARAMA AIYAR *v.* PADMANABHA AIYAR, 23 M. L. J. 373; (1912) M. W. N. 1086 **425**

——— ——— ——— **s. 42, O. XXI, rr. 16, 53**—*Attachment of decree for mesne profits—Assignment of decree after attachment—Part consideration intended to benefit assignor and defeat creditors Fraudulent assignment—Right of assignee to execute decree—Determination of equities between assignee and attachers in execution—Assignee entitled to charge for consideration paid by him—Rights of attachers where attachment not made by Court passing decree—Attachment of decree by judgment-debtor—Right to execute.*

An assignee of a decree, which has been attached, has, under Order XXI, rule 53, clause 2, the right to execute the decree notwithstanding the attachment.

But the right of the assignee to execute the decree is subject to the rights of the attachers just as the assignor's right itself would be. The assignment will not prevent the assignor's creditors from proceeding against the decree as if it still remained the property of the assignor. The assignment, though valid as between the parties to it, is subject to the rights of the creditors, including both those who may have already attached the decree and other creditors who might proceed against the decree notwithstanding the assignment.

Where the difference between the real value of the decree and the consideration for its assignment is, by a secret agreement between the assignor and the assignee, intended to benefit the assignor and to defeat his creditors, the assignment is fraudulent and invalid against the creditors and will not affect their rights to proceed against the decree as being still the property of the assignor. Neither the assignor, nor the judgment-debtor, can object to it on that ground.

The assignee in such a case is entitled to execute the decree notwithstanding the partial fraud and is entitled to a charge for the consideration actually paid by him, and if the prior attachments are valid, his charge would be subject to the rights of the attachers.

An application for execution by the assignee decree-holder may be resisted by the attaching creditors and all questions of rights of priority, etc., should be determined in the execution proceedings.

Civil Procedure Code—(1908)—contd.

Per *Sundara Aiyar, J.*—An order of attachment of a decree by the Court actually executing the decree after its transfer to it from the Court which passed it is not altogether void. The defect in the attachment, if any, consequent on its being made by a Court other than that which passed the decree is not such a jurisdictional defect as to make the order void. The defect may be waived by the judgment-debtor, as where the latter does not take objection to the attachment.

Per *Sadasiva Aiyar, J.*—Orders of attachment in execution of a decree, though these orders are effected by sending notice to other Courts, *are made in exercise of the powers in executing a decree* and, therefore, under section 42 of the Civil Procedure Code, 1908, the Court to which the decree is sent for execution can also itself exercise the power mentioned in Order XXI, rule 53, clause 1 (*b*) as exercisable by the Court which passed the decree.

Per *Sundara Aiyar, J.*—Order XXI, rule 16 of the Civil Procedure Code, 1908, does not make an assignment of a decree in favour of one of several judgment-debtors invalid in law. The provision for disabling such transferee judgment-debtor from executing the money-decree does not in terms apply to transferees of decrees other than those for money. But, whether the judgment-debtor taking an assignment of a decree against himself for immoveable property can execute it or not, the attachment of the said decree by him is not invalid.

Per *Sadasiva Aiyar, J.*—A judgment-debtor who obtains the decree by assignment cannot execute it, but he has the right to apply for a set-off of the amount due to him as decree-holder in a suit against his assignor as against what is due by him and his co-judgment-debtors in the suit wherein he got the decree assigned to himself. His rights and priorities should be determined as if the decree for the larger amount was attached at his instance as soon as either of the decree-holders applies for execution. ARMUGHA MUDELIAR *v.* YAGAMBA BAI AMMANI, 13 M. L. T. 227 **323**

——— ——— ——— **s. 47** **88**

——— ——— ——— **s. 47**—Order allowing or rejecting application for setting aside sale **884**

——— ——— ——— **ss. 47 (2), 50**—*Execution—Suit for money due under order against legal representative—Objection by legal representative to procedure—Jurisdiction of execution Court to convert suit against legal representative into execution proceedings.*

An order for payment of *batta*, recoverable as in execution was passed by a Court and the petition in execution for its recovery was transferred to another Court. Subsequently, the party against whom the order was made died. A suit for recovery of the money was then filed in the second Court against his legal representative, who objected that the matter was one for execution and under section 50, Civil Procedure Code, he could only be brought in by the Court which passed the order. The executing Court decided to treat the suit as an execution petition and the legal representative as a party to it, and proceeded to make an order against him:

Civil Procedure Code—(1908)—contd.

Held, (1) that the order was wrong;

(2) that the legal representative had not been brought in under section 50, Civil Procedure Code, and could not be proceeded against in execution;

(3) that the Court, which passed the order sought to be executed, could only bring the legal representative on the record. NACHIAPPA GOUNDAN *v.* PONNUSAMY NAICKER, 23 M. L. J. 287; (1912) M. W. N. 888 **293**

——— ——— ——— **s. 50** **293**

——— ——— ——— **s. 57** — Civil prisoner released owing to mistake **911**

——— ——— ——— **s. 58 (2)** **911**

——— ——— ——— **s. 60**—*Attachment—Salary of officer of Regular Forces—Army Act (44-45 Vic. Ch. 58), s. 136.*

The salary of an Officer of the British Regular Army is not liable to attachment in execution of a decree, under section 60 of the Civil Procedure Code.

Section 60 does not encroach upon the provisions of the Army Act. VELCHAND *v.* BOURCHIER, 14 BOM. L. R. 777; 37 B. 26 **13**

——— ——— ——— **s. 60 (n) prov.** **284**

——— ——— ——— **s. 64** **625**

——— ——— ——— **s. 66** — Purchase by manager of Hindu family **434**

——— ——— ——— **ss. 69, 70, Sch. III, s. 7 (1) (b)**—*Execution of decree—Decree awarding interest till realisation—Application for execution calculating interest to date of application—Execution transferred to Collector—Duty of Collector to calculate interest to date of payment—Nature of Collector's authority—Jurisdiction—Question of satisfaction of decree.*

Under section 7 (1) (*b*) of Schedule III to the Civil Procedure Code, 1908, the Collector has to take into account the decretal amount with the whole of the interest awarded by the decree. That includes not merely interest up to the date of *darkhast*: but also interest which runs according to the decree up to the date of payment. It is the duty of the Collector to do so, even though the decree-holder has omitted to mention in his application the particular claim for further running interest. The Collector cannot return the decree to the Civil Court as satisfied till after the whole amount, including interest awarded by the decree up to the date of satisfaction has been paid.

Sections 69 and 70 of the Civil Procedure Code give authority to the Collector for the purpose of enabling him to determine the best mode or modes of satisfying the decree, whether it is to be satisfied by management by the Collector himself of the land attached in execution of decree, or whether it is to be by its sale or letting.

So far as the machinery necessary for the satisfaction of the decree is concerned, the Collector is the sole authority. The discretion is his and no Civil Court can interfere with that discretion. But that discretion does not extend to any jurisdiction in the Collector to determine, whether the decree itself

Civil Procedure Code—(1908)—contd.

has been satisfied or not. The latter jurisdiction is the Civil Court's. It is that Court alone which is competent to determine the question judicially. BHURCHAND HANSRAJ DOSHI *v.* VIRA CHAMPA KHACHAR, 14 BOM. L. R. 787; 37 B. 32 **142**

——— ——— ——— **s. 70** **142**

——— ——— ——— **s. 73**—*Order for rateable distribution—Whether open to revision by High Court.*

An order under section 73 of the Civil Procedure Code deciding that a person is not entitled to rateable distribution, is not open to revision by the High Court, even though the order is wrong, as the person affected has his remedy by suit. MURUGAPPA CHETTIAR *v.* NARAYANASAMY PILLAI, (1912) M. W. N. 956 **389**

——— ——— ——— **s. 73, O. XXI, r. 89**

—Sale in execution—Application for setting aside sale—Deposit of amount specified in sale proclamation—Amounts due to decree-holders applying for rateable distribution.

Where an application is made to set aside a sale under rule 89, Order XXI, it is necessary to deposit, under clause (b) of the rule, besides 5 per cent. of the purchase-money, only the amount specified in the proclamation of sale as due to the decree-holder in execution of whose decree the sale has been held, and not the amounts due by the judgment-debtor to all other decree-holders who have applied under section 73 for rateable distribution. VEERA RAGHAVAN PATTAR *v.* VATASSERI PARA MANNADISSIER, 23 M. L. J. 585 **920**

——— ——— ——— **s. 73 (2)** **254**

——— ——— ——— **s. 80**—*Suit for injunction against public officer—Notice not necessary.*

Where the object of the suit is to obtain against a public officer, not the Secretary of State in Council, an injunction to restrain what would otherwise be an irreparable injury, the suit is not subject to the notice required by section 80 of the Code of Civil Procedure. NAGINLAL *v.* OFFICIAL ASSIGNEE, 14 BOM. L. R. 1146 **876**

——— ——— ——— **ss. 85, 87**—*Sovereign Prince or Ruling Chief, suit against—Consent of Governor-General in Council—Private International Law—Suit against Foreign State.*

A suit will not lie against a Sovereign Prince or Ruling Chief without the consent of the Governor-General in Council.

G. sued the Travancore State or its Dewan as representing the State, for damages for wrongful dismissal from service:

Held, that no such suit would lie, as the Civil Procedure Code made no provision for suits against a State apart from its Prince or Chief. Such a suit would also contravene the well established rules of Private International Law. GILMORE *v.* STATE OF TRAVANCORE, 12 M. L. T. 496; 23 M. L. J. 605 **444**

——— ——— ——— **s. 87** **444**

——— ——— ——— **s. 89** **902**

——— ——— ——— **s. 92**—*Public religious trust—Suit by trustees for recovery of trust property from outsiders—Outsiders heirs of late manager.*

Civil Procedure Code—(1908)—contd.

A suit by the trustees of a public religious trust for the recovery of property, which has gone wrongfully into the possession of persons who are strangers to the trust, is not governed by the provisions of section 92 of the Civil Procedure Code, 1908. The mere fact that these persons in possession are heirs of the late manager of the trust property is immaterial. MALHAR BHAGVANT KULKARNI *v.* NARSINGH KRISHNA MAJLI, 14 BOM. L. R. 941; 37 B. 95 **665**

——— ——— ——— **s. 92**—*Public charitable trust—Trustee setting up his private right—Plaint—Nature of suit how determined.*

The plaintiff's case was that the defendant was a trustee of a particular *Mandir*, the *Mandir* itself being public charitable property, that the defendant, both by setting up adverse title of his own and in other ways, had been guilty of breach of trust, and that, therefore, the defendant should be removed from his possession and the Court's direction should be given as to the administration of the trust. The defendant claimed that the property was his own private property:

Held, that the suit fell within the scope of section 92 of the Code of Civil Procedure, and the mere circumstance that the defendant set up in himself a private title adverse to the trust would constitute a breach of trust.

The character of a suit is primarily to be ascertained by a reference to the pleadings, and is not dependent upon the plaintiff's success at the trial. GIRDHARLAL *v.* NARANLAL, 14 BOM. L. R. 1135 **779**

——— ——— ——— **s. 94 (d), O. XL, r. 1**—*Receiver—Appointment* pendente lite—*Discretion of Court—Appointment on application of mortgagee in mortgage suit—Interest left in arrear—Right to nominate—Receiver, to whom belongs—Appointment to be made in interests of both mortgagee and mortgagor.*

Though the appointment of a Receiver *pendente lite* is a matter entirely within the discretion of the Court, it must, in the exercise of that discretion, be guided by the circumstances of each particular case. As a general rule, the appointment of a Receiver will be made as a matter of course on the application of a mortgagee, if the interest payable under the security is in arrear.

As a general rule, the right to propose a person for the appointment of Receiver belongs to the party interested in obtaining the appointment, and effect will be given to his nomination. If the Court appoints a Receiver at the instance of a mortgagee, then the Court exercises its discretion as to who shall be appointed Receiver, and appoints the Receiver, whom, having regard to the interests of both the mortgagee and mortgagor, the Court considers the best person. EASTERN MORTGAGE AND AGENCY CO. LD. *v.* RAKEA KHATUN, 16 C. W. N. 997 **202**

——— ——— ——— **s. 94 (e)** **361**

——— ——— ——— **s. 102** **90, 522**

——— ——— ——— **s. 104** **884**

——— ——— ——— **s. 104 (1) (a), O. XXXII, r. 7, Sch. II, cls. 8 and 15 (1) (a)**—*Reference for minor to arbitration—Superseding arbitration—Appeal—Revision.*

Civil Procedure Code—(1908)—contd.

Unless an award is superseded under Schedule II, para. 8 of the Civil Procedure Code, section 104 (1) (a) bars an appeal; but if the Court has, in superseding an award, adopted a procedure not authorised by law, and there is no other remedy available, the Chief Court will interfere on revision.

Where matters in dispute are referred to arbitration through the Court, and an arbitrator is deliberately selected, a plea that the reference was bad by reason of the parties being minors and sanction of the Court not having been granted under Order XXXII, rule 7 of the Code, has no force. BUDH SINGH *v.* RAM NATH, 251 P. W. R. 1912; 125 P. L. R. 1912 **388**

——— ——— ——— **s. 104 (1) (f)** **902**

——— ——— ——— **s. 115**—Collector's order reversing Mamlatdar's decision **676**

——— ——— ——— **s. 115** — Interlocutory order for ends of justice **361**

——— ——— ——— **s. 115**—Passing decree in terms of award before expiry of 10 days from date of submission of award—Material irregularity—Appeal—Revision **431**

——— ——— ——— **s. 115** — Refusal to draw up preliminary decree **637**

——— ——— ——— **s. 115** -- Revision not competent when there is an appeal—Position of Vakil **391**

——— ——— ——— **s. 115**—Transfer of occupancy tenancy **522**

——— ——— ——— **s. 121** **884**

——— ——— ——— **s. 129, O. XLI, r. 10**—*Security for costs—Bombay High Court Rules, r. 725.*

A., a resident of Hyderabad who had no immoveable property in British India, filed a suit against *B.* on the Original Side of the Bombay High Court. The hearing of the suit occupied eight days and *B.* made no application for security for costs. On the suit having been dismissed, *A.* filed an appeal and deposited Rs. 500 as security for costs of the appeal in accordance with the rules of the Bombay High Court. *B.* applied that *A.* may be required to give security for costs in the lower Court under Order XLI, rule 10 of the Code of Civil Procedure:

Held, (1) that rule 725 of the rules of the Bombay High Court and not Order XLI, rule 10, was the governing rule with reference to appeals from the Original Side;

(2) that *A.* having complied with rule 725, and *B.* having abstained, in the original suit, from applying for security of the costs of the original hearing, there was no reason why the Court should exercise its discretion to order security for the said costs. BEHRAM JUNG *v.* SULTANALI, 14 BOM. L. R. 1106 **739**

——— ——— ——— **s. 144**—Forcible possession taken by decree-holder **121**

——— ——— ——— **s. 146** — *Representative of decree-holder—Transferee of decree-holder's interest during pendency of suit, whether can execute decree.*

Civil Procedure Code—(1908)—contd.

M. sued for the recovery of some immoveable property. By a compromise, *M.* was awarded a portion of the property. Before a decree could be passed in terms of the compromise, *M.* transferred his interest in the property to *A.* *A.* did not apply to bring himself on the record. After the decree was passed, *A.* applied to execute the decree as representative of *M.*:

Held, that he was not a representative within the meaning of section 146 of the Code of Civil Procedure and, as his name was not on the record, he could not execute the decree. DOST MUHAMMAD *v.* ALTAF HUSAIN KHAN **512**

——— ——— ——— **s. 146, O. XXI, r. 16**—*Assignment of decree—Limitation—Execution of decree—Petition by transferee decree-holder to enter up satisfaction.*

A transferee decree-holder may put in a petition to enter up satisfaction of a whole or a part of a decree without putting in an application for execution. There is no necessity, according to the Code, for the assignee getting any previous order recognising his assignment before doing so.

It is open to a decree-holder to certify satisfaction of a decree at any time.

The date of assignment has nothing to do with the question of limitation applicable to execution of decree.

A transferee decree-holder is not precluded from receiving payment from the judgment-debtor of the amount due under the decree by the mere fact that he had not paid some portion of the consideration to his transferor. DHARANI MUDALI *v.* MEENAMBA BAI, 12 M. L. T. 592 **617**

——— ——— ——— **s. 148**—*Extension of time fixed by decree—Pre-emption decree—Appeal.*

Payment of money into Court within a fixed time in pursuance of a decree is not an act prescribed or allowed by the Civil Procedure Code within the meaning of section 148.

A Court has no power to extend the time fixed by a pre-emption decree for payment of price.

An order extending time fixed for payment of money by a decree is appealable. SURANJAN SINGH *v.* RAM BAHAL LAL, 10 A. L. J. 520 **912**

——— ——— ——— **s. 151, O. XL, rr. 1 to 4, O. XLIII, r. 1 (s)**—*Receiver—Power to discharge and remove—Rules—Prayer to be put in possession of properties—Discharge or removal of Receiver—Appeal—Inherent power of Court—Execution by Appellate Court—Practice.*

There is no specific provision made in the Civil Procedure Code for the discharge or removal of a Receiver, nor is there any provision for appeals against orders of discharge or removal of Receivers.

The power to discharge and remove or to give directions to a Receiver must be taken to be inherent in the Court which appointed the Receiver and the Appellate Court has got all the powers of the original Court.

A prayer for execution cannot be made to the Appellate Court direct.

The prayer in a petition to discharge the Receiver and put the parties in possession was treated as a prayer for appointment of the petitioners as Receivers of the properties they claimed possession of and was granted. SUBRAMANIA IYER *v.* MUTHULAKSHMIAMMAL, (1912) M. W. N. 1208 **583**

Civil Procedure Code—(1908)—contd.

——— ——— ——— **s. 152**—*Amendment of decree—Costs assessed on wrong principle—Proper remedy—Review—Appeal—Revision.*

A decree can only be amended if one of the reasons specified in the Civil Procedure Code as justifying amendment is established.

The revisional powers of the High Court cannot be exercised *ultra vires* and without authority.

An application was made to have an arbitration award, made out of Court filed, but it was dismissed with costs on 18th June 1904. A decree was drawn up in which Pleader's fee was assessed *ad valorem* on the value of the suit for purposes of jurisdiction. On the 12th August 1911, an application was made to amend the decree by substituting a smaller sum as Pleader's fee:

Held, (1) that there was no reason for amendment as the decree was not at variance with the judgment and there was no clerical or arithmetical error nor any error arising from any accidental slip or omission,

(2) that the applicant's proper remedy was by review or by appeal on the ground that a matter of principle was involved and that costs had been assessed on an erroneous principle;

(3) that the applicant could not ask for amendment several years after his proper remedy had been barred by limitation. SHAHAB DIN *v.* SIRAJ-UD-DIN, 25 P. W. R. 1913 **418**

——— ——— ——— **s. 153, O. VII, r. 11, O. VI, r. 17**—*Want of verification and signature—Late verification and signature—Limitation Act (IX of 1908), s. 22—New party—Party not signing or verifying pleading.*

If one of the plaintiffs is wrongly described in the plaint as a minor and has not himself signed and verified the plaint, he is not on that account to be considered not a party.

Want of signature and verification does not entail the rejection of the plaint as such verification and signature can be supplied at any stage of the proceedings.

The plaintiff who has not signed or verified cannot be considered to be a new party, when he signs or verifies the plaint, so as to attract the application of section 22 of the Limitation Act. ARUNACHELLAM CHETTY *v.* PRABHAYYA CHETTY, (1912) M. W. N. 1207 **580**

——— ——— ——— ——— **s. 238** **969**

——— ——— ——— ——— **O. 1, r. 3, O. 22, r. 10**—*Addition of parties.*

By a compromise, effected between *A.* and *B.*, *A.* was to remain in possession of ⅛th of certain property as her legal share and of the balance in lieu of dower. *A.* gifted the property to *C.* who mortgaged it to *D.*

After the death of *A.*, *B.* sued *C.* for possession of ⅞th of the property. After the institution of the suit, *C.* sold the property to *D.* *D.* applied to be made a party to the suit of *B.* as a defendant:

Held, that as no relief was sought against the applicant and the case against him was not the same as against other defendants already on the record, he could not be made a party to the suit. CHIMMAN LAL *v.* SIKANDAR KHAN, 10 A. L. J. 387 **641**

Civil Procedure Code—(1908)—contd.

——— ——— ——— **O. 2, r. 2**—Parties different **434**

——— ——— ——— **O. 2, r. 2**—Suit for profits by co-sharers—Pendency of partition proceedings **833**

——— ——— ——— **O. 2, r. 2**—*First suit by mortgagee to recover arrears of interest—Subsequent suit to recover both principal and interest or possession against vendee of equity of redemption—Intermediate declaratory decree.*

Where a mortgagee, who has, under the terms of the mortgage-deed, a clear option on the happening of a default in regular payment of interest by the mortgagor, of either taking possession at once or of realizing interest or of accumulating interest with principal until possession is taken, sues and obtains a decree only for arrears of interest, his subsequent suit against the vendee of the equity of redemption to recover both principal and interest due or possession of the mortgaged property is barred under rule 2, Order II of Act V of 1908.

Even the fact that the mortgagee had obtained an intermediate declaratory decree against the vendee, declaring his lien against the mortgaged property both for principal and interest, is of no effect and cannot revive his rights which had once been extinguished on the first occasion under the force of the said rule by reason of his suing only for arrear of interest. BRIJ LAL *v.* RAM RATTAN **581**

——— ——— ——— **O. 6, r. 17, O. 7, r. 11** **580**

——— ——— ——— ——— **O. 9, r. 5, O. 17, r. 3**—*Summons returned unserved—Time given to appellant to take further steps—No steps taken within time—Power of Court to proceed to decide appeal.*

A second appeal was filed in the High Court. Summonses to the respondents were returned unserved. Time was granted to the appellants to take further steps in the matter. No steps were taken within time. The Court ordered the appeal to be put up in ordinary course for hearing:

Held, (1) that under Order XVII, rule 3, the Court could proceed to decide the appeal, and that Order IX, rule 5, did not apply to the case;

(2) that Order IX, rule 5, did not give appellants the right to apply for a fresh summons at any time within a period of one year from the date of the return made to the Court by the serving officer. JAISARI SINGH *v.* JAISARI SINGH **294**

——— ——— ——— ——— **O. 9, r. 8**—*Plaintiff not giving evidence—Suit to be dismissed—Defendant not entitled to prove his case.*

When the plaintiff offers no evidence, the Court has no jurisdiction except to dismiss the suit for want of prosecution. In such a case, the defendant is not entitled to prove his case.

But when the plaintiff has given evidence, in that case, notwithstanding that the Court has formed an opinion in favour of the defendant, the defendant can say that he is entitled to give evidence in proof of the case he has made in his own written statement, so that in the case of an appeal, there may be no remand, but the whole case may be disposed of. KESRI CHAND *v.* NATIONAL JUTE MILLS, CO. LD. 16 C. W. N. 268; 40 C. 119 **87**

Civil Procedure Code—(1908)—contd.

——— ——— ——— **O. 9, r. 12**—*Next friend's disobedience—Party to suit—Order for personal appearance—Power of Court.*

It is not correct to say that the Court has no power to order a party to appear in person except when empowered by specific sections found in the Civil Procedure Code. The Court has such power whenever it considers that the interests of justice require any party to appear in person at any stage of the case.

The Court, however, has no power, under Order IX, rule 12, to dismiss a minor's suit for default because of the disobedience of his next friend. The next friend is not a party to the suit, and can be treated as such only for purposes of answering interrogatories or for saddling him with costs. RAJAGOPALA PANDARITHAR *v.* MUTHU KUMARA CHETTIAR, 23 M. L. J. 676: 13 M. L. T. 19 **762**

——— ——— ——— **O. 17, rr. 2, 3**—*Plaintiff's suit dismissed by Assistant Collector as not proved—Appeal.*

An Assistant Collector dismissed a suit for profits recording the following order:

"As the plaintiff has failed to prove his claim and has failed to prosecute the case, it is ordered that the plaintiff's claim be dismissed for default."

Held, that the Assistant Collector did not take action under rule 2, Order XVII, but that he acted under rule 3 of that Order and, therefore, an appeal lay against that order. CHUTTAN LAL *v.* KANHAYA LAL, 10 A. L. J. 478 **836**

——— ——— ——— **O. 17, r. 3** **294, 836**

——— ——— ——— **O. 18, r. 15 and O. 20, r. 1**—*Evidence and Vakil's arguments heard by one officer—Judgment by successor without hearing arguments—Judgment pronounced without notice—Validity.*

Where a Munsif recorded the evidence in a case and heard arguments of Counsel, but judgment was written and pronounced by his successor without hearing Counsel, or giving them notice of the date on which the judgment would be announced; *held*, that under Order XVIII, rule 15 of the Code of Civil Procedure, 1908, it was not necessary to hear Counsel again: but that the omission to notify the date on which judgment was to be pronounced, as required by Order XX, rule 1 of the ode, was a serious irregularity, if not an illegality, necessitating the setting aside of the judgment, and directing the Munsif to proceed afresh with the case according to law. KANUMOORY NILADRI RAZU *v.* KASA SUBBIAH, 12 M. L. T. 332; (1912) M. W. N. 999 **278**

——— ——— ——— **O. 20, r. 1** **278**

——— ——— ——— **O. 21, r. 2** **752**

——— ——— ——— **O. 21, r. 16** **323, 617**

——— ——— ——— **O. 21, r. 53** **323**

——— ——— ——— **O. 21, rr. 58, 61** **12**

——— ——— ——— **O. 21, r. 66** **88**

——— ——— ——— **O. 21, r. 73** **539**

——— ——— ——— **O. 21, r. 89** **920**

Civil Procedure Code—(1908)—contd.

——— ——— ——— **O. 21, r. 93** **437**

——— ——— ——— **O. 22, r. 1** **621**

——— ——— ——— **O. 22, r. 1**—*"Legal representative"—Heir—Survival of right to sue—Substitution of sons for father—Hindu Law*—Mitakshara—*Suit for protecting reversionary estate from waste and rendition of accounts.*

In every case, under Order XXII, rule 1, Civil Procedure Code, the first point to be decided is whether the right to sue survives, and that must be decided with reference to the nature of the suit.

The continuance of a suit depends, not on the qualifications of the representative of the deceased plaintiff but on the nature of the suit. The survival of a right to sue does not depend on the presence, or even the existence, of an heir. The words "legal representative" in Order XXII, have a very wide signification, and are not synonymous with the term "heir" or with the limited class governed by section 11 of the Civil Procedure Code for the purpose of the law of *res judicata*.

A suit to declare an alienation invalid beyond the life-time of a widow, is a representative suit for the benefit of the eventual reversioner.

Under the terms of an award, a trust estate was managed by a Hindu widow. She was prevented thereby from alienating it. It was declared that on her death, the estate should devolve on the reversionary heirs, who were also given an authority to obtain rendition of accounts. The presumptive representative, asserting malversation and mismanagement of the trust estate in the hands of the widow, sued for the removal of the widow from the office of trustee and the substitution of the plaintiff for her, and further prayed for rendition of accounts and delivery of the balance of income to the newly appointed trustee. Plaintiff died during the pendency of the suit and his sons applied to be substituted in his place as his legal representatives:—

Held, (1) that the right to sue survived, as the right was appurtenant to the reversionary estate;

(2) that the sons of the plaintiff, as being the immediate reversioners charged with the duty of protecting the reversion, were proper legal representatives of the plaintiff for the purposes of Order XXII, rule 1;

(3) that the plaintiff was primarily acting for the benefit of the reversionary estate. RAM DIN *v.* RAJ RANI, 8 N. L. R. 113 **101**

——— ——— ——— **O. 22, r. 4** **621**

——— ——— ——— **O. 22, r. 10** **641**

——— ——— ——— **O. 23,** *not applicable to execution proceedings,* **O. XXI, r. 2**—*Powers of executing Court on application of judgment-creditor to enquire into terms of compromise.*

Order XXIII, Civil Procedure Code, does not apply to execution proceedings.

Order XXI, rule 2 only authorises the recognition by the executing Court of payment or adjustment. An inquiry into the terms of an alleged compromise cannot be made on the application of the judgment-creditor under Order XXI, rule 2 and there is no jurisdiction in the Judge to deal with such matter on such application.

Civil Procedure Code—(1908)—contd.

Neither the fact that in the first instance the creditor asked for an order of inquiry into the terms of the compromise nor the fact that the Judge adjourned the summons for evidence as to the alleged compromise, can give the Judge jurisdiction.

The counter affidavit of the judgment-debtor cannot be recognised as an application under Order XXI, rule 2. LODD GOVINDOSS *v.* RAMDOSS, (1912) M. W. N. 1245; 24 M. L. J. 88 **752**

——————— **O. 23, r. 1**—*Withdrawal of suit—Leave to bring fresh suit—Facts set out with no clear conception of nature of rights.*

Where, from the plaint and the proceedings in the lower Court, it is apparent that the plaintiff has no clear conception of his rights, the High Court will grant permission to withdraw the suit with leave to bring a fresh suit under Order XXIII, rule 1 of the Civil Procedure Code. CHIDAMBARA MUDALI *v.* KOZHANDAVELU MUDALI, (1912) M. W. N. 1003 **395**

——————— **O. 23, r. 1** —*Application for leave to withdraw suit with liberty to bring fresh suit—Defective judgment—High Court's power to set aside order—Revision—Practice.*

A Court allowed a person to withdraw his suit with liberty to bring a fresh suit; there was nothing in the judgment to show that the Court was satisfied that the suit must fail by reason of some formal defect or that there was any other sufficient cause for permitting the suit to be withdrawn:

Held, that the High Court could interfere in revision and set aside the order allowing the suit to be withdrawn. RADHA RAWAN *v.* TULA RAM, 10 A. L. J. 393 **647**

——————— **O. 32, r. 7** **388**

——————— **O. 34, r. 1** **432**

——————— **O. 34, r. 6**—*Mortgage suit—Successful party—Pesonal decree for costs.*

Under Order XXXIV, rule 6 of the Code of Civil Procedure, the successful party in a mortgage suit which is contested is entitled to have a personal decree for costs against the persons who contested the suit, when the mortgage property has been sold and found insufficient. KOMANDAR KAMALAMMAL *v.* KOMANDUR NARASIMHACHARLU, 12 M. L. T. 312; (1913) M. W. N. 139 **244**

——————— **O. 39, r. 1, O. 41, rr. 5 & 6**—*Stay of execution, reasons for—Annoyance to feelings, whether a ground for stay—Injunction, when to be granted.*

In an application for a stay of execution, the Court has to be satisfied that the appellant is likely to sustain substantial injury by execution being allowed to take place before the disposal of the appeal. It is not usual for the Court to grant stay of execution if the appeal itself does not raise fairly arguable questions. Where no pecuniary or tangible loss is shown, it would not be right to grant stay of execution merely on the ground of annoyance to feelings.

In an application for a temporary injunction, the Court will have to be satisfied that the applicant has a *prima facie* case and further that the protection of his interest requires that an injunction should issue temporarily.

Civil Procedure Code—(1908)—contd.

Quære.—Whether when a party goes to Court claiming an injunction against his opponent to restrain him from doing something wrongful, the opponent should have the right, as a matter of interlocutory relief, to restrain him from doing the very act which he claims to be entitled to do and which he asks the Court to be allowed to be done without obstruction from his opponent? VATHIAR RAMANUJA AIYANGAR *v.* AIYANACHARIAR, 23 M. L. J. 316 **219**

——————— **O. 39, r. 1** **361**

——————— **O. 40, r. 1** **202**

——————— **O. 40, r. 1**—*Appointment of Receiver—Properties not comprised in suit.*

Rule 1, Order XL, of the Civil Proceduse Code, 1908, does not empower the Court to appoint a Receiver of properties which cannot be dealt with by the Court in the suit. MARULASIDDA RAJI *v.* SIDDALINGA RAJA **16**

——————— **O. 40, r. 1**—*Receiver, functions of—Suit by Receiver to recover value of property sold prior to his appointment.*

The functions of a Receiver appointed under Order XL, rule 1 of the Civil Procedure Code, 1908 (section 503 of the Code of 1882) are to take possession from the parties to the suit of any moveable and immoveable property in respect of which he has been appointed Receiver, to manage it, to realise its income, and to continue in custody of it until removed by the Court.

He cannot recover from a stranger to the suit property which the latter had acquired anterior to his appointment as Receiver; nor does his appointment affect any rights previously acquired by third persons, nor has he the right to recover property sold away by the judgment-debtor on the ground that the sale is voidable under section 53 of the Transfer of Property Act, or that the sale was not binding on the creditors of the judgment-debtor. MAHAMED KASIM PANCHAPAKESA CHETTI, 35 M. 578 **233**

——————— **O. 40, rr. 1 to 4**—(1) Power to discharge and remove Receiver **583**

——————— **O. 40, r. 1 (1) (d)**—Mortgage-deed providing for appointment of Receiver—Receiver unable to pay interest—Receiver ordered to pay money to mortgagor to appeal against mortgaged decree **849**

——————— **O. 40, r. 1 (d)**—Receiver's power to sue **751**

——————— **O. 41, r. (1)** **119**

——————— **O. 41, r. 2** **638**

——————— **O. 41, rr. 5, 6, 12**—*Court to which application for stay of sale should be made.*

In view of the alteration of the language in Order XLI, rule 6 (2), which re-produces the old section 546, it is clear that the Legislature intended that the application for stay of an order for sale of immoveable property should be made only to the Court which made the order. KANNIAPPAN CHETTI *v.* MANIKAVASAGAM CHETTI, 23 M. L. J. 677 **763**

Civil Procedure Code—(1908)—contd.

——— ——— ——— O. 41, rr. 5, 6 219
——— ——— ——— O. 41, r. 6 763
——— ——— ——— O. 41, r. 10 739
——— ——— ——— O. 41, r. 12 763
——— ——— ——— O. 41, r. 19—*Appeal dismissed in absence of both parties—Restoration—Notice to other side, whether necessary.*

If an appeal is dismissed on account of both the appellant and respondent being absent on the day of hearing, no notice to the respondent is necessary before passing an order of restoration of appeal. BIRJ LAL v. BUA RAM, 10 A. L. J. 399 292

——— ——— ——— O. 41, r. 23—*Decision on preliminary issue—Burden of proof wrongly placed—Ground for remand.*

It is not a good ground for passing an order of remand under Order XLI, rule 23, to say that the preliminary issue has been decided by the Court of first instance on a wrong view of the burden of proof, unless the Appellate Court also finds that that decision was wrong. HABIBULLAH KHAN v. LALTA PRASAD, 10 A. L. J. 190; 34 A. 612 94

——— ——— ——— O. 41, r. 23—*Order of remand—Power of the Court of Appeal—Civil Procedure Code (Act XIV of 1882), s. 564, effect of removal—Construction of statutes.*

Plaintiffs sued for accounts and redemption of certain mortgaged property; the trial Court after taking accounts decreed possession to the plaintiffs. In appeal, however, the Appellate Court differed from the trial Court's findings as to certain items of the account and as to whether one particular parcel of the land mortgaged had been proved to have been in the mortgagee's possession. Thereupon, the original decree was reversed and the case remanded for taking fresh accounts:

Held, that the order of remand could not be lawfully made.

Order XLI, rule 23, read together with other rules in the same order, clearly shows that the intention of the Legislature is to avoid remands wherever they can be avoided, and to ensure that in all cases where the Court of Appeal is in possession of sufficient materials to form a judgment, that Court shall record its own judgment on the materials before it and shall not waste time and put the parties to further costs by remanding to a Subordinate Court.

The removal of section 564 of the old Civil Procedure Code had no other object but to withdraw those restrictive provisions of that section which in practice had been found so embarrassing, such restrictions occurring for instance in cases where the Appellate Court has allowed an amendment of the pleading or has added a party to the record. NAROTTAM RAJARAM v. MOHANLAL, 14 BOM. L. R. 1154 891

——— ——— ——— O. 41, r. 31—*Judgment—Appellate Court, duty of—Conflicting evidence—Grounds of appeal.*

The memorandum of appeal in the lower Appellate Court contained seven grounds out of which the Court referred to one only in the judgment and as regards that also, all that the Judge said was that he saw no sufficient reason for differing from the first Court's decision; there was conflicting evidence o be discussed;

Civil Procedure Code—(1908)—contd.

Held, that the appeal had not been disposed of according to law and that the judgment and decree should be set aside and the lower Court directed to re-hear the appeal and decide it according to law upon such of the seven grounds contained in the memorandum of appeal as might not be specifically abandoned at the hearing.

Where evidence conflicts, it is the duty of the Appellate Court to weigh and discuss it and come to its own conclusion on it and give its own reasons for that conclusion. MAUNG PU v. MA GYAUK THAY, 5 BUR. L. T. 269 898

——— ——— ——— O. 41, r. 33 638
——— ——— ——— O. 43, r. 1 884
——— ——— ——— O. 43, r. 1 (s) 583, 849
——— ——— ——— O. 43, r. 1 (r) 361
——— ——— ——— O. 45—Appeal to Privy Council. *See* PRIVY COUNCIL APPEAL.
——— ——— ——— O. 47, r. 7—*Order granting review—Appeal—Dismissal in default—Restoration on review.*

A suit was dismissed for default. An application for restoration was also dismissed. The plaintiff then applied for review of judgment. The Court of first instance allowed the application for review and restored the suit to its original number. On appeal, the District Judge reversed the order of the first Court granting the application for review, on the ground that no review could be granted when an application for restoration had been dismissed:

Held, that this was not a ground upon which an appeal could be allowed under the provisions of Order XLVII, rule 7. HAR NARAIN v. UMRAI, 10 A. L. J. 396 661

——— ——— ——— Sch. II, cl. 8 320, 388
——— ——— Sch. II, cl. 10—*Award—Notice of filing to parties essential.*

The provisions of rule 10, Schedule II of Act V of 1908 are mandatory and the Court must give notice of the filing of the award to the parties. MUHAMMAD HUSAIN v. LALTU, 15 O. C. 294 430

——— ——— Sch. II, cl. 15 (1) (a) 388
——— ——— Sch. II, cl. 15 (a)—*Arbitration—Award—Misconduct—Award when to be set aside—Reference to arbitration on the basis of exclusion of certain evidence—Umpire admitting this evidence.*

An arbitrator or an umpire is the chosen Judge of the parties; his decision is final and the Court has no power to touch that decision or interfere with it merely on the ground that it is not correct or that it is the result of bias.

It is because the award of an arbitrator or an umpire is final and the party against whom it is made is debarred from appealing to any Court of law, however unjust the award may be, that Courts have been most anxious to see that nothing unfair or irregular is done by the arbitrator or umpire while discharging his duties as such. The Courts have always been most alert to interfere and set aside any award in which it appears that the arbitrator or umpire has not acted with scrupulous fairness towards both parties.

Civil Procedure Code—(1908)—concld.

In cases of reference to arbitration through the Court, the Courts have always exercised a most vigilant supervision over the conduct of the arbitrator to whom at the request of the parties it delegates the duty of deciding disputes between the parties and any irregularity or action, which is not consonant with the general principles of equity and good conscience which ought to govern the conduct of an arbitrator, is resented by immediately brushing aside the award of the arbitrator against whose decision there is no appeal.

A reference to arbitration was made through the Court on the basis and footing that an alleged adjustment was not to be taken into consideration by the arbitrators or the umpire, who were explicitly and imperatively directed by the Court not to take the said adjustment into consideration. In spite of this direction, the umpire admitted, at the request of one of the parties and in face of a protest from the other, the adjustment in evidence and used it as evidence against the latter in deciding an important question of *onus* of proof:

Held, that the admission of the adjustment, being an obvious breach of the direction of the Court contained in the reference order and a grave error of judgment which prejudiced the case, was a clear case of "misconduct in law" on the part of the umpire. HAJI AHMED *v.* ESSANJI TAJBHOY, 14 BOM. L. R. 1007 **696**

——————— **Sch. II, cl. 16**—*Limitation Act (IX of 1908), Sch. I, Art. 158—Passing decree in terms of award before expiry of 10 days from date of submission of award—Material irregularity—Appeal—Revision—Civil Procedure Code (Act V of 1908), s. 115.*

A decree passed in terms of an award immediately the award is submitted, without waiting for the expiry of the ten days within which an application, under Schedule II, paragraph 16 of the Code of Civil Procedure, to set aside the award may be made, is invalid.

It is doubtful whether there is an appeal in such a case, but as the decree has been passed notwithstanding the express provision of Schedule II, paragraph 16 of the Code, the Court acts without jurisdiction or with material irregularity in the exercise of its jurisdiction, so as to call for interference by the High Court under section 115 of the Code.

Even if an appeal is preferred against such a decree, the High Court can treat it as a revision petition. SURAPPARAJU *v.* NARAYANARAJU, (1912) M. W. N. 1232 **431**

——————— **Sch. III, s. 7 (1) (b)** **142**

——————— **Sch. III, s. 11** **887**

Civil and criminal trespass **415**

Claim—*Collusive sale by judgment-debtor to claimant to defraud creditors—Possession of claimant to be deemed as in trust for judgment-debtor—Trust need not be shown to be capable of enforcement—Civil Procedure Code (Act V of 1908), O. XXI, rr. 58, 61.*

S., a judgment-debtor, for the purpose of defrauding his creditors, conveyed certain property to *P.*, who again collusively conveyed it to the claimant who took possession. This property being attached by the creditor of *S.*, the claimant put forward a claim:

Claim—concld.

Held, (1) that the claimant was in possession for the benefit of the judgment-debtor as his trustee and that the claim should be rejected under rule 61, O. XXI of the Civil Procedure Code;

(2) that it was not necessary in order to defeat the claim to show that the trust was one capable of enforcement by law. MCINTOSH *v.* BIDHU BHUSAN SEN, 16 C. W. N. 959 **12**

Collector is a subordinate Court **676**

Commission—Sale of immoveable property—Agreement for payment of commission to person negotiating sale—Completion of contract, payment of commission on—Payment after realization of purchase-money — Document, construction of — Absence of alternative claim for decree—*Quantum meruit*, effect of **106**

Commitment. *See* CRIMINAL PROCEDURE CODE, s. 403 (4) **54**

——— ——— ——— once made can only be quashed on point of law **813**

Companies Act (VI of 1882), s. 58—*Company—Articles of Association providing for registration of transferee if proper person—Refusal of Agent of Company to register transferee—Transferee's right to go to Court · Jurisdiction of Court.*

One of the Articles of Association of a Company provided that if the transferee of a share was a proper person, the share would be transferred to his name. A transferee applied for registration of his name but the Agent of the Company refused peremptorily, without giving any reason, to allow the transferee's name to appear on the register, and the Company merely adopted the action of the Agent. The transferee thereupon applied to the Court for rectification of the Company's register by the substitution of his name in place of his transferor:

Held, that the Court had jurisdiction, even without reference to the Directors or the Company, to determine whether the transferee had a right under the Article to get his name registered or not, and, for that purpose, to determine whether he was a proper person. RAJNAGAR SPINNING, WEAVING AND MANUFACTURING, CO. LD. *v.* MANILAL MAGANLAL, 14 BOM. L. R. 919 **640**

——————— **ss. 140, 169**—*Appointment of official liquidator—Wishes of creditors—Discretion—Appeal—Powers of Appellate Court.*

The appointment of any person as an official liquidator is so entirely a matter for the discretion of the Judge dealing with the winding-up that an Appellate Court will not review his decision except under very special circumstances or unless it can be shown that the Judge had acted on a wrong principle.

Section 140 of the Indian Companies Act does not make it obligatory on the Court to comply with the wishes of the majority of creditors. NOBLE *v.* BANK OF BURMA, LD., 5 BUR. L. T. 193 **853**

——————— **s. 169** **853**

Company. *See* COMPANIES ACT.

——————— *Dealing with stranger—Internal management of Company, whether stranger bound to look into—Stranger whether can assume validity of acts—Loan to Company—Credited by Company—Document*

Company—concld.

incomplete—Creation of charge—Lease—Landlord's arrears—Possession by liquidator—Landlord's acquiescence—Landlord, whether secured creditor.

A stranger dealing with a Joint Stock Company is not bound to look into the indoor management of the Company; and he may assume that all the acts done by the Company or on its behalf are regular and proper.

A stranger lent money to a Company, which was credited by the Company or its managing agents in the loan account. A document was given to the lender, to which the seal of the Company was affixed, but it was only attested by the signature of the managing agents. It did not appear that the money had been borrowed with the approval of the Directors, and the document was not signed by any of the Directors, as required by the Company's articles of association:

Held, that the lender was entitled to assume that the managing agents had obtained the approval of the Directors to the borrowing of the sum; and that even if the signature of the managing agents was not sufficient, the lender who had advanced money to the Company upon the terms that security should be given to him, was nevertheless entitled under the rules of equity to have a charge on the property of the Company, although if the security was not complete.

The rule that the landlord of a Company is entitled to be paid in full for rent and royalties accruing due subsequent to liquidation should the liquidators remain in possession, cannot be applied to the case where the landlord acquiesces in the liquidator's possession. And the landlord is not entitled to claim as a secured creditor in respect of any rent and royalties which are due before or after the liquidation. CHARNOCK COLLIERIES CO. LD. *v.* BHOLANATH DHAR, 39 C. 810 **976**

Compensation. *See* CRIMINAL PROCEDURE CODE, s. 250.

——————— for improvements. *See* LANDLORD AND TENANT.

——————Minor seeking equitable relief —Compensation for benefit received **371**

——————Security without consideration **842**

——————— to work for period of work **894**

Complaint, definition of—Letter to District Judge **573**

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Compromise by Pleader on behalf of client **391**

——————— of subject-matter of appeal—Adjustment of 'all matters in dispute'—Oral evidence of independent agreement—Written compromise silent as to certain provisions **43**

Conjugal rights. *See* RESTITUTION OF CONJUGAL RIGHTS.

Consideration—Alienation by widow of whole property to next reversioner—Agreement by reversioner to re-convey portion of property **487**

——————*Contract of management—No personal liability—Consideration for contract cannot be consideration for later pro-note.*

Consideration—concld.

One *S.* and the defendant obtained a manganese concession in Mysore and agreed to admit *E.* to a share of the profits arising therefrom. In consideration thereof, *E.* caused the plaintiff Company to undertake the management and development of the rights comprised in the said business and to finance the concern. The sums so advanced were to bear interest at 2 per cent. above the current Bank of Madras rate and were to be paid or deducted from the sale-proceeds of the ore as disposed of or shipped. The plaintiff Company were also entitled by way of remuneration to a commission. The Company found after some time that the mines were not working profitably and refused to make any further advance. *E.*, who was really the plaintiff Company, represented to the defendant that he was bound to pay to the plaintiff Company a share of the monies alleged to be due to the Company and the defendant executed the suit promissory-note:

Held, (1) that there was no consideration for the promissory-note because under the agreement there was no personal liability on the part of the members to pay to the plaintiff Company the monies advanced by it;

(2) that the plaintiff Company did not make any advance on account of any request made by the defendant but only made an advance in consideration of the previous agreement and that the advance could not be treated as consideration for the promissory-note also. ANGLO-INDIAN TRADING CO., LD. *v.* GERALD FRANK BRIERLY, (1912) M. W. N. 930 **256**

——————Forbearance to prosecute appeal **466**

——————*Proof—Registration not conclusive without further proof—Oral evidence to explain registered deed—Securities without consideration—Other compensation.*

Mere execution and registration of a bond, without proof what money had passed, without documentary evidence to show what sums were advanced, without production of account books, and without any witnesses to prove that money had been advanced, is not conclusive on the point that consideration passed between the parties.

On the other hand, oral evidence to explain the purpose of a registered deed purporting to be a bond, is admissible.

Securities in respect of which there was no consideration ought not to be made securities for other unconnected expenses defrayed for the obligor by the obligee. LALLU SAHI *v.* RAJBANS BHARTHI, 13 M. L. T. 191; (1913) M. W. N. 155; 24 M. L. J. 355; 17 C. L. J. 284 **842 P. C.**

Construction of bond **9**

——————— **of contract** **37**

——————— **of deed**—Deed to be construed in favour of grantee **494**

——————Mortgage-deed **671**

——————*Adoption—Power to widow to adopt son—Reversioner acceding assent for consideration.*

The deeds and contracts of the people of India should be liberally construed. The form of expres-

Construction—contd.

sion, the literal sense, is not to be so much regarded as the real meaning of the parties which the transaction discloses.

In construing such deeds and contracts, regard must be had to all the attendant circumstances of the transaction.

A. died leaving a widow *B.* and a mother *C.* After *A.*'s death, *B.* and *C.* executed a deed of adoption, by which they adopted one *D.*, as the son of *A.*, reciting in the deed that the adoption was in compliance with the expressed wishes of *A.* *E.*, one of the reversionary heirs of *A.*, sued for a declaration that the deed of adoption was invalid against his reversionary interests and obtained a decree to that effect. Subsequently, *E.* executed an agreement by which he gave *B.* and *C.* authority to adopt any one they liked (*mutbanna apna muqarrir kar leven*) and, as a consideration for this concession, *E.* received immediate possession of a large portion of *A.*'s estate. Accordingly, *B.* and *C.* again adopted *D.*, saying "*mutbanna apna qarar de kar iqrar karte hain ke D. mazkur hamara mutabanna hai.*"

After the death of *E.*, *B.* and *C.*, *E.*'s grandson, *F.*, sued for possession of his share in the estate of *A.*:

Held, (1) that the intention of the parties must not be gathered from the strict terms used in the agreement and the deed of adoption but that the circumstances of the case must also be considered;

(2) that the intention of the parties was that the widows should appoint an heir to the last male-holder of the estate, *A*;

(3) that the adoption was binding on *E.* and his heirs. NIDHAN SINGH *v.* SHAM SINGH, 24 P. L. R. 1913 **524**

——— ——— ——— *Transfer—Sale—Contract of sale—Registered deed—Transfer of Property Act (IV of 1882), s. 54—Registration Act (III of 1877), ss. 17 (b) (c), 44.*

Whether a registered deed has the effect of creating a sale must depend on the circumstances of the case.

Words of conveyance are not absolutely necessary to create a transfer. All depends on the intention and acts of the parties.

Two persons entered into a transaction which they embodied in a deed of sale. The deed was described as a contract of sale but it was registered and it distinctly provided that on certain events happening, the property should be regarded as sold to the vendee. The vendee was put in possession of the property in consequence of the registered deed:

Held, that there was a transfer in consequence and by operation of the registered deed when the conditions of the deed were fulfilled. KONDU KANAUJI DHAVDE *v.* VISHNU MAHESHWAR BHAT, 14 BOM. L. R. 801; 37 B. 53 **176**

——— ——— ——— **of document**—Evidence of surrounding circumstances **497**

——— ——— ——— **of grant** **37**

——— ——— ——— Grant of *malevaram* right **481**

——— ——— ——— Grant to be construed in favour of grantee **180**

——— ——— ——— **of judicial order** **61**

Construction—concld.

——— ——— ——— **of kabuliyat** **177**

——— ——— ——— **of lease** **180**

——— ——— ——— **of mortgage-deed**—Mortgage in which possession is postponed to be delivered on a date subsequent to the mortgage, interpretation of **329**

——— ——— **of statutes**—Power of Court to make order of remand in appeal **891**

——— ——— ———. *See* INTERPRETATION OF STATUTES.

——— ——— **of statutory rule** **37**

——— ——— **of wajib-ul-arz.** *See* PREEMPTION **594**

——— ——— **of will.** *See* WILL.

——— ——— ——— Grant of *shebait*-ship **696**

Contract of management—No personal liability—Consideration for contract cannot be consideration for later pro-note **256**

——— ——— *Sale of immoveable property—Agreement for payment of commission to person negotiating sale—Completion of contract, payment of commission on—Payment after realization of purchase-money—Document, construction of—Absence of alternative claim for decree*—Quantum meruit, *effect of.*

A contract between plaintiff and defendant, providing for payment to the former of a certain commission on his affecting a sale of the latter's property, was in the following terms:—"We are by this bound to pay you a commission of Rs. . . . as remuneration for the trouble you take, out of the amount that may be realized by means of sale of . . . . our Rettiambadi Mitta for 4½ lakhs within the limited time of two months mentioned in the power-of-attorney executed by us in your favour this day . . . . The aforesaid commission amount shall be paid out of the amount which you may obtain and give for us."

Held, (1) that under the said agreement, the commission was payable to plaintiff not when he concluded the contract of sale of the property, but when the defendant actually obtained the purchase-money or, at any rate, not before he had removed all the obstacles to the defendant receiving the amount;

(2) that it was not competent to the Court to decree any sum for plaintiff *quantum meruit* as there was no alternative claim in that behalf. IMMUDIPATTAM VIJAYA GANDIPA *v.* ANNASAWMY AIYAR **106**

——— ——— **of sale.** *See* SPECIFIC PERFORMANCE.

——— ——— **to sell**—Suit for specific performance—When limitation commences to run—Delay in suit, when fatal to suit **399**

——— ——— ——— *Liability of vendee to pay interest on consideration money.*

An agreement of sale provided for the payment of the consideration on a particular date and for the execution of the conveyance on the date of such payment. By a collateral agreement it was stipulated that if payment was not made on the day specified, interest was to be paid at one per cent. per mensem from the due date. The vendor, however, was not able to give a good title to the property until long after the appointed day as he had to institute a suit for clearing his title:

Contract—concld.

Held, that the vendee's obligation to pay interest and the vendor's obligation to execute a valid sale-deed were mutually dependent and that interest was payable only from the date on which the vendor could give a clear title. ADUSUMILLI SINGARAYADU *v.* SAYANI NARAYANASAMI, (1912) M. W. N. 915 **273**

——— **of service** for definite term--Discontinuance of service by the servant during term --Right to claim compensation for period of work **894**

——— **to transfer** negotiable instrument **721**

Contract Act (IX of 1872), s. 2 (d)—*Consideration—Forbearance to prosecute appeal.*

A forbearance to continue an appeal against a person on that person's brother agreeing to pay the amount claimed in appeal is a good consideration. ZAKIR ALI *v.* GULAB RAI, 15 O. C. 314 **466**

——— ——— **s. 11**—Contract by minor is void **979**

——— ——— **s. 16** **309**

——— ——— **s. 23** — *Void contract — Public policy—Husband and wife—Agreement for future separation—Muhammadan parties—English Law.*

The rule of English Law that an agreement which provides for, and, therefore, encourages future separation between the spouses, is void as being against public policy, applies to Muhammadans. The fact that Muhammadan Law allows polygamy does not make the rule inapplicable. It is as much the policy of the Muhammadan Law as of the English Law, that people who are married should live together and not apart.

Consequently, an agreement made between a Muhammadan husband and his wife, providing for a certain maintenance to be given to the wife in the event of a future separation between them, is void as being opposed to public policy under section 23 of the Contract Act. BAI FATMA *v.* ALI MAHOMED, 14 BOM. L. R. 1178 **946**

——— ——— **s. 25**—Acknowledgment of time-barred debt without promise to pay **722**

——— ——— **s. 39** **37, 894**

——— ——— **ss. 64, 65** **894**

——— ——— **s. 65** **987**

——— ——— **s. 69**—Assessment paid by mortgagee **253**

——— ——— **s. 69**—Mortgagee of other co-sharer paying revenue **45**

——— ——— **s. 69**—Vendor paid by pre-emptor—Vendor again suing vendee for unpaid purchase-money **288**

——— ——— **s. 69**—*Decree for rent—Decree against recorded tenant—Sale of tenure of share of recorded tenant—Decretal amount paid by recorded tenant's co-sharer—Co-sharer's right to be reimbursed by recorded tenant—Provincial Small Cause Courts Act (IX of 1887), Sch. II, Art. 41—Civil Procedure Code (Act V of 1908), s. 102—Appeal, Second —Small Cause suit.*

Contract Act—concld.

Plaintiff was the owner of three-sevenths and defendant No. 1 of two-sevenths of a *patni* tenure; but the name of the defendant No. 1 alone was recorded in the landlord's books as the holder of the tenure. In 1307, the defendant No. 1 sold his share to a stranger and the share passed to the vendee with effect from the beginning of 1308. Subsequently, the landlord brought a suit for recovery of arrears of rent in respect of 1307 and 1308 against the defendant No. 1, the recorded tenant, and obtained a decree. In execution of the decree, the tenure was sold by auction, but the sale was set aside upon the plaintiff depositing the necessary amount which was less than Rs. 500. The plaintiff brought the present suit against defendant No. 1 for recovery of two-sevenths share of the sum so deposited. Plaintiff did not implead the vendee of defendant No. 1 as a defendant nor did he ask for any relief against him.

Held, (1) that although at the date of the institution of the suit, the defendant No. 1 had no interest in the tenure, yet the suit did not fall outside the scope of Article 41 of Schedule II of the Provincial Small Cause Courts Act;

(2) that as the suit was not a Small Cause suit a second appeal was competent;

(3) that when a decree was made against defendant No. 1, the recorded tenant, he became "bound by law to pay" the decreed amount to the landlord in the terms of section 69 of the Contract Act;

(4) that the plaintiff was a person interested in the payment of this debt, and he was entitled to be "reimbursed" by the defendant No. 1, although the assignee of the latter was benefited by the payment. BATUK NATH MANDAL *v.* BIPIN BIHARI CHAUDHURY, 16 C. W. N. 973; 17 C. L. J. 179 **90**

——— ——— **s. 70** **288**

——— ——— **s. 70**--Assessment paid by mortgagee **253**

——— ——— **ss. 73, 74** — Compensation to servant for period of work **894**

——— ——— **s. 134**—*Surety, discharge of—Principal debtor sued but not proceeded with owing to want of address.*

The inability of a creditor to proceed with his suit against the principal debtor by reason of the disappearance of the latter, and his consequent demand of relief against the surety only, does not operate as a discharge of the surety under section 134 of the Contract Act. BALAJI *v.* HASTIMAL, 8 N. L. R. 188 **893**

——— ——— **s. 188** **139**

——— ——— **ss. 230 (2), 236**—Undisclosed principal **973**

Contribution suit, nature of **45**

Conversion to Christianity—Effect on personal Law **257**

Co-sharer—Adverse possession **657**

——— ——— Suit for profits **833**

Costs—Mortgage-decree—Successful party—Personal decree for costs **244**

Court-fee—Appeal by Secretary of State against Court's award **764**

——— ———Pre-emption suit—Value of buildings **245**

——— ———Suit to remove Granthi **270**

——— ———*Declaratory decree—Consequential relief—Suit for declaration that plaintiff is occupancy* raiyat *and for settling fair rent*—Ad valorem *Court-fee—Party—Status of plaintiff—Persons recorded as* raiyats, *whether necessary parties—Bengal Tenancy Act (VIII of* 1885), *s.* 104-H.

A suit under section 104H of the Bengal Tenancy Act, for a declaration that the plaintiff is an occupancy *raiyat* and not a tenure-holder as he has been entered in the Record of Rights, and for settling a fair and equitable rent for his holding, is not a suit for a mere declaratory decree, but one for a consequential relief, and, therefore, *ad valorem* Court-fee should be paid upon such a plaint.

Any declaration, which is made as regards the status of the plaintiff, must be made in the presence of those who are now recorded as *raiyats* under him. PAJIRUDDIN *v.* SECRETARY OF STATE, 16 C. L. J. 383 **919**

——— ———*Redemption suit—Court Fees Act (VII of* 1870), *s.* 7 *cl.* 9—*Amount claimed by mortgagor.*

A suit merely to redeem a mortgage without praying for any additional relief against the mortgagee must be held to fall under section 7, clause 9 of the Court Fees Act.

Where a mortgagor also prays for the payment to him of the amount found due to him on taking accounts, after the discharge of the mortgage debt, he should state the amount so claimed and pay additional Court-fees thereon. KODI VENKATAPPA ROW *v.* BARNALA SURYANARAYANA, 12 M. L. T. 493 **442**

——— ———*Suit for declaration that plaintiff is sole* shebait *and for injunction—Valuation for jurisdiction identical with valuation for Court-fees—Plaintiff not to assign arbitrary value on suit—Cour Fees Act (VII of* 1870), *s.* 7 *(IV) (c) and (d), Sch. I, Sch. II, Art.* 17 *(iii)—Suits Valuation Act (VII of* 1887), *s.* 8.

A suit in which the plaintiff seeks for a declaration that he is the sole *shebait* of a certain idol and also for an injunction to restrain the defendant from interfering with his possession of the endowed properties, falls within section 7, clause 4, sub-clause (*c*) of the Court Fees Act, 1870, and the value, as determined for purposes of jurisdiction, must, under section 8 of the Suits Valuation Act, 1887, also determine the value for the purpose of Court-fees.

Where the plaintiff valued his suit for the purpose of jurisdiction at Rs. 11,005, but for the purpose of Court-fees valued the prayer for injunction at Rs. 1,000, and paid Rs. 10 as Court-fees for the declaration under Schedule II, Article 17 (*iii*) and Rs. 75 for the injunction under Schedule I, read with section 7 (*iv*) (*d*) of the Court Fees Act:

Held, that the plaintiff was bound to pay *ad valorem* Court-fees upon the plaint and memorandum of appeal, on the basis that the value of the relief claimed was Rs. 11,005.

Court-fee—concld.

In cases falling under section 7 (*iv*) of the Court Fees Act, although the plaintiff is to state the amount at which he values the relief sought, the Legislature never intended that he should be at liberty to assign any arbitrary value and thus be free to choose capriciously the forum of trial or appeal. RAJ KRISHNA DEY *v.* BEPIN BEHARY DEY, 16 C. L. J. 194 **162**

Court Fees Act (VII of 1870), s. 7, cls. I, IV (d)—*Suit for rent and declaration of title with injunction—Valuation—Jurisdiction.*

A., as the heir of one *D.*, brought a suit against *B.* and *C.* As against *B.*, the relief claimed was the recovery of arrears of rent on the basis of a lease of the property in dispute by *D.* As against *C.* the relief claimed was a declaration of title and injunction as it was alleged that *C.* prevented *B.* from paying rent to *A.*:

Held, (1) that the suit was based on two distinct causes of action, for money and for declaration of title, with injunction;

(2) that the suit fell within clauses I and IV (*d*) of section 7 of the Court Fees Act;

(3) that the value for purpose of jurisdiction was the value for computation of Court-fees. PARUMAL AILMAL *v.* MOTUMAL, 6 S. L. R. 114 **44**

——— ———— **s. 7, (IV) (c) (d)** **162**

——— ——— ——— **s. 7 (IX)** **442**

——— ———— **s. 8** **764**

——— ——— ——— **Sch. I** **162**

——— ——— ——— **Sch. II, Art. 17 (iii)** **162**

——— ——— ——— **art. 17 (4)** **764**

Covenant for renewal. *See* LEASE.

Criminal Breach of Trust. *See* PENAL CODE, ss. 405, 406, 408.

Criminal Cases—Jurisdiction **559**

Criminal Procedure Code (Act V of 1898)—*Ganjam Collectorate—Division into Agency District and non-Agency District—Sessions Court—Agent—Deputy Magistrate—General Deputy Magistrate—Jurisdiction.*

For Magisterial as well as for Judicial and Revenue Administration, the old Ganjam Collectorate was long ago divided into an Agency District and a non-Agency District. The Magistrates of the Agency District are not, as such, in any way subordinate to the Sessions Court of the non-Agency Sessions Division of Ganjam, nor does the fact that the same person is a first class Sub-Divisional Magistrate in both Districts, make him subordinate to the Sessions Court of the Ganjam Sessions Division in regard to the Magistrate's jurisdiction in the Agency District. The Agency District is also a Sessions Division, the Sessions Judge of which is the Agent himself.

'Deputy Magistrate' and 'General Deputy Magistrate' are titles unknown to the Code of Criminal Procedure.

An offence was committed within the limits of the Ganjam Agency tracts. The case was transferred by the Agent to the first class Magistrate of Gumsoor Sub-Division, who had local criminal jurisdiction over certain Agency as well as certain non-Agency tracts.

Criminal Procedure Code—contd.

The Sessions Judge of the Ganjam Sessions Division set aside the conviction recorded by the Magistrate:

Held, (1) that the Magistrate tried the case as a Magistrate of the Agency tracts;

(2) that the proper forum of appeal was the Agent and not the Sessions Judge of Ganjam Division. PUBLIC PROSECUTOR *v.* SADANANDA PATNAIK, 23 M. L. J. 670; 12 M. L. T. 601; 13 CR. L. J. 850 **786**

——— ——— ——— **ss. 4 (h), 250**—*Complaint—Information laid by Police Officer—Police report—Compensation—Bombay District Municipal Act (IV of 1890), ss. 51, 68 (c).*

The definition of complaint in section 4 (*h*) of the Criminal Procedure Code excludes only such Police reports as are made under section 173 after the conclusion of the Police investigation

Where a Police officer lays an information against a person under section 51 or section 68 (*c*) of the Bombay District Police Act, such information is a complaint within the meaning of section 4 (*h*), Criminal Procedure Code; compensation can be awarded against the Police Officer, if the case is frivolous or vexatious. IMPERATOR *v.* KHUSHALDAS, 6 S. L. R. 82; 13 Cr. L. J. 752 **64**

——— ——— ——— **ss. 35, 411**—*Sentences to run concurrently—Sentence of six months' imprisonment on each of two counts by Presidency Magistrate—Right of appeal—Aggregate sentence.*

Two sentences, each of six months' imprisonment, passed simultaneously under section 35 of the Criminal Procedure Code, and directed to run concurrently, cannot be held to be a single sentence of one year's imprisonment, but would be considered as a single sentence of six months' imprisonment.

If such a sentence is passed by a Presidency Magistrate, it will not be appealable under section 411 of the Criminal Procedure Code. SUKNANDAN SINGH *v.* EMPEROR, 13 CR. L. J. 787 **531**

——— ——— ——— **ss. 35 (3), 413**—*—Appeal—Sentence of one month's imprisonment under more sections than one—Sentences to run concurrently—Appeal, whether lies to Sessions Court.*

Concurrent sentences for the purpose of appeal must be taken in the aggregate.

Therefore, where a Deputy Magistrate convicted the accused under sections 143 and 365/114, Indian Penal Code, and sentenced them to one month's rigorous imprisonment under each section, the sentences to run concurrently:

Held, that an appeal lay to the Sessions Court. ABDUL KHALEK *v.* EMPEROR, 17 C. W. N. 72; 13 CR. L. J. 877 **813**

——— ——— ——— **ss. 87, 88, 110, 112, 114**—*Warrant for arrest of person who had left Court's jurisdiction—Proclamation—Attachment of property.*

A Magistrate cannot legally issue a warrant under section 114, Criminal Procedure Code, for the arrest of a person who has already left the local limits of the Magistrate's jurisdiction. The person proceeded against must be actually and physically present in the district in which the Magistrate exercises jurisdiction.

Where a warrant under section 114 was issued for the arrest of a person who had left the district and subsequently a proclamation against the person was issued and proceedings taken under sections 87, 88, Criminal Procedure Code:

Held, that the warrant, proclamation and attachment were all illegal. RAMJIBHAI, *In re*, 14 BOM. L. R. 889; 13 CR. L. J. 796 **540**

——— ——— ——— **s. 88** **540**

——— ——— ——— **ss. 94, 165**—*Penal Code (Act XLV of 1860), ss. 97, 99—Search of accused's house—Specific article—General search for stolen property, whether authorised by law.*

Every person has a right, subject to the restrictions contained in section 99 of the Indian Penal Code, to defend property, whether moveable or immoveable, of himself or of any other person, against any act which is an offence falling within the definition of criminal trespass.

The law does not empower a Police officer to search an accused's house for anything but the specific article which has been or can be made the subject of summons or warrant to produce. A general search for stolen property is not authorized, and the law cannot be got over by using such an expression as "stolen property relevant to the case."

A right of private defence exists against such an unauthorized search. PRANKHAHG *v.* EMPEROR, 16 C. W. N. 1078; 13 Cr. L. J. 761 **76**

——— ——— ——— **ss. 103, 165 (2) & (3)**—*Search—Failure to call witnesses—Illegality—"Conduct the search in person," meaning of.*

Section 165 (2) does not mean that an officer-in-charge of a Police station or Investigating Officer personally conducting a search must himself make the search, *e. g.*, ransack boxes, examine the roof, dig up the floor, or otherwise seek for the property. Nor is it necessary that all these processes must take place under his eye. The meaning of the section is, that the officer should be present on the spot and exercise a general supervision over the search, in contradistinction to the cases where he is unable to go to the spot, and deputes a subordinate by a written order to conduct the search in his place.

The failure to call inhabitants of the locality as witnesses to a search, that is, failure to strictly comply with the provisions of section 103, does not make a search illegal. SATAGOPALA CHARLU *v.* SATRUGHNA BEHARA, 23 M. L. J. 445; (1912) M. W. N. 1111; 13 Cr. L. J. 763 **75**

——— ——— ——— **s. 107**—*Security to keep peace—Procedure.*

A Magistrate, in ordering a person to furnish security to keep the peace, must follow the directions laid down in Chapter VIII of the Code of Criminal Procedure and give the person bound over an opportunity to show cause. JAGDAMBA PRASAD *v.* EMPEROR, 13 CR. L. J. 844 **716**

——— ——— ——— **s. 110** **540**

——— ——— ——— **s. 110**, proceedings under, whether can be transferred **58**

——— ——— ——— **ss. 110, 122**—*Joint trial of more persons than one—Evidence against each person—Persons of bad character seen with accused, effect of—Sureties not to be rejected merely on Police report.*

Criminal Procedure Code—contd.

Where a number of persons are tried jointly upon a charge under section 110, Criminal Procedure Code, it is incumbent upon the Magistrate to exercise great care and caution in dealing with the evidence and to insist that definite evidence be given against each person who is charged.

Where the evidence amounted to nothing more than that some persons said to be of bad character had been seen on occasions at the *Kothar* where the accused did his work:

Held, (1) that it did not justify the Magistrate in holding that the accused was a dangerous dacoit and extortioner and habitual protector and harbourer of thieves;

(2) that Magistrates have no authority to reject sureties merely upon an unfavourable report of the Police. JAI GOVIND *v.* EMPEROR, 15 O. C. 263; 13 CR. L. J. 760 **72**

——————— **s. 110** — *Meaning and object of section—Security demanded from person not "resident" within jurisdiction.*

The expression "any person within the local limits" in section 110 of the Criminal Procedure Code, means any person who is within the local limits at the time the Magistrate takes action under the section.

The object of the section is to prevent crime and that object would be defeated if its scope were restricted to persons *residing* within the jurisdiction of the Magistrate.

Consequently, a Magistrate has jurisdiction to take security from a person who resides outside the jurisdiction of the Magistrate but is found within the local limits of his jurisdiction. KORA RANGAN, *In re*, 23 M. L. J. 535; 13 CR. L. J. 781 **413**

——————— **s. 110** — *Power of Police to detain—Suspected person.*

Section 110 is not intended to afford the Police a means of keeping a suspected person under detention until they are able to work out a case against him. Action of this kind on the part of the Police tends to throw doubt upon their work generally and a Magistrate should not detain a person under section 110 of the Criminal Procedure Code, unless he has the necessary information upon which he can make the order in writing required by section 112. EMPEROR *v.* PAIMAL NAI, 10 A. L. J. 351; 13 CR. L. J. 827 **571**

——————— **s. 110** — *Proceedings initiated under the section must be disposed of by the same Magistrate—Case cannot be sent up to another Magistrate—Bombay Regulation XII of 1827, s. 27.*

Proceedings under section 110, Criminal Procedure Code, should be disposed of by the Magistrate before or by whom they were initiated. The Code requires that he should pass the final order *himself* either discharging or taking security from the accused.

Therefore, where a 1st class Magistrate, before whom proceedings under section 110, Criminal Procedure Code, were initiated recorded evidence in the case and then sent it up to the District Magistrate who, acting under section 27 of Bombay Regulation XII of 1827, placed certain restrictions upon the personal liberty of the accused:

Held, that the 1st class Magistrate had no jurisdiction to send up the case to the District Magistrate and the latter had no jurisdiction to dispose of it. EMPEROR *v.* KISAN KEVJI, 14 BOM. L. R. 713; 13 CR. L. J. 748 **60**

Criminal Procedure Code—contd.

——————— **s. 110** — *Witnesses for prosecution examined after defence witnesses—Illegal procedure—Prosecution witnesses as good as defence witnesses, effect of.*

In a proceeding under section 110 of the Criminal Procedure Code, the Sub-Divisional Magistrate examined some of the prosecution witnesses after the case for the defence had been closed, without recording any reason for doing so:

Held, that the procedure was erroneous and unauthorised.

In a case under section 110 of the Code of Criminal Procedure, if the defence evidence is as good as that of the prosecution, the accused is entitled to an acquittal. GANGA SINGH *v.* EMPEROR, 10 A. L. J. 383; 13 CR. L. J. 772 **404**

——————— **s. 112** **416, 540**

——————— **s. 114** **540**

——————— **ss. 117, 118** **416**

——————— **s. 118** — *Security for good behaviour.*

A person was asked to furnish security for good behaviour. He gave two sureties. The Magistrate rejected the sureties on the ground that they did not live within a radius of five miles from the residence of the accused:

Held, that the order rejecting the sureties was bad and that there was no valid ground for rejecting the security. HASIN-UD-DIN *v.* EMPEROR, 10 A. L. J. 354; 13 CR. L. J. 831 **575**

——————— **s. 122** **72**

——————— **ss. 123, 397** — *"Undergoing sentence of imprisonment"—Person committed to prison for failure to furnish security—Subsequent sentence of theft for imprisonment—Postponement of sentence—Practice.*

When a person is committed to prison under section 123, Criminal Procedure Code, for failure to give security, he is not "undergoing a sentence of imprisonment" within the meaning of section 397.

Therefore, a subsequent sentence of imprisonment passed on the person in regard to theft cannot be postponed till after the expiry of the imprisonment under section 123, Criminal Procedure Code. EMPEROR *v.* VISHNU BALKRISHNA RAM, 14 BOM. L. R. 965; 13 CR. L. J. 849 **785**

——————— **s. 145,** *proceedings under—Magistrate ordering his subordinate officer to make inquiry—Magistrate's order in accordance with subordinate's report without hearing evidence himself illegal.*

A Magistrate, acting under section 145 of the Criminal Procedure Code, referred the issues raised between the parties to a Tahsildar for inquiry. On submission of the report by the Tahsildar, the Magistrate accepted the report, and, without hearing the entire evidence himself, passed an order accordingly:

Held, that the order was illegal, and must be set aside. SARDHA PRASAD *v.* PITAMBER LAL, 13 CR. L. J. 777; 10 A. L. J. 465 **409**

Criminal Procedure Code—contd.

——— ——— ——— **ss. 145, 439, 537**—*Revision—Charter Act, s. 15—Jurisdiction—Interference by High Court.*

A petition does not lie under section 439, Criminal Procedure Code, to revise proceedings under section 145 of the Code.

The words in section 439, "the record of which has been called for by itself," are not limited to cases where the High Court acts *suo motu*. They are not used in contradistinction to "which otherwise comes to its knowledge" but as contrasted with "which has been reported for orders" they have reference to the recognised channels by which the High Court becomes seized of the case; that is to say, either by calling for the records itself or by having the case reported to it under section 438 by a Sessions Judge or a District Magistrate who has himself called for the records under section 435. In either case, the Court is acting both of its own motion and on petition. There is, therefore, no room for the reading of the words "otherwise comes to its knowledge" as having reference to petition.

The words "or otherwise comes to its knowledge" in section 439 have no reference to any power outside the Criminal Procedure Code.

Under section 15 of the Charter Act, it has never been customary to interfere except when it can be said that the Magistrate's order was passed without jurisdiction.

The failure by a Magistrate to comply with any provision of the Code as to his preliminary procedure does not destroy his jurisdiction to take action under the Code.

Semble:—Such irregularity would be covered by section 537, Criminal Procedure Code. The essential requisite to give a Magistrate jurisdiction under section 145, Criminal Procedure Code, is that he must be satisfied from information of some sort that a dispute exists likely to cause a breach of the peace concerning land or water or the boundries thereof in his jurisdiction. Once he is so satisfied his jurisdiction is complete and his subsequent action must be considered in relation to procedure, not jurisdiction. KAMAL KUTTY *v.* UDAYAVARMA RAJA, 12 M. L. T. 439; 23 M. L. J. 499; 13 Cr. L. J. 753; (1912) M. W. N. 1154 **65**

——— ——— ——— ——— **s. 145,** *scope of—Absolute continuous possession dealt with—Party claiming right of easement not to be made party to section 145 proceedings—Jurisdiction of Magistrate—Public, if may be declared to be in possession.*

Section 145 of the Code of Criminal Procedure only deals with rights of absolute continuous possession of immoveable property, and proceedings under that section are entirely without jurisdiction unless they are directed to the decision of absolute continuing possession of either party.

The right of a party, who does not claim anything beyond the right to worship on one day in the year and the right to make due and proper preparations for the holding of that worship by erecting huts for the purpose of holding the *puja*, is in the nature of an easement and not in the nature of possession, and, therefore, such a party cannot be made a party to a proceeding under section 145, Criminal Procedure Code,

Criminal Procedure Code—contd.

The public cannot be declared to be in possession of any piece of land, for if that be done, then both parties to the dispute are included in that term and the possession, therefore, is joint possession and the jurisdiction of the Court under section 145, Criminal Procedure Code, is ousted. MANIK CHANDRA CHAKRAVARTI *v.* PREO NATH KUAR, 13 CR. L. J. 789; 17 C. W. N. 205 **533**

——— ——— ——— ——— **s. 165 (2) (3)** **75**

——— ——— ——— ——— **s. 179**—*Penal Code (Act XLV of 1860), s. 406—Criminal breach of trust—Loss entailed by criminal breach of trust completes offence—Jurisdiction.*

The loss resulting from criminal breach of trust is a consequence which completes the offence. The Court within whose jurisdiction such loss accrues can try the offence.

A. and *B.*, who both resided at Cawnpore with their wives, entered into an arrangement by which a machine purchased with *A.*'s money was entrusted to *B.* While both were at Bombay, *A.* allowed *B.* to take the machine to some place in Madras to work it for the mutual benefit of both. Subsequently, *A.* died and *B* thereupon misappropriated the machine and the money made out of it. *A.*'s wife and heir filed a complaint in the Court of the Cantonment Magistrate, Cawnpore, under section 406, Penal Code:

Held, that the Cawnpore Court had jurisdiction to try the offence. GEORGE LANGRIDGE *v.* GRACE ATKINS, 13 CR. L. J. 856; 35 A. 23; 10 A. L. J. 431 **792**

——— ——— ——— ——— ——— ——— **s. 195**—*Perjury and its abetment during Police investigation of a theft case—Theft case ending in conviction—Sanction to prosecute, whether necessary—Penal Code (Act XLV of 1860), s. 193—Perjury during Police investigation.*

The petitioners were placed for trial before a Magistrate under section 193, Indian Penal Code, for making and abetting the making of certain false statements during the Police investigation of a theft case which ended in a conviction. A sanction to prosecute the petitioners for perjury and its abetment was not obtained from the Court which had tried the theft case:

Held, that the sanction of the Court was necessary and without its sanction, the petitioners could not be tried.

The words "in relation to an offence" in section 195 of the Criminal Procedure Code are wide enough to include evidence which was adduced before a Court and which was heard by the Court. MAHADEV YADNESHWAR JOSHI, *In re*, 14 BOM. L. R. 715; 13 Cr. L. J. 751 **63**

——— ——— ——— ——— **s. 195**—Sanction for bringing false charge before Police **570**

——— ——— ——— ——— **ss. 195, 435**—*Revision—"Inferior criminal Court"—District Registrar—Sanction to prosecute granted by District Registrar—High Court's power to interfere.*

A District Registrar is not an inferior Criminal Court within the meaning of section 435, Criminal Procedure Code.

Criminal Procedure Code—contd.

Consequently, the High Court has no power, under section 435, Criminal Procedure Code, to interfere with an order passed by a District Registrar granting sanction for the prosecution of a person for an offence. ARDESHIR KAVASJI KARANJAVALLA, *In re*, 14 BOM. L. R. 970; 13 CR. L. J. 845 **717**

——— ——— ——— ——— **s. 195** *-Sanction to prosecute—Complaint to Magistrate—Investigation by Police—Permission to Police to proceed against complainant—Case classed B—Penal Code (Act XLV of 1860), s. 211.*

A complaint of an offence was made to a Magistrate, who examined the complainant and sent the case to the Police for investigation. The Police reported that the case was false and asked for orders for the prosecution of the complainant. At the foot of this report, the Magistrate made the following endorsement:—"The case is classed as (*B*). You may proceed against the complainant."

Held, that the order made by the Magistrate at the foot of the report made by the Police could not be accepted as a sanction under section 195, Criminal Procedure Code. EMPEROR *v.* LALUBHAI, 14 BOM. L. R. 960; 13 CR. L. J. 855 **791**

——— ——— ——— ——— **s. 195**—*Sanction to prosecute—Superior Court's duty when there is no* prima facie *case for sanction.*

Where sanction to prosecute for any offence specified under section 195 of Act V of 1893, has been granted, the superior Court should see whether the discretion has been properly exercised, and when there is no *prima facie* case for the prosecution, the sanction should be revoked. JHANDU *v.* EMPEROR, 40 P. W. R. 1912 CR; 13 CR. L. J. 831 **575**

——— ——— ——— ——— **s. 195 (b)** *-Complaint, definition of—Letter of District Judge.*

A document was tampered with during the pendency of a suit before a Munsif. The Munsif reported the fact to the District Judge, who wrote to the District Magistrate to take action in the matter:

Held, that the letter of the District Judge to the District Magistrate fell within the definition of a complaint under section 195 (*b*) of the Code of Criminal Procedure. DEBI PROSAD *v.* EMPEROR, 10 A. L. J. 361; 13 CR. L. J. 829; 35 A. 8 **573**

——— ——— ——— ——— **s. 195, cl. (b)**—*Penal Code (Act XLV of* 1860), *s.* 211—*Making false report to Police—Grant of B summary not sanction—Sanction not required—Jurisdiction.*

A Magistrate gave to the Police what is called a B summary in regard to the accusation made by a complainant. The complainant was thereupon prosecuted under section 211, Indian Penal Code, before the same Magistrate for giving a false report constituting the said accusation. The Magistrate inquired into the offence and convicted him.

Held, (1) that the Magistrate was competent to try the accused. The giving of a B summary was by no means tantamount to the grant of a Magisterial sanction for the prosecution of the original complainant, inasmuch as a B summary was not an order passed under the Code of Criminal Procedure at all, but was a mere administrative order made by the Magistrate for the purpose of facilitating Police work and Police statistics;

Criminal Procedure Code—contd.

(2) that the offence in this case was constituted by the maliciously false report which the accused submitted to the Police, and that offence was not committed in, or in relation to, any proceeding in any Court, and, therefore, no sanction was needed for the prosecution of the accused. EMPEROR *v.* CHANDABHAI, 14 BOM. L. R. 1160; 13 CR. L. J. 904 **1000**

——— ——— ——— ——— **s. 195 (c)** *-Sanction to prosecute for forgery—Offence committed prior to production of document in Court—No sanction required.*

Courts are prohibited from taking cognizance of an offence described in section 463 of the Penal Code when such offence has been committed by a party to any proceeding in any Court in respect to a document produced or given in evidence in any such proceeding. But if the offence was committed prior to its production in Court, prosecution for such offence requires no sanction.

Section 195 of the Criminal Procedure Code does not remove from the cognizance of Criminal Courts an offence described in section 463 of the Penal Code, when such an offence has been committed by an ordinary individual. LALTA PROSAD *v.* EMPEROR, 10 A. L. J. 294; 13 CR. L. J. 863; 34 A. 654 **799**

——— ——— ——— ——— **s. 195 (6)**—*Sanction to prosecute—Revocation of sanction by Appellate Court—Power of High Court to grant sanction.*

Section 195 (6) does not limit the right of appeal to one superior Court only.

The higher Appellate Court has power not only to grant a sanction which has been refused but also to grant a sanction which has been revoked.

A sanction which has been revoked is in effect only sanction which has been refused. LALU *v.* GURDASMAL, 6 S. L. R. 81; 13 Cr. L. J. 768 **80**

——— ——— ——— ——— **s. 197**—*Lower Subordinate of Public Works Department, charge against, of bribery—Whether sanction to prosecute necessary.*

Inasmuch as a lower Subordinate in the Public Works Department can be appointed and transferred by a Superintending Engineer, without reference to the Local Government, sanction to entertain a complaint of bribery against such lower Subordinate is not necessary. REDDY VENKAYYA, *In re*, 12 M L. T. 351; 13 CR. L. J. 770 **402**

——— ——— ——— ——— **s. 202,** *scope of—Preliminary inquiry—Order after issue of process—Judicial order—Construction.*

An order under section 202, Criminal Procedure Code, is one by virtue of which the Magistrate decides to postpone issuing process against the accused.

Such an order can only be passed after recording reasons in writing.

An order for holding a preliminary inquiry under section 202 cannot be passed after process has been issued against the accused.

If a judicial order can be construed as either legal or illegal, the construction that makes it legal must prevail. GAJI *v.* JUMANSHAH, 6 S. L. R. 83; 13 Cr. L. J. 749 **61**

——— ——— ——— ——— **s. 208** governs s. 347 **813**

Criminal Procedure Code—contd.

——— ——— ——— ——— **ss. 208, 210, 212, 213, 347**—*Magistrate's discretion to summon and examine witnesses for defence before or after framing charge—"Stop further proceedings", meaning of.*

Section 210, in requiring "the evidence referred to in section 208 sub-sections (1) and (2)" to be recorded before a charge is drawn up, does not require a Magistrate to record the evidence of witnesses whom, in the exercise of the discretion given by sub-section (3), he has deemed it unnecessary to summon. Therefore, the accused is not entitled to delay asking the Magistrate to summon his witnesses until the last moment before the charge is drawn up and then require him to summon and examine his witnesses, as such a procedure would lead to undue delay in the commitment of cases and the evils which such delay would entail.

Though it is left to the discretion of a Magistrate (section 212) to examine witnesses for the defence after the charge is drawn up and then to cancel the charge and discharge the accused (section 213), the Criminal Procedure Code does not compel a Magistrate to summon and examine witnesses for the defence after a charge has been drawn up or even before the charge has been drawn up if, for reasons to be recorded, the Magistrate deems it unnecessary to do so.

Obiter.—The expression "stop further proceedings," in section 347 of the Criminal Procedure Code, means, to stop proceeding with the case *as a trial* and instead to commit the case to the Sessions for trial by that Court. SESSIONS JUDGE OF COIMBATORE *v.* IMMUDI KUMARA KANGAYA, 23 M. L. J. 368; 13 CR. L. J. 778; 13 M. L. T. 116; (1912) M. W. N. 1243 **410**

——— ——— ——— ——— **s. 209** **714**

——— ——— ——— ——— **s. 210, 212** **410**

——— ——— ——— ——— **s. 213** **54, 410**

——— ——— ——— ——— **s. 213, sub-s. (2)**—*"Witnesses for defence," whether expression covers evidence extracted by cross-examination from prosecution witnesses—Charge against accused framed before cross-examination of prosecution witnesses—Subsequent cross-examination—Cancellation of charge, if legal.*

A Magistrate, having drawn up a charge against an accused person with a view to his commitment to the Court of Session, can thereafter allow the accused to cross-examine the witnesses for the prosecution, and, as a result, cancel the charge.

The words "witnesses for the defence" in section 213 sub-section (2) of the Criminal Procedure Code are wide enough to cover evidence extracted by cross-examination from witnesses for the prosecution. JOGENDRA NATH MOOKHERJI *v.* MOTI LAL CHAKRAVARTI, 16 C. W. N. 1155; 39 C. 885; 13 CR. L. J. 774 **406**

——— ——— ——— ——— **s. 215** — Quashing of commitment **714**

——— ——— ——— ——— **ss. 215, 346, 347, 349**—*Commitment once made can be quashed only on point of law—Section 347 to be read subject to section 208.*

Where a Magistrate thinks from the first that a case ought to be tried by a Court of Session, the procedure laid down in Chapter XVIII of the Code of Criminal Procedure is *prima facie* obligatory on him and he must, under section 208, take all such evidence as may be produced for the prosecution or on behalf of accused and give the accused an opportunity to cross-examine the prosecution witnesses. Section 347 has no applicability in such a case.

The words "stop further proceedings" in section 347 refer obviously to proceedings of a trial or of an inquiry with a view to a trial by himself when it appears to the Magistrate that the case is one which ought to be tried by the Court of Session or the High Court.

A commitment made without examining prosecution witnesses and allowing the accused an opportunity to cross-examine is illegal and must be quashed.

Per *Robinson, J.* dissenting:—Section 347 applies to *all inquiries whatsoever.*

A commitment, without examining the prosecution evidence and giving the accused an opportunity to cross-examine witnesses, is not illegal and cannot be quashed. EMPEROR *v.* CHANNING ARNOLD, 5 BUR. L. T. 239; 13 CR. L. J. 877; 6 L. B. R. 129 **813**

——— ——— ——— ——— **s. 239** — *Joint trial—Same transaction—Accused conspiring to procure conviction of innocent persons—Several acts linked together by one design though done at intervals.*

Five accused persons, *A.*, *B.*, *C.*, *D.* and *E.*, finding that a robbery was committed and that cash and ornaments worth a very large sum were stolen, aided and abetted each other in inducing a young man, *F.*, whom they knew to be entirely innocent of the offence, for the consideration of a bribe of Rs. 100, falsely to confess to complicity in the crime, and to acquiesce in being prosecuted for it, the object being to share the loot with the real thieves. To this end, the accused wrongfully confined *F.*, fabricated false evidence in order to procure his conviction, knowingly instituted a false prosecution against him, and in that prosecution gave false evidence in order to secure his conviction.

All the five accused were jointly tried. *A.* was convicted of fabricating and giving false evidence to procure conviction of an offence, of wrongful confinement and of causing criminal proceedings to be instituted against a person without just or lawful ground. *E.* was convicted of giving false evidence with intent to procure conviction of the same offence as *A.* intended. It was urged that the joint trial of *A.* and *E.* was illegal:

Held, that the joint trial of *A.* and *E.* was not illegal inasmuch as

(*a*) section 239, Criminal Procedure Code, was distinctly applicable and, in the circumstances of the case, the joint trial was not only legal but was demanded in the interest of public time and public convenience;

(*b*) there was one sustained and continuous plot for screening the real offenders in the robbery and of exposing an innocent man to a false charge with a view that the accused or some of them might participate in the stolen property; to secure this end various means had to be adopted, one of the means, a mere incident in the whole transaction, being the giving of false evidence in the prosecution of *F.*;

(*c*) the accusation against all the accused was that they carried out a single scheme by successive acts done at intervals, but there was complete unity of project and the whole

Criminal Procedure Code—contd.

series of acts were so linked together by one motive and design as to constitute one transaction within the meaning of section 239. EMPEROR *v.* GANESH NARAYAN DIKSHIT, 14 BOM. L. R. 972; 13 CR. L. J. 833 **705**

——— ——— ——— **ss. 249, 403, 437**

—Case challaned by Forest Department—Proceeding stopped by Magistrate, effect of—Further inquiry ordered by District Magistrate—Forests Act (VII of 1878), s. 32.

The Forest Department challaned a case of an offence punishable under section 32 of the Forests Act. The maximum term of imprisonment prescribed for this offence is six months. Acting under section 249, Criminal Procedure Code, the trying Magistrate stopped the proceedings. The District Magistrate, purporting to act under section 437, Criminal Procedure Code, set aside the Magistrate's order:

Held, (1) that the order of the District Magistrate was *ultra vires* as section 437 did not apply to the case:

(2) that the order under section 249 would not bar further proceedings in accordance with law. ACHHRU *v.* EMPEROR, 13 CR. L. J. 860: 8 P. W. R. 1913 CR. **796**

——— ——— ——— ——— **s. 250** — Complaint — Information laid by Police Officer—Police report—Compensation **64**

——— ——— ——— **ss. 256, 257, 526**

—Transfer application to superior Magistrate—Duty of Magistrate to adjourn—Accused given opportunity to cross-examine prosecution witnesses or cite defence witnesses—Duty to give another opportunity.

There is no duty cast on a Magistrate to adjourn a case because an application is being made to a superior Magistrate for transfer; section 526, Criminal Procedure Code, confines that duty to cases where application is made to the High Court.

Once the requirements of section 256 or 257 have been complied with and the accused refuses to state that he wishes to cross-examine witnesses or cite defence witnesses, there is no provision requiring the Magistrate to offer an opportunity to the accused to have his witnesses summoned. VAITHINATHA IYER *v.* KUPPU THEVAN, (1912) M. W. N. 1121; 13 CR. L. J. 823 **572**

——— ——— ——— ——— **s. 257** **572**

——— ——— ——— ——— **s. 260** *—Practice—Summary trial—Cattle-lifting.*

Cattle-lifting is a serious offence and should not be tried summarily. EMPEROR *v.* ALLAHRAKHIO, 6 S. L. R. 101; 13 CR. L. J. 780 **412**

——— ——— ——— ——— **ss. 260, 439** *—Summary trial—Case involving question of title and documentary evidence—Revision—Power of High Court to set aside order of acquittal.*

In the exercise of its revisional powers, the High Court has power to reverse an order of acquittal and to direct that further inquiry be made or that the accused be re-tried or committed for trial.

But this revisional jurisdiction will be exercised sparingly and generally in those cases only where there is an error of law and procedure patent on the face of the judgment.

A case involving the decision of a question of title and the production of documentary evidence should not be tried summarily. EMPEROR *v.* TIRITHDAS, 6 S. L. R. 120; 13 CR. L. J. 771 **403**

Criminal Procedure Code—contd.

——— ——— ——— ——— **s. 263** *—Summary trial—Refusal by Magistrate to take evidence, if legal—Recording evidence not same as hearing evidence.*

Section 263 of the Criminal Procedure Code, does not excuse a Magistrate from *hearing* the evidence of all witnesses. It only excuses him from recording the evidence of any of the witnesses. Recording evidence is not the same as hearing evidence. In all criminal trials, if the accused denies the charge, the complainant and such witnesses as he may produce must be examined and the case must be decided upon the effect of their evidence. JABAR SAEIKH *v.* TOMIZ SHEIKH, 16 C. W. N. 984; 39 C. 931; 13 Cr. L. J. 759 **71**

——— ——— ——— ——— ——— **s. 304** *—Jury trial—Verdict of majority given as verdict of Jury—No dissent by any Juror—Discovery of mistake after some days—Power of Court to disturb verdict and order—Jurisdiction—Criminal cases—Interpretation of statutes—Practice—Reference to Full Bench—Punjab Courts Act (XVIII of 1884), s. 11.*

Jurisdiction in criminal case is not to be assumed, and in regard to matters for which the Legislature has made express provision, it must not be assumed in excess of the jurisdiction so conferred.

Courts in India cannot travel beyond the scope of section 304, Criminal Procedure Code.

The Court will not disturb a verdict openly given in Court, if it is satisfied that all the Jurors heard the words of the Foreman and expressed no dissent at the time.

The power of amendment of a verdict provided by section 304, Criminal Procedure Code, must be exercised before or immediately after the verdict is recorded and cannot be exercised after the Jurors have dispersed.

In a trial by Jury before a Judge of the Chief Court the Foreman publicly announced the verdict of "not guilty" as the unanimous verdict of the Jury, in the hearing of all the Jurors and without dissent on the part of any of them. The verdict was recorded and the prisoner was acquitted. From information received some days afterwards, the trying Judge was led to believe that, as a matter of fact, the Jurors were not agreed as regards the verdict. The Judge summoned the Foreman of the Jury and examined him on oath.

He deposed that the verdict given as the unanimous verdict was really the verdict of a majority of the Jurors and was given as the unanimous verdict owing to a misunderstanding that the opinion of the majority was binding upon all the Jurors.

The Judge thereupon took action under section 11 of the Punjab Courts Act and referred for the opinion of the Full Bench the question as to whether any proceedings should be taken in the matter and if so, what course should be adopted:—

Held, (1) that the Full Bench had jurisdiction to give the opinion as the question arose before a Judge, sitting as a Single Bench, in a judicial proceeding;

(2) that the Court had no jurisdiction, in consequence of the Foreman's subsequent statement, to set aside a verdict given in open Court and in the hearing of all the Jurors and the formal order of acquittal, that followed thereupon. EMPEROR *v.* BRIAN BONHAM CARTER, 13 CR. L. J. 815; 9 P. W. R. 1913 CR. **559**

Criminal Procedure Code—contd.

——— ——— ——— ——— **ss. 337 (3), 209, 215, 437**—*Pardon—Approver—Discharge of co-accused by Magistrate—Pardon withdrawn—Approver committed to Sessions—Power of High Court to direct further inquiry against discharged accused—Joint trial of approver and discharged persons—Quashing of commitment.*

Five persons were originally sent up for trial on a charge of dacoity. At the beginning of the Magisterial inquiry, conditional pardon was granted to one of the accused and the case proceeded against the remaining four accused. When the approver was examined as witness, he denied all knowledge of the dacoity and in the absence of material evidence against the four accused, they were discharged by the Magistrate under section 209, Criminal Procedure Code. Subsequently, the pardon tendered to the approver was withdrawn and he was committed for dacoity to the Court of Session.

The material piece of evidence against the approver was his confessional statement incriminating both himself and the other accused. The Sessions Judge referred the case to the High Court for quashing the commitment of the approver and for an order directing re-trial of the discharged accused *along with* the approver:

Held, (1) that the High Court had power, under section 437, Criminal Procedure Code, to direct that further inquiry should be held in the case of the discharged accused and that if that inquiry ended in the framing of the charge, the said accused should be committed to the Court of Session;

(2) that the provisions of sub-section 3 of section 337, Criminal Procedure Code, were fully carried out when they were applicable, namely, during the pendency of the Magisterial proceedings, and they did not constitute any bar against the High Court's ordering that, if the inquiry against the discharged persons ended in a commitment, they should be committed to be tried jointly with the approver;

(3) that even if the commitment of the approver were not quashed, the High Court could order the joint trial of the discharged accused with the approver by directing that the trial of the approver should be delayed till the Magistrate passed his final orders in the case of the discharged accused.

Sub-section 3 of section 337 contemplates only a case where there has been a commitment made by the Magistrate to the Court of Session or the High Court. It omits to consider the case where the Magistrate himself on his own responsibility discharges the accused person. The meaning of the sub-section is that the approver shall not be set at large until the judicial proceedings pending against the accused are finished. It is immaterial whether the proceedings are finished by a Magisterial order of discharge before a trial or by a Judge's order of acquittal after trial. In the case of the Magisterial discharge, the sub-section would be satisfied if the approver were detained in custody or on bail until the order of discharge was made, and the provisions of the sub-section would be inapplicable to any proceedings held thereafter. EMPEROR *v.* INTYA SALABATKHAN, 14 BOM. L. R. 897; 13 CR. L. J. 842 **714**

Criminal Procedure Code—contd.

——— ——— ——— **s. 346** **813**

——— ——— ——— **s. 347** should be read subject to s. 208 **813**

——— ——— ——— **s. 347** — Stop further proceedings **410**

——— ——— ——— **s. 349** **813**

——— ——— ——— **ss. 367, 424, 537**—*Judgment at variance with directions given by law—Defect not cured.*

Section 537 of the Code of Criminal Procedure does not cure the defects in a judgment which is clearly at variance with the directions given in sections 367 and 424 of the Code and which materially prejudices the accused in the trial of their appeal. KANHAI SINGH *v.* EMPEROR, 10 A. L. J. 435; 13 CR. L. J. 698 **795**

——— ——— ——— **s. 397** — Sentence of imprisonment on person imprisoned for default to furnish security **785**

——— ——— ——— **s. 403** **796**

——— ——— ——— **ss. 403 (4), 213**—*Trial of several accused by Magistrate first class—Some acquitted, others convicted—Appeal by convicts to Sessions Judge—Power of Sessions Judge to direct commitment of acquitted persons for murder on same facts—Commitment under direction—Penal Code (Act XLV of 1860), ss. 148, 149, 302, 304, part 2, 325, 326—Unlawful assembly—Object—Death of one person by injuries caused—Murder—Death by rash act.*

Certain persons were tried by a Magistrate, 1st class, for offences under sections 325, 326, 148, Penal Code. They were all convicted of the offences except *A.* and *B.*, who were acquitted. On appeal by the convicts, the Sessions Judge quashed the convictions and directed that all accused persons, including *A.* and *B.*, be committed for trial to the Court of Session as the offence committed was *prima facie* one of murder. In pursuance of that order, the accused were committed to the Court of Session and convicted of an offence under section 302:

Held, (1) that the subsequent trial of *A.* and *B.* for the offence of murder was justified under section 403 (4), Criminal Procedure Code;

(2) that the order of the Sessions Judge directing their trial was legal;

(3) that the commitment of *A.* and *B.* to the Court of Session was valid.

Certain persons who were reaping their crops were assaulted by the accused with sharp edged weapons and heavy sticks, the object being to prevent the latter by force from carrying away the produce.

As the result of the injuries inflicted on the attacked party, one of them died. It was not proved that the intention of the accused was to cause the death of any person or to inflict such bodily injuries as were likely to result in death:

Held, (*a*) that the accused constituted an unlawful assembly;

(*b*) that the offence of causing fatal injury was such as the members of the assembly knew to be likely to be committed in prosecution of their common object;

Criminal Procedure Code—contd.

(c) that each of the accused was, therefore, guilty of an offence under section 304, part 2, read with section 149, Indian Peal Code;

(d) that none of the accused was guilty of an offence under section 302. WADHAWA SINGH v. EMPEROR, 7 P. R. 1912 Cr.; 39 P. W. R. 1912 Cr. 243 P. L. R. 1912; 13 Cr. L. J. 742 **54**

——— ——— ——— **s. 411** **531**

——— ——— ——— **s. 413** **813**

——— ——— ——— **ss. 417, 423 (a)**—*Riot case—Duty of Police to ascertain guilty party—Duty of Court—Re-trial of appeal, power of High Court to direct.*

It is not the duty of the Police to determine in a riot case "which of two mutually destructive stories is the correct one." The Police are not called upon, nor is it within their province, to determine in a case of this kind which of the two parties concerned was in the wrong. It is for the Courts to determine upon the evidence on the record which of the two parties has been guilty of the offence charged against them, and none-the-less so because the record is lengthy and the case complicated and difficult.

The fact that a Sessions Judge obviously failed to apply his mind to the determination of questions before him, and declined to adjudicate therein himself, because the Police did not attempt to adjudicate as to the guilt or innocence of persons implicated, is an indication of a complete misconception of the respective duties of the Courts and the Police, and the High Court will in such a case, under the wide powers conferred upon it by section 423 *(a)* of the Code of Criminal Procedure, direct a lower Appellate Court to re-try an appeal which was before it for determination. EMPEROR v. CHANDA SINGH, 13 Cr. L. J. 737; 7 P. L. R. 1913; 43 P. W. R. 1912 Cr. 2 P. R. 1913 Cr. **49**

——— ——— ——— **s. 423A** **49**

——— ——— ——— **s. 424** **795**

——— ——— ——— **s. 435**—Inferior Criminal Court **717**

——— ——— ——— **s. 435, 437,**—*Further inquiry—Magistrate's power not absolute.*

A Magistrate has not an absolute right to order further inquiry in any case under section 437 of the Criminal Procedure Code. If he finds no illegality, impropriety or irregularity and nothing incorrect in the proceeding of the Court below, he is not empowered to set aside an order of discharge upon other grounds, or upon no ground at all. PRANKHANG v. EMPEROR, 16 C. W. N. 1078; 13 Cr. L. J. 764 **76**

——— ——— ——— **s. 437**—Power of High Court to direct further inquiry against accused **714**

——— ——— ——— **s. 437** — Proceedings stopped by Magistrate—Further inquiry ordered by District Magistrate **796**

——— ——— ——— **s. 439**—Interference on the ground of want of corroboration **79**

——— ——— ——— **s. 439**—Power to set aside acquittal **403**

——— ——— ——— **s. 439**—Revision of proceeding under s. 145 **65**

Criminal Procedure Code—contd.

——— ——— ——— **s. 476** — *Action under section—When may be taken.*

To justify action under section 476, it will suffice if it is taken with reasonable promptitude, *i e.*, so shortly after the conclusion of the proceedings as to make it practically the continuation of the same proceeding. PICHAI ROWTHAN v. EMPEROR, (1912) M. W. N. 1203; 13 CR. L. J. 825 **569**

——— ——— ——— **s. 476** — *Offence committed by person not party or witness in case—Jurisdiction to order prosecution—Stay of criminal proceedings—Pendency of civil appeal.*

It is not necessary under section 476, Criminal Procedure Code, that the person proceeded against should be a party or a witness in the proceedings before the Court ordering his prosecution. All that is required is that such an offence, as is there referred to, should be either committed before the Court or brought under its notice in the course of judicial proceedings.

The mere pendency of a civil appeal is not in itself sufficient ground for staying criminal proceedings, under section 476, Criminal Procedure Code. KESHAV NARAYAN MANOLKAR, *In re*, 14 BOM. L. R. 968; 13 CR. L. J. 848 **720**

——— ——— ——— **s. 526** **572**

——— ——— ——— **s. 526**—*Stay of proceedings—Rule issued by High Court—Telegram sent by High Court Vakil to Court below—Disregard of telegram—Bias against accused—Transfer of case.*

A Rule for the transfer of a case was issued by the High Court upon the application of an accused person staying further proceedings before a Magistrate and the direction given by the High Court was intimated to the Magistrate by a telegram sent by the Vakil who obtained the Rule, but the Magistrate proceeded with the case disregarding the telegram;

Held, that the Magistrate acted injudiciously in going on with the case, that the conduct of the Magistrate indicated clearly the bent of his mind and his bias against the accused, and that the case ought to be transferred to another Court. HEM CHANDRA KAR v. MATHUR SANTHAL, 16 C. W. N. 1031; 13 Cr. L. J. 766 **78**

——— ——— ——— **s. 526**—*Application for transfer—Materials to be considered.*

What the Court has to consider on an application for transfer is not merely the question whether there has been a real bias in the mind of the presiding Magistrate against the accused but also the further question whether incidents may not have happened which, though they may be susceptible of explanation and may have happened without any real bias in the mind of the Magistrate, are nevertheless such as are calculated to create in the mind of the accused a reasonable apprehension that he may not have a fair and impartial trial.

Where a District Magistrate cancelled the license for arms held by an accused and refused to grant an interview to him:

Held, that the circumstances were sufficient grounds for transfer of the case from the District. RAM KISHAN DAS v. EMPEROR, 10 A. L. J. 357; 13 CR. L. J. 823; 35 A. 5 **567**

Criminal Procedure Code—concld.

——— ——— ——— ——— **s. 526 (8)**—*Transfer—Magistrate's duty—Full opportunity not given—Proceedings void—Sufficiency or insufficiency of reasons by whom to be decided—Proceedings under section 110, Criminal Procedure Code, whether can be transferred.*

After an application for transfer has been made under section 526 (8), Criminal Procedure Code, a Magistrate is competent to hear and record all the evidence for the prosecution, if he considers that the grounds set forth as reasons for the transfer are insufficient and unlikely to be acceded to by a superior Court. But when the evidence for the prosecution is completed, it is the bounden duty of the Magistrate, irrespective of the sufficiency or insufficiency of the grounds set forth for transfer, to allow a fair and reasonable opportunity to the accused to apply for a transfer before calling upon him for his defence.

It is for the High Court, and not for a Magistrate to decide, whether the grounds set forth for a transfer are good or not.

Unless full opportunity is given to an accused who has made an application for a postponement of the case in order to enable him to apply for transfer before he is called upon for his defence, the proceedings are void.

This was a case under section 110, Criminal Procedure Code, and the High Court directed it to be transferred from the District Magistrate to another Magistrate. BAGGU MAL *v.* EMPEROR, 13 Cr. L. J. 746; 254 P. L. R. 1912; 42 P. W. R. 1912 CR.; 1 P. R. 1913 Cr. **58**

——— ——— ——— **s. 528**—*Order of transfer made by Sub-Divisional Magistrate—Appeal to District Magistrate not maintainable—Jurisdiction.*

A District Magistrate cannot set aside an order of transfer passed by a Sub-Divisional Magistrate. ILTAF HUSAIN *v.* EMPEROR, 13 CR. L. J. 782 **414**

——— ——— ——— **s. 532** **570**

——— ——— ——— **s. 537** **65, 570**

——— ——— ——— **s. 537**—Defective judgment **795**

Criminal Trespass. *See* PENAL CODE, ss. 441, 447, 448.

Culpable Homicide. *See* PENAL CODE, ss. 299 TO 304.

Custom—Customary law considerations—Mutation in transfer cases **979**

——— ———Daughter—Maintenance **903**

——— ———Kolis—Marriage of divorced woman without receipt of pecuniary benefit **949**

——— ———Muhammadan family adopting Hindu worship **758**

——— ———*Proprietary body—Settlers acquiring right to sites by adverse possession—Right to collect due.*

The fact that defendants have, by adverse possession, become owners of the sites occupied by them and by their *kamins* in the area of plaintiff's *patti*, does not lead to the inference that the defendants thereby became jointly entitled with plaintiffs to the

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dues and cesses leviable within that area. The presumption is that the right to collect these dues and cesses rested in the proprietary body of the *patti*. KAMIRA *v.* LALU, 110 P. R. 1912; 30 P. L. R. 1913 **907**

——— ——— of transferrability. *See* LANDLORD AND TENANT.

——— ———**Adoption** *of collateral—Jats of the Gujranwala District—Repudiation of adoption—Age.*

Among *Jats* of the Gujranwala District, a sonless proprietor may validly adopt any one of the descendants of a common ancestor, residing in the village whom he prefers.

When an adoption has once been completed, it cannot be set aside or repudiated by the adoptive father.

Among *Jats* and kindred tribes in the Punjab, a man may appoint an heir from the descendants of a common ancestor; he need not necessarily appoint the nearest collateral.

The age at which an adoption takes place is immaterial. SANT SINGH *v.* MULA, 23 P. L. R. 1913 **350**

——— ———**Alienation** *by father of ancestral property—Necessity—Burden of proof—"Just debt"—Privy Council Appeal—Concurrent findings—Practice.*

In the case of an alienation by a father, governed by Customary Law, the *onus* of proving necessity for the consideration rests upon the vendee.

An agriculturist male proprietor of lands may alienate ancestral lands as against the reversioners for valid necessity such as a "just debt". A "just debt" means a debt which is actually due and is not immoral, illegal, or opposed to public policy, and has not been contracted as an act of reckless extravagance, or of wanton waste, or with the intention of destroying the interests of the reversioners.

A concurrent finding of fact is conclusive on the point. KIRPAL SINGH *v.* BALWANT SINGH, 13 M. L. T. 5; 11 A. L. J. 1; 9 P. W. R. 1913; (1913) M. W. N. 58; 17 C. L. J. 137; 15 BOM. L. R. 79; 17 C. W. N. 302 28 P. L. R. 1913; 24 M. L. J. 318 **656 P. C.**

——— ——— ——— De facto *guardian mortgaging minor nephew's property—Suit for possession—Right of nephew and sons of mortgagor to resist claim on the ground of no necessity—Joint and several liability—Necessity—Ground of attack in plaint but not pressed in appeal—Part of consideration for mortgage not for necessity—Incomplete mortgage—Incompetency of mortgagee to get possession.*

In a suit for possession as mortgagee against the sons of an agriculturist, before the mortgagee can succeed, he must show that the mortgage was with consideration and for necessity.

A mortgage by the guardian of a minor is not valid unless it is proved that the minor's property was mortgaged for his benefit.

Where a minor's uncles undertake to pay his father's just debt by including it in their own bonds, and afterwards mortgage their share as well as that of the minor in the ancestral land, in consideration of that bond debt, the mortgage cannot be enforced so far as the minor's share is concerned,

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as such an alienation cannot be considered for his benefit.

Where a portion of the consideration for a mortgage by a male proprietor of his ancestral holding is not for necessity, the mortgage is incomplete so far as his reversioners are concerned and on his death the mortgagee cannot maintain a suit for possession of the property on the strength of that mortgage against the reversioners.

A ground of attack, mentioned in the plaint in respect of which no issue was drawn by the first Court and which was not repeated either in the written grounds of 1st or 2nd appeal, cannot be raised at the time of argument before the Chief Court. HIRA SINGH *v.* LAHORI MAL, 174 P. W. R. 1912: 217 P. L. R. 1912 **247**

——— **Alienation**—*Necessity—Interest in advance—Compound interest—Money required for pre-emption decree—Small sum of money paid as make-weight—Decree passed on book account · Acquiescene —Estoppel—Market-value of land.*

Where the principal mortgage-money is shown to have been borrowed for legal necessity, the interest added in advance as well as the compound interest charged under the terms of the mortgage-deed cannot be disallowed. These constitute a valid charge on the mortgaged property.

Such an alienation cannot always be regarded as unnecessary merely because the mortgagor has agreed to pay heavy interest thereon.

Interest at 12 per cent. per annum is not excessive.

If interest is not paid when due, there is nothing illegal in charging compound interest.

All that an alienee has to do is to satisfy himself that the alienor wants the money for a necessary purpose but he is not bound to go any further.

It is a valid necessity to raise money for paying in amount fixed for a decree for pre-emption of land.

Where a transaction is in the main for necessity, it cannot be upset merely because the alienor receives as make-weight a comparatively small sum of money even though no particular necessity for that sum may be shown.

Where a decree has been passed on a book account, apparently for ordinary expenses and interest, strict proof of necessity is not required, particularly where the record of the case has been destroyed.

One hundred times the *jama* of a land is its fair price.

Where, leaving out of consideration the items overcharged by a vendee, the land has still fetched the price at this rate, the sale is not liable to be disturbed for want of full necessity.

The mere fact of the sons cultivating a part of the alienated land as tenants under the alienee during their father's life-time does not amount to an estoppel, but long delay in suing coupled with several previous unsuccessful attempts of their father to get the sale set aside raises the presumption that the sale was for consideration and necessity. YAQUB KHAN *v.* RAGHPAT RAI, 165 P. W. R. 1912; 192 P. L. R. 1912; **235**

——— *ancestral holding for liq* ... *ity—Sale of whole* ... *purchasing a mare to a* ... *g mortgage money and* ... *some canal.* *some squares of land on*

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The sale of the whole of *chahi* ancestral land, which, owing to its insufficiency to maintain the holders and their families, was under mortgage, in order to pay the mortgage debt, and to purchase a mare by means of which a tenancy of two squares of land on the Jhelum Canal was acquired, is justifiable and the transaction is not open to question at the instance of the sons and reversioners of the holders on the ground of absence of necessity. NABI BAKHSH *v.* BHAGAT SINGH, 176 P. W. R. 1912; 214 P. L. R. 1912 **251**

——— **Alienation**—*Succession—Right of daughter of uncle of last male owner to contest alienation by his widow · Muhammadan Law*—Gujars *of Kharian, District Gujrat.*

Among *Gujars* of Kharian, in the Gujrat District, a daughter of the uncle of the last male owner is not entitled by custom, in the absence of a proof to the contrary, to inherit property left by him, nor is she regarded as a reversionary heir possessing a right of control in respect of alienations made by his widow. She has also no such right under the Muhammadan Law.

If such a right of inheritance by custom, and consequently a right of control in respect of alienations by widows, is claimed, it must be proved by the party asserting it. NIAMAT ULLAH *v.* AISHA BIBI, 90 P. R. 1912; 250 P. L. R. 1912; 262 P. W. R. 1912 **21**

——— **Hindu Law**—*Alienation—Gift by widow of Sarin* Khatri *of Lahore of her husband's estate in favour of his daughter—Incompetency of reversioners to challenge gift.*

Among Sarin *Khatris* of Nayar *got* of Lahore emigrated from Kunjah in the Gujrat District, no special custom, contrary to Hindu Law, exists by which collaterals exclude daughters. All Sarin *Khatris* of Lahore City follow Hindu Law in matters of succession.

As by Hindu Law a daughter is an heir, a gift by a widow of a Sarin *Khatri* of Lahore of her husband's separate moveable and immoveable property in favour of his daughter, cannot be challenged by his collaterals, as it simply amounts to an acceleration of succession. KARORI MAL *v.* JAWALA DEVI, 258 P. W. R. 1912 **510**

——— *Non-agricultural* Banias *of town—Adoption of sister's son, validity of—Occupancy-holding—Adopted son, whether succeeds—Punjab Tenancy Act (XVI of* 1887*), s.* 59.

Non-agricultural *Banias*, who reside in a town, are not governed by the Customary Law, and amongst them the adoption of a sister's son is valid, and the adopted son succeeds to an occupancy tenancy. BRIJ INDAR SINGH *v.* BANSI LAL, 88 P. R. 1912; 218 P. L. R. 1912; 230 P. W. R. 1912 **36**

——— **Inheritance.** *See* CUSTOM—SUCCESSION.

——— **Muhammadan Law**—*Family custom—Succession—Right of representation—Daughter of daughter who died during life-time of her mother*—Kanjars *of Jagadhari town, Ambala District.*

Kanjars of Jagadhri in the Ambala District are not governed by Agricultural Customary Law, nor do

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they follow strict Muhammadan Law in matters of succession. The right of representation exists among these people. SAHIB JAN v. AMIRAN, 196 P. L. R. 1912; 244 P. W. R. 1912 **214**

——— —**Re-marriage**—Kumbis of Berar **133**

——— —**Succession**—*Ancestral property*—Onus probandi.

The burden of proving that the entire estate left by a land owner is ancestral rests on the person who asserts that it is. The fact should be proved conclusively.

If the property in the possession of an adopted son is not ancestral, the collaterals of his adoptive father cannot succeed to the property, although the adoption is invalid by custom. ALA SINGH v. KHARK SINGH, 253 P. W. R. 1912; 257 P. L. R. 1912 **392**

——— ——— ——— ——— Arains *of Tahsil Sharkpur, District Lahore—Self-acquired property of nephew—Nephew's daughter preferred to his paternal uncle.*

Among *Arains* of Tahsil Sharkpur, District Lahore, a paternal uncle has no right to the self-acquired property of his nephew in preference to that nephew's daughter. ZAINAB BIBI v. BADAR-UD-DIN, 270 P. W. R. 1912; 20 P. L. R. 1913 **187**

——— ——— ———Pathans *of* Chhach, *District Attock—Daughters preferred to collaterals of 4th degree.*

Among *Pathans* of the *Chhach* tract of the Attock District, the collaterals in the 4th degree do not succeed in preference to daughters. AHMADJI v. SHAHANCHI, 12 P. L. R. 1913 **378**

——— ——— ——— ———Right of daughter—*Gujjars* of Kharian **21**

——— ——— ——— *Widow — Daughter — Unmarried*—Khattars *of Fatehjang—Maintenance, form of.*

Among *Khattars* of Fatehjang, Attock District, there is no custom by which a widow or an unmarried daughter takes a share of inheritance with the sons of the propositus.

In such a case, a widow or an unmarried daughter is only entitled to maintenance which may be awarded by setting aside certain land for her. ROSHNAI KHANAM v. NAWAB KHAN, 112 P. R. 1912; 32 P. L. R. 1913 **903**

——— ———**Widow**—Maintenance **903**

——— ———**Vatandar Joshi**—Suit to recover fees paid to usurper—Liability of *yajman*—Action against person procuring breach of contract **138**

Customary dues—Right to collect **907**

Damages, award of—No prayer in plaint—Contract of sale **497**

——— ———Fire insurance—Liability of company **755**

——— ———Malicious prosecution—Reasonable and probable cause **316, 879**

——— ———Minor's money—Investment—Trust **597**

——— ——— for trespass—Limitation **605**

Damages—concld.

——— ———Trespass on immoveable property **740**

——— ———*Cause of action—Contract to transfer negotiable instrument—Failure to perform—Measure of damages—Unstamped promissory-note executed on settlement of accounts—Admissibility in evidence—Promissory-note for previous debt dishonoured—Revival of debt.*

A, as the agent of *B*, took, in the name of a third party, a negotiable promissory-note from *C.*, a debtor of *B.*, for the sum due. On settlement of accounts between *A.* and *B*, in May 1905, it was agreed that *A.* should take possession of, and deliver to *B.*, the said promissory-note duly endorsed. *A.* failed to carry out this covenant and hence *B.* instituted a suit in December 1906 to recover from *A.* the amount of the note. At the settlement of issues, *A.* offered to hand over the note:

Held, (1) that it could not be said that *B.* had not sustained any damage. *A.* by taking the note in the name of a third party and allowing it to remain in his possession and neglecting to hand it over to *B.*, put it out of *B.*'s power to sue the debtor on the original consideration. *A.*, having more than reasonable time within which to perform his obligation under the covenant, his offer of performance of the obligation after the institution of the suit, could not affect *B.*'s right of action;

(2) that it was not necessary for *B.* to prove that *C.* had become insolvent or that *B.* would be unable to realise his debt if he sued *C.*;

(3) that *B.* was entitled to recover from *A.* the amount for which *C.* had executed the debt.

A promissory-note, executed in lieu of a previous debt, is only a conditional satisfaction of the debt. If the creditor retains the note in his own hands and it is dishonoured, the previous debt revives. But if the note has been endorsed to a third person, no suit can lie on the original debt.

Where on settlement of accounts between principal and agent, a promissory-note is executed, which being unstamped is inadmissible in evidence, nothing can be recovered on the settlement itself, as there is no completed obligation created by way of settlement except by the promissory-note. SUBRAMANIAN CHETTY v. MUTHIA CHETTY, 35 M. 639 **721**

Dancing girl—Power to adopt **422**

Dasi putra **276**

Debtor and Creditor—Advance to broker on pro-note **824**

Debuttar property—Letters of Administration **155**

Declaration of right—Wrong entry in settlement record—Subsequent correction of entry—Cause of action **675**

Declaratory decree—Fraud—Discretion **602**

——— ———**suit.** *See* SPECIFIC RELIEF ACT, s. 42.

——— ——— ——— by reversioner—Conditional decree **508**

——— ——— ——— for declaration that plaintiff not tenure-holder but *raiyat* **917, 919, 921**

——— ——— ———Sale of equity of redemption—Limitation **864**

Declaratory suit -concld.

——— ——— ———Will by widow—Suit by reversioner to set it aside—Cause of action **586**

——— ———*Relief granted different from that asked for in plaint—Court of second appeal, power of, to interfere with discretion of lower Courts.*

Where the two Courts below exercised their discretion in granting the plaintiff a declaration somewhat different from that asked for in the plaint, without any formal amendment of the plaint, the Court of second appeal refused to interfere in the absence of good reasons justifying interference. MUHAMMAD SARFARAZ BEGAM *v.* MUNNA **315**

——— ——— ———*Petition by Hindu widow for transfer of* patta *to the name of another—Suit to declare such transfer not binding on reversioner not maintainable.*

A petition to the Revenue Authorities by a Hindu widow for transfer of *patta* in respect of her husband's lands to another person's name would not, by itself, furnish a cause of action to a reversioner for a declaration that his reversionary right cannot be affected by the widow's conduct, as such petition does not amount to the assertion of a right to the property sought to be affected. BAGGU SIMMANNA *v.* ITRAGULU CHINNAYA **375**

——— ——— ——— *Suit against decree-holder and judgment-debtor that attached property is not liable to attachment—Judgment-debtor also made defendant but not appearing, disputing or admitting plaintiff's claim—Jurisdiction—Value of Suit—Value of property.*

In execution of his decree, a decree-holder had the property in dispute attached as that of his judgment-debtor. The plaintiff filed an objection against the attachment but without success. Thereupon he brought this regular suit praying for a declaration that the property was his and not of the judgment-debtor. The decree-holder as well as the judgment-debtor were both impleaded as defendants but the latter did not appear and, therefore, so far as he was concerned, there was neither admission nor denial of the plaintiff's claim:

Held, that, as the judgment-debtor was made a party to the suit, the jurisdiction value of the suit was the value of the property, it being quite immaterial that the judgment-debtor did not appear and dispute or admit the claim. KALLU MAL *v.* SHAMS-UD-DIN, 269 P. W. R. 1912; 14 P. L. R. 1913 **196**

Decree. *See* EX PARTE DECREE; MORTGAGE-DECREE.

——— ———, alteration of—Acting upon altered decree for number of years, effect of—Mortgage decree providing for interest up to date of grace but silent as to subsequent interest—Petition by judgment-debtors for time agreeing to pay subsequent interest and praying for sanction—Grant of time by Court—Whether order sanctioned agreement or not **936**

——— ———, amendment of—Costs assessed on wrong principle **418**

——— ———, assignment of. *See* ASSIGNMENT OF DECREE.

———, *assignment of—Assignment by agent acting under power-of-attorney—Absence of provision in power to transfer decree—Power of assignee to execute decree—Contract Act (IX of 1872), s. 188.*

Decree—concld.

A power-of-attorney should be construed strictly. Such a construction does not disable an attorney from exercising all powers incidental to the execution of powers expressly conferred on him or from exercising powers which are necessarily implied and which may be termed 'medium' powers.

This is the principle laid down in section 188 of the Indian Contract Act, 1872.

The power to transfer a decree for a consideration is not incidental to any power expressly conferred in a power-of-attorney to execute the decree.

Where a power-of-attorney contained the following clause: "to execute all decrees in the name of my father or in any other name on my behalf or otherwise to attach and realize all monies due thereon:"

Held, that the agent acting under the power could not assign the decree that he was authorized to execute. PALANIAPPA CHETTIAR *v.* ARUNACHELLAM CHETTIAR, 12 M. L. T. 528; 23 M. L. J. 595; (1912) M. W. N. 1204 **139**

——— ———Conditional decree—Court's power to grant—Admissibility of unregistered document for collateral purposes **987**

——— ———, effect of—Father impleaded as party to suit—Effect of decree on son **734**

——— ———, form of—Legatee suing for interest on money bequeathed **754**

——— ———Joint decree—Rights *inter se* of plaintiff not adjudicated **205**

——— ———Suit by reversioner—Conditional decree **508**

Deed, construction of. *See* CONSTRUCTION OF DEED.

Defendant's right to prove his case when plaintiff not giving evidence **87**

Dekkhan Agriculturists' Relief Act (XVII of 1879), s. 2—*Agriculturist—Court of Wards—Suit on behalf of ward—Status of ward—Maintenance allowance, effect of—Rich agriculturist—Bombay Court of Wards Act (I of 1905), ss. 2, 4, 25, 32.*

A suit brought by the Court of Wards on behalf of a ward, who is an agriculturist, is governed by the provisions of the Dekkhan Agriculturists' Relief Act.

In such a suit, the real plaintiff is the ward and it is his status which has to be considered.

A temporary allowance made to a ward for the purposes of maintenance is not conclusive of the ward's status. To ascertain what that status is, regard must be had to the character of the ward's property from which this allowance is derived.

The Dekkhan Agriculturists' Relief Act makes no distinction based on the comparative riches or poverty of the person whose status is being investigated. A rich agriculturist is just as much the agriculturist under the Act as a petty agriculturist. MANOHAR RAMCHANDRA HINGE *v.* COLLECTOR OF NASIK, 14 BOM. L. R. 943; 37 B. 97 **670**

——— ——— ——— **ss. 47, 48** **87**

Deposit of Insurance policy by way of security **627**

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Discretion. See DECLARATORY SUIT; SPECIFIC RELIEF ACT, s. 42.

——— ——Appointment of Official Liquidator 853

——— ——— **of Court.** See U. P. COURT OF WARDS ACT.

——— ———*Declaratory decree—Fraud.*

The Court will not go out of its way to help a plaintiff, who got up a number of fraudulent deeds to cheat creditors, to obtain a declaration that some portion of the alleged consideration actually passed between the parties to the fraud. LAKSHMINARAYANA NAIDU *v.* SOMASUNDARAM PILLAI, 12 M. L. T. 534 602

Dismissal in default—Restoration on review 661

District Registrar is not inferior Criminal Court 717

Divorce Act (IV of 1869), s. 3—*Jurisdiction—Divorce suits—Resident at Aden—District Judge—Aden Courts Act (II of 1864), s. 3.*

The Resident at Aden is not a 'District Judge' as defined in section 3 of the Divorce Act, as he has not been appointed a "Commissioner of a Division."

Consequently, the Resident has no juristion to try and pass decrees in cases under the Divorce Act. A. MOUNA *v.* J. E. MOUNA, 14 BOM. L. R 872; 37 B. 57 215

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——— ——— ——, *execution of—Executant executing document as guardian of another—Liability of person for whom guardian acts—Recital in document as to guardianship, whether necessary.*

Where a document is in fact executed by a person for himself and as guardian of another, it is not necessary, to render the latter liable, that the executant should describe himself as the guardian of the person who is sought to be bound by it. GOVINDA MUDELEY *v.* MUTHUSAWMY PILLAY 169

Dower—Muhammadan widow in possession of property in lieu of dower—Right of husband's heir to oust her 81

Drunkenness. *See* PENAL CODE, s. 85.

Easement. *See* EASEMENTS ACT 22

——— ———*Easement of necessity, what is—Grant of part of land by owner—Easements implied in favour of part granted—No reservation by implication in favour of grantor except in case of easement of necessity.*

An easement of necessity is an easement which is not merely necessary for the reasonable enjoyment of the dominant tenement, but one without which that tenement cannot be used at all.

Where an owner of land grants part of the land and retains other parts himself, all easements necessary for reasonable enjoyment are usually implied in favour of the part so granted, but such easements are not raised by implication in favour of the part retained, unless they are easements of necessity. Or, in other words, there is ordinarily no reservation by implication in favour of the grantor except in the case of an easement of necessity. C. H. CROWDY *v.* L. O'REILLY, 16 C. L. J. 417 966

Easements Act (V of 1882), s. 15—*Claim for title over land in possession of another—Evidence of ownership—Right negatived by evidence Right to easement—Whether can be declared on proof thereof.*

The words 'as an easement' in section 15 of the Indian Easements Act do not mean that the enjoyment should be in the assertion of claim of an easement. Illustration (*b*) to that section shows that the expression 'as an easement' was introduced in order to show that unity of title or possession during the period of 20 years, or a portion thereof, makes the possession useless to create a right of easement.

The claimant of a right of easement need not necessarily prove that he asserted, during his enjoyment, only a limited right of easement as opposed to ownership. He need only prove that the user was for the beneficial enjoyment of another land. The mere claim of the higher right of ownership would not, on failure to prove the same, prevent a person from acquiring the lesser right of easement, provided he can show that he asserted certain rights of enjoyment over the land in question for the benefit of another land belonging to him. KONDA REDDI *v.* RAMASWAMI REDDI 112

——— ——— ——— **s. 15**—*Easement—Prescriptive right, acquisition of—Right of way—Old way used for 20 years and then abandoned—New way not used for 20 years.*

The fifth paragraph of section 15 of the Easements Act, which applies both to continuous and discontinuous easements, seems to render it impossible to acquire a statutory prescriptive title to an easement unless and until the claim thereto has been contested in a suit.

A. enjoyed for more than 20 years a right of way over *B.*'s land through a particular passage. About 16 or 17 years ago, *A.* abandoned the old passage and began to use a new passage. The deviation was not due to any building erected by *B.* but was made by *A.* of his own accord.

B. sued *A.* for a perpetual injunction restraining *A.* from passing along *B.*'s land and from obstructing *B.* in the building of a wall across the land.

A. pleaded that he had acquired a presciptive right of way:

Held, that *A.* had no right of way,—

(*a*) across the old passage as it was not used within two years next before the institution of the suit;

(*b*) across the new passage as it had not been used for 20 years.

SULTAN AHMAD *v.* WALLIULLAH, 10 A. L. J. 227 22

Ejectment—Tenant holding over after formal ejectment 464

——— ——— **suit**—Lessee ready to accept renewal on proper terms 180

Endorsement—Whether assignment of actionable claim 417

Endorser, liability of 951

Endowment. *See* RELIGIOUS ENDOWMENTS.

Enfranchisement. *See* INAM.

English Law—Drunkenness—Extortion 800

Equitable mortgage. *See* TRANSFER OF PROPERTY ACT, s. 59.

——— ———Assignment—After-acquired property—Covenant to re-place goods sold by other goods—Lien—License **31**

Estate, *manager of—Late production of accounts by—Whether evidence of dishonesty—Receiver.*

The late production of accounts and documents by the manager of an estate is not sufficient evidence of dishonest dealing with the estate to warrant the appointment of a Receiver.

Obiter:—The High Court will not deal with any material which was not before the original Court. NARAYANASAMI AIYAR *v.* JANAKI AMMAL, (1912) M. W. N. 904 **261**

Estoppel—Alienation by father—Sons cultivating portion of land **235**

——— ———Failure to raise question of incompetency of Court **684**

——— ———Inconsistent position in Court **513**

——— ———Possession of *mutwalli* also entitled to contingent beneficial remainder—Life-tenant obtaining possession from trustee **689**

——— ———Representation of females by males **758**

——— ———*Denial of mortgagee's right by representatives of mortgagors—Waqf property—Simple mortgage—Adverse possession against mortgagor, whether extinguishes mortgage security.*

Although the representatives of a mortgagor are estopped from denying the mortgagee's right, yet it is open to them as *mutawallis* to plead that the property was *waqf* and that the mortgage was, therefore, void.

After the execution of a simple mortgage, a trespasser ousted the mortgagor from the possession of the property:

Held, that such ouster did not constitute adverse possession against the mortgagee and did not extinguish the mortgage security. NANDAN SINGH *v.* JUMMAN, 10 A. L. J. 278; 34 A. 640 **632**

——— ———*Grant by Government—Suit for possession by grantee—Expression of intention not to claim land prior to grant—Whether amounts to estoppel—Fraud.*

A mere disclaimer by a person of his preferential right to acquire land, made to a rival applicant, will not estop him from suing to recover possession after it was actually granted to him by Government, in the absence of a deliberate fraud practised by him on Government or on the rival claimant.

A person, who, as adjoining owner, had a preferential right to the grant of a certain land by Government, expressed his intention not to claim that the land should be allotted to him:

Held, that such disclaimer at a time when he had no right to the land would not work as an estoppel unless he was guilty of the exercise of deliberate fraud on his rival or the Government. PERIATHAMBI GOWNDAN *v.* PERIYA GOWNDAN, 23 M. L. J. 593; 12 M. L. T. 539 **489**

——— ———*Vendor denying his title—Possession not permissive—Question of fact—Revision—Evidence Act (I of 1872), s. 115.*

Estoppel—concld.

That a certain person's possession is not permissive is a finding of fact and, consequently, cannot be questioned in revision.

A person selling a property is not estopped from denying the correctness of his title so far as the claim of a third person is concerned, but such a vendor is not to be trusted when he is playing the vendee false by supporting that claim. SHAM SINGH *v.* PREM SINGH, 260 P. W. R. 1912 **508**

Evidence. *See* ADMISSIBILITY.

——— ———Admissibility of judgment in civil suit between parties relating to same subject-matter in proceedings against Pleader—Whether conclusive proof **544**

——— ———Surrounding circumstances **152**

——— ———*Execution of mortgage-deed by father—Suit for sale against son—Circumstances under which it was executed—Oral evidence, admissibility of.*

A suit for sale on the basis of a mortgage-deed, executed by a Hindu father, was brought against the mortgagor's son. The deed was executed in lieu of a prior mortgage-deed, which was not produced:

Held, that oral evidence was admissible to prove the circumstances under which the mortgage-deed was executed in order to show that the mortgage was executed for a family necessity. RAM JAR SINGH *v.* BHAGALU SINGH, 10 A. L. J. 401 **669**

——— ———*Judge's personal knowledge of facts, whether can be imported into judgment.*

Per *Sundara Aiyar, J.*—A Judge is not entitled to rely on specific facts not proved by the evidence in the case but known to him personally or otherwise. But a Judge may use his general knowledge and experience in determining the credibility of evidence adduced before him and applying it to the decision of the specific facts in issue in the case.

Per *Sadasiva Aiyar, J.*—A Judge must be allowed to use even his personal knowledge of concrete private facts, provided he mentions his knowledge to the parties and they do not object to his deciding the case, and he must be allowed to use his knowledge of general or public facts, historical, scientific, political and otherwise, in coming to a conclusion. MULPURA LAKSHMAYYA *v.* VARADARAJA APPAROW, 23 M. L. J. 624; (1912) M. W. N. 1193; 12 M. L. T. 561 **353**

Evidence Act (I of 1872), ss. 18, 21—*Recital in mortgage-deed—Admissible in evidence against representative of mortgagor—Probative value of recital.*

A recital in a mortgage-deed is admissible in evidence as against the mortgagor as well as against those who derive their title from him. Sections 18 and 21 of the Evidence Act make the recital admissible against them even as an admission. The probative value of such recital, however, is a different question. NAWAL KUNWAR *v.* BAKHTAWAR SINGH, 10 A. L. J. 390 **644**

——— ——— ——— **s. 21** **722**

——— ——— ——— **s. 21**—Recital in mortgage-deed **644**

——— ——— ——— **s. 32**—Entries in *Samadaskat* book **722**

Evidence Act—contd.

——— ——— ——— **s. 34**—*Collection papers—Admissibility—Corroborative evidence—Absence of proof to show by whom rents had been collected—Collection papers, not admissible.*

Certain collection papers were produced by an officer of the landlord who deposed that they were in his custody. No question was put to him as to who had written the papers, nor was there any evidence to show by whom the rents had been collected and when and by whom the entries in the collection papers had been made:

Held, that the papers were not admissible under section 34 of the Evidence Act. AKTOWLI *v.* TARAK NATH GHOSH, 16 C. L. J. 328 **266**

——— ——— ——— **s. 54** **565**

——— ——— ——— **s. 92**—Admissibility of oral evidence to prove colourable nature of transaction **39**

——— ——— ——— **s. 92**—Admissibility of previous negotiations to vary terms of document **737**

——— ——— ——— **s. 92**—*Compromise of subject-matter of appeal—'Adjustment of all matters in dispute'—Oral evidence of independant agreement—Written compromise silent as to certain provisions.*

Where the subject-matter of an appeal is compromised by the parties by means of a written agreement which recited that '*all matters in dispute*' were adjusted, it is not open to any of the parties to tender oral evidence of a separate agreement not comprised in the written deed of compromise on the ground that it related to a matter on which the compromise was silent. RAJARAM RAO *v.* TULJARAM RAO **43**

——— ——— ——— **s. 92 (3) & (4)**—*Registered contract—Admissibility of oral evidence.*

Oral evidence of modifications of a registered contract is inadmissible. SHER MUHAMMAD *v.* NIKKA MAL, 21 P. L. R. 1913 **362**

——— ——— ——— **ss. 101, 102, 110** **889**

——— ——— ——— **s. 111**—*Position of active confidence — Experienced* mukhtiar *of inexperienced young man—Burden of proof—Allegation of* benami *transaction.*

Where the affairs of an inexperienced young man, who has just come into possession of his property, are managed by an experienced *mukhtiar*, the latter stands in a position of active confidence to the former within the meaning of section 111 of the Evidence Act.

Where a sale to a person in a position of active confidence to the vendor is impugned on the ground that the vendor intended the sale-deed to be a *benami* document, the rule in section 111 as to burden of proof applies and it is for the vendee to prove that the transaction was for consideration and was entered into in good faith. SURATSINGH *v.* BALDEO, 8 N. L. R. 150 **363**

——— ——— ——— **s. 114** **889**

——— ——— ——— **s. 114**—Production of document with endorsement of payment **396**

——— ——— ——— **s. 114, Illus. (b)**—*Accomplice—Evidence—Presumption—Corroboration—Rule of practice—Revision—Interference on the ground of want of corroboration.*

Evidence Act—concld.

Where the act of an accomplice imports no great moral delinqency, the presumption enacted in illustration (*b*) to section 114 of the Evidence Act does not apply. This is recognized as a consideration controlling or rebutting that presumption in the second explanatory illustration (*b*) to the section.

The rule as to corroboration being necessary to accomplice evidence is a rule of practice.

Even if this rule of practice has not been adhered to by the lower Court, the High Court will not interfere on revision unless the case presents exceptional circumstances. EMPEROR *v.* ISARDAS, 6 S. L. R. 106; 13 Cr. L. J. 767 **79**

——— ——— ——— **s. 115** **508**

——— ——— ——— **s. 115**—Inconsistent action in Court **513**

——— ——— ——— **ss. 115, 116** **689**

Execution by Appellate Court—Practice **583**

——— ——— ——— *Auction sale—When becomes complete—Application to set aside sale by deposit of purchase-money—Limitation.*

In execution of a decree, certain property was put up for sale on 22nd August 1911. The sale officer, however, did not make a declaration on that date as to who was the purchaser but referred to the Civil Court for certain information. On receipt of the information, on 28th August 1911, he allowed the person whose bid was the highest to deposit one-fourth of the price. The sale was confirmed *ex parte* on 23rd September. The Civil Courts were closed from the 24th September to 26th October. The judgment-debtor deposited the amount of the decree *plus* five per cent. of the purchase money on the 26th of October and applied to have the sale set aside:

Held, (1) that the auction sale was concluded on 28th August, and, therefore, the application to set aside the sale was not barred by limitation;

(2) that the Court was not precluded by the *ex parte* order of confirmation from accepting the deposit and setting aside the sale.

The mere making of the last bid does not conclude a sale. For the conclusion of a sale, it is necessary for the sale officer to accept the final bid and to make a declaration as to who is the purchaser and to order him to pay over 25 per cent. of the purchase-money. MUNSHI LAL *v.* RAM NARAIN, 10 A. L. J. 475; 34 A. 65 **783**

——— ——— **of decree**—Attachment—Private alienation after attachment - Subsequent attachment by another creditor—Debtor declared insolvent - First attachment raised by satisfaction of decree—Claim enforceable under attachment—Validity of private alienation **625**

——— ——— ——— Limitation. *See* LIMITATION ACT, SCH. I, ARTS. 179 TO 182.

——— ——— ——— Petition by transferee to enter up satisfaction **617**

——— ——— ——— Powers of executing Court on application of judgment-creditor to inquire into terms of compromise **752**

——— ——— ——— *Alteration of decree—Acting upon altered decree for number of years, effect of—Mortgage decree providing for interest up to date of grace but silent as to subsequent interest—Petition by judgment-debtors for time agreeing to pay subse-*

Execution of decree—concld.

quent interest and praying for sanction—Grant of time by Court—Whether order sanctioned agreement or not—Civil Procedure Code (Act XIV of 1882), s. 275A—Judicial orders, construction of—Presumption of judicial acts having been regularly performed—Inconsistent positions—Parties not to be allowed to assume—Practice.

A decree must ordinarily be executed as originally made and the parties cannot be permitted to make a substantial alteration therein.

But where the parties have acted upon the decree as altered for a number of years and treated it as valid, the judgment-debtors who have been substantially benefited thereby, cannot be permitted to take exception to its validity.

A mortgage decree made in 1903 directed that interest should run on the principal amount at the bond rate up to six months. No provision was made in the decree for interest from the expiry of the period of grace to the date of realisation. The decree was made absolute and the decree-holder applied for sale of the mortgaged properties. The judgment-debtors presented a petition to the Court asking for time to enable them to satisfy the decree and agreeing to pay interest up to the date of realisation of the whole amount. The decree-holder gave his consent to the petition which prayed for the Court's order of sanction to the agreement. The Court granted time and the sale was postponed. Subsequently in several applications for execution, the claim for interest up to realisation was made, and the judgment-debtors raised no objection to the claim, and obtained adjournment upon part payments and expressly agreed to pay the balance of the entire decretal amounts etc., on the adjourned dates:

Held, that the agreement contained in the petition of the judgment-debtors was sanctioned by the Court under section 257A of the Civil Procedure Code of 1882, because the Court deemed the consideration reasonable under the circumstances of the case, and that the agreement was valid.

A judicial order must be reasonably construed. Although there is no presumption of law that a particular act required to be performed has been done, yet judicial acts must be presumed to have been regularly performed.

Parties litigant are not allowed to assume inconsistent positions in Court to the detriment of their opponents: where they have elected to adopt a certain course of action, they will be confined to the course they have deliberately adopted. GOKHAI PADHAN *v.* GONES LAL PANDIT, 16 C. L. J. 404 **936**

——————— *Attachment of properties, objections to, by parties—Inquiry in execution—Objection to plaintiff's purchase at auction sale—Objection by stranger.*

All objections to attachment of property in execution of a decree raised by parties to the suit must be made in execution proceedings.

If the attachment and sale were effected without the knowledge of the party objecting, the proper course for him is to get the sale set aside in execution proceedings.

An objection to the purchase of properties at a Court sale without the leave of the Court can only be raised by parties to the suit and not by strangers. JAGADAMBAL AMMAL *v.* RAMASWAMY IYENGAR **126**

Executor, alienation by—Title of executor not obtaining Probate **4**

Ex parte decree against minor is null and void **263**

——— ——— ——— against Receiver without leave to sue **916**

——— ——— ———, *setting aside of—Executing process for enforcing judgment, meaning of—Attachment of debt due to judgment-debtor—Notice—Limitation Act (XV of 1877), Sch. II, Art. 164—Civil Procedure Code (Act XIV of 1882), s. 268.*

Where a decree-holder, who had obtained a decree *ex parte*, applied for execution of the decree by attachment of certain money held in deposit by the decree-holder on behalf of the judgment-debtor and the money in question was attached, though no notice had been issued to the judgment-debtor according to the provisions of section 268 of Act XIV of 1882:

Held, (1) that the attachment was an execution of process for enforcing the judgment which set time running under Article 164 of Act XV of 1877;

(2) that the money attached being moveable property not in possession of the judgment-debtor, it was only necessary to give notice to the person in possession of the same. RAJAB ALI SHAH *v.* UPPER INDIA COUPER (PAPER) MILLS CO. LD., 15 O. C. 289 **420**

Extension of time fixed by pre-emption decree **912**

——— ———Period fixed for payment of money by pre-emption decree **868**

Family arrangement—Title of relation—Registered document, absence of **885**

Fire Insurance—*Damage—Liability of Company—Actual damage.*

The Insurance Companies take possession of the damaged premises in order to minimise the damage in their own interests. When they have taken possession of the premises and done what in their opinion was wisest to minimise the damage, they cannot say that actual damage is not the natural and direct consequence of the fire. AHMED BHOY *v.* BOMBAY FIRE AND MARINE INSURANCE CO. LD., 13 M. L. T. 11; 11 A. L. J. 42; 15 BOM. L. R. 19; (1913) M. W. N. 64; 17 C. W. N. 269; 17 C. L. J. 154; 24 M. L. J. 328 **755 P. C.**

Foreclosure. *See* MORTGAGE.

Foreign State, suit against **444**

Forest Act (VII of 1878), s. 32 **796**

Forfeiture for non-payment of rent—Relief against forfeiture—Landlord's act—Lease not providing for period of grace—Loss of improvements—Equitable relief—Plea of payment not proved **947**

——— ——— on non-payment of rent **991**

——— ——— **of tenancy**—Transfer of holding **654**

Forgery. *See* PENAL CODE, ss. 467, 471.

Fraud. *See* LIMITATION ACT, 1908, s. 18.

——— against creditors—*Benami* sale—Suit for possession **918**

———, effect of **39**

———Grant by Government **489**

———Right of suit **125, 126**

———*Execution of decree—Sale—Fraud antecedent relevant in determining whether there was fraud subsequent to sale—Fraud to be considered as a whole—Limitation Act (IX of* 1908), *s.* 18.

It cannot be laid down as an inflexible rule of law that proof of fraud antecedent to an execution sale necessarily indicates continuance of that fraud subsequent to the sale. At the same time, it is clear that proof of fraud antecedent to the sale, may have an important bearing on the determination of the question whether there was fraud subsequent to the sale, sufficient for the purpose of section 18 of the Limitation Act, in other words, the question of fraud should be considered as a whole. TOOKOOMONI DASI *v.* DWARKA NATH, 16 C. L. J. 581; 17 C. W. N. 478 **972**

Fraudulent assignment—Right to execute decree **323**

——— **transfer** **393**

———Land Revenue Sale **878**

Fruit trees—Immoveable property **910**

Full Bench, reference to—Practice **559**

Further inquiry. *See* CRIMINAL PROCEDURE CODE, s. 437.

Ganjam Collectorate — Division into Agency District and non-Agency District—Sessions Court—Agent—Deputy Magistrate—General Deputy Magistrate—Jurisdiction **786**

General Clause Act (X of 1897) **185**

——— **s. 6** **629**

Gift. *See* CUSTOM—GIFT; HINDU LAW—GIFT; MUHAMMADAN LAW—GIFT.

Government Tenants (Punjab) Act (III of 1893)—*Horse breeding peasant grant—Jhelum Canal Colony—Tenancy to devolve on one person and not to be alienated—Compromise for joint succession in Civil Court—Decree of Civil Court, effect of—Government as landlord not affected—Chief Court—Revision.*

One *S.* held a horse breeding peasant grant in the Jhelum Canal Colony. After the death of *S.*, the grant, under the rules, could devolve upon a single person only as an impartible holding. It was also one of the conditions of grant that it should not be alienated without the previous sanction of the Financial Commissioner. *S.* died without a male issue but left three brothers *A.*, *B.* and *C.* The Colonization Officer mutated the whole grant in favour of *B.* only. On this, *A.* instituted a civil suit for possession of the land of the grant on the ground that he, as eldest son of his father, was entitled to succeed in preference to *B.* The two brothers entered into a compromise whereby they agreed to hold the land jointly in equal

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shares. Upon this, the Court passed a decree in terms of the compromise.

The Colonization Officer refused to effect mutation in accordance with the decree of the Civil Court, on the ground that the decree was illegal. The decree was accordingly referred to the Chief Court for revision:

Held, (1) that there was no good ground for interfering with the decree:

(2) that the decree in no way affected the rights of the Government as landlord, who could obtain ejectment or otherwise enforce the conditions of the tenancy;

(3) that the decree did not prevent the Government from enforcing any rights it might have in consequence of the infringement of the conditions of tenancy;

(4) that as between *A.* and *B.*, there was a valid compromise to which the Court was bound to give effect in a decree, which was valid and binding on the parties. ALI MARDAN *v.* BAKAR KHAN, 7 P. W. R. 1913; 27 P. L. R. 1913; 13 P. R. 1913 **680**

Grant by Government—Suit for possession by grantee—Expression of intention not to claim land prior to grant—Whether amounts to estoppel—Fraud **489**

——— of part of land by owner—Easements implied in favour of part granted—No reservation by implication in favour of grantor except in case of easement of necessity **966**

Grievous hurt. *See* PENAL CODE, ss. 325 TO 336.

Grove planted with permission of *zemindar* on payment of rent—Right to transfer such grove **656**

Guardian. *See* MINOR.

———Mortgage of minor's property by guardian — Burden of proof — Necessity — Suit against guardian as well as minor—Guardian confessing judgment—Money-decree **909**

———Power of natural guardian—Sale of minor's property—Validity discussed—Necessity—Benefit **609**

——— **of minor** not properly appointed—Partition **846**

——— **ad litem**—*Non-appearance of proposed guardian—Plaintiff's duty to ask Court to appoint guardian—Decree against minor not represented—Decree null and void.*

Where the proposed guardian of a minor defendant does not enter appearance, the plaintiff ought to ask the Court to appoint one of its officers as guardian *ad litem.* If this is not done and the minor is wholly unrepresented, a decree made against him is absolutely null and void. DINABANDHU NANDI *v.* MASHUDA KHATUN, 16 C. L. J. 318 **263**

Guardian and Ward—*Power of guardian to mortgage ward's property—Ward seeking equitable relief—Compensation for benefit received by ward—Specific Relief Act (I of* 1877), *s.* 41.

Where a minor plaintiff seeks equitable relief, such as the cancellation of a document, the Courts will not

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grant that relief unless and until the plaintiff is willing and agrees to restore any benefits that he may have received under the transaction covered by such document.

A., the *de facto* guardian of a minor, mortgaged the latter's ancestral property in order to pay off a just debt contracted by the father of the minor; the minor sued to recover the mortgaged property on the ground that *A.* had no authority in law to mortgage his property:

Held, (1) that the estate of the minor, which came to him through his father, could not have been made liable, either directly or indirectly, in respect of claims against his father for monies lent, as during his life-time the latter did not charge the estate in his possession with the payment of those debts;

(2) that the minor could not, under the circumstances, be ordered to make any compensation at all.

Though, under section 41 of the Specific Relief Act, a Court has ample power, on adjudging a cancellation of a mortgage debt in favour of the plaintiff, to require the latter to make such compensation to the other as justice may require, such power will not be used if it is shown that the defendant has been in possession for several years and been enjoying the produce during that time. CHOGHATTA *v.* ASO MAL **371**

Guardians and Wards Act (VIII of 1890)—*Illegitimate children, custody of—Law applicable to them.*

In dealing with the custody of illegitimate children, the Courts in England are governed by equitable rules and exercise equitable jurisdiction. One of those rules is that the desire of the mother of an illegitimate child as to its custody is primarily to be considered.

This equitable rule should be adopted in the case of parties in this country whose personal law is obscure.

An illegitimate child is regarded as no body's child, and neither the father nor the mother has any absolute right to the custody of their illegitimate child. MA MYA *v.* FELIX SLYM, 5 BUR. L. T. 164; 6 L. B. R. 116 **926**

Hereditary office, *claim to—Nature of proof—Long possession—Presumption of right—Proof of creation of right unnecessary.*

In a claim for hereditary right, the Court can infer such right from proof of long possession. Though, by itself, long possession is not sufficient to create a hereditary right, yet a presumption in favour of such right is not improper, as in most cases, proof of the creation of a hereditary right at some particular time is not to be expected. ITTICHERI EDATHIS SAMANTHAM *v.* ANANDA PISHAROTI **179**

Hereditary Offices (Vatan) Act (Bom. Act III of 1874), s. 5—Vatan—*Sale in execution—Collector levying full assessment—Character of land not charged—Right of auction-purchaser—Right of next holder after death of judgment-debtor—Limitation.*

Certain *vatan* land was sold in 1872 in execution of a decree against the holder of the *vatan* and purchased by *A.* Because of the Court-sale, the Collect-

Hereditary Offices (Vatan) Act—concld.

or levied the full assessment and assigned it for remuneration for service:

Held, (1) that the land did not lose its character as *vatan* property merely because the Collector levied full assessment and altered the mode of remuneration:

(2) that *A.* merely took the right, title and interest of his judgment-debtor, and on the death of the latter, his right under the Court-sale ceased;

(2) that consequently, the next holder of the *vatan* became entitled to the property and could recover it within 12 years from the death of the previous holder.

A *vatan* continues in that character even when the Gordon Settlement has been applied to it and service has ceased to be demanded as a consequence of the Settlement. SHIVRAM *v.* MAHADEV NARAYAN, 14 BOM. L. R. 797; 37 B. 81 **170**

——— ——— ——— **ss. 11, 11 A**—*Revenue Jurisdiction Act (X of 1876), s. 4*—Deshmukhi Vatan—*Alienation of Vatan—Power of Collector to set aside alienation and resume possession—Order granting alienor's heir permission to recover possession—Adverse possession of alienee for more than 12 years—Suit by alienee—Injunction—Jurisdiction of Civil Court—Decree, form of.*

In 1877, *A.* came into possession of certain *Deshmukhi vatan* lands by virtue of a *miras* lease and mortgage executed by *B.* After the death of *B.* in 1892, *A.* remained in possession for 10½ years when *B.*'s son obtained an order from the Collector to the effect that the land in suit may be recovered from the possession of *A.* and given to *B.*'s son under the Hereditary Offices Act. The Collector did not summarily resume possession of the land or assess it at the rates prescribed. *A.* continued in possession even after the Collector's order.

In 1906, *A.* filed the present suit to restrain *B.*'s grandson by a perpetual injunction from recovering possession of the lands, as his title had been perfected by adverse possession for upwards of twelve years:

Held, (1) that the Revenue Jurisdiction Act, 1876, was no bar to the suit as the order passed by the Collector was not authorised by the Hereditary Offices Act;

(2) that although *A.* might be obliged to yield to summary eviction at the hands of the Collector under section 11A of the Hereditary Offices Act, he was not obliged to submit to proceedings for recovery of possession at the hands of *B.*'s heirs;

(3) that the mere fact that the application was made to the Collector within 12 years from the death of the alienor did not interrupt the adverse possession of *A.*;

(4) that *A.* was entitled to an injunction against *B*'s grandsons restraining them from taking proceedings in a Court of law or *otherwise than under the Hereditary Offices Act*, 1874, to recover possession from *A.*

Adverse possession runs in favour of the person in possession and will confer a title on him unless a suit is brought within twelve years. MAGANCHAND *v.* VITHALRAO, 14 BOM. L. R. 793; 37 B. 37 **148**

High Court. *See* LETTERS PATENT.

——— ———Power to direct re-trial of appeal **49**

——— ———*Jurisdiction — Testamentary Judge —Power to declare Will invalid—Power to issue Letters of Administration in face of Will—Practice—Original Civil Jurisdiction.*

A Judge, exercising testamentary and intestate jurisdiction of the High Court of Bombay, has no power to declare that a Will made by a testator is invalid or inoperative in law by reason of the testator having no power to make such a Will and dispose of the property mentioned therein by that Will. Such a declaration can only be made by the High Court in the exercise of its Original Civil Jurisdiction.

The Testamentary Judge can adjust no civil rights to property between the parties.

Where a Will exists, the Testamentary Judge cannot ignore its existence and direct Letters of Administration to issue in the absence of a pronouncement by a Court of competent jurisdiction that the Will is in effect invalid and inoperative in law, although none of the executors under the Will are willing to act in the matter. DHURAMSI MORARJI GOCULDAS, *In re*, 14 BOM. L. R. 1031 **730**

——— ———'s **jurisdiction** to revise proceedings under s. 145, Criminal Procedure Code **65**

Hindu Law—Adoption—Daughter's son - Nephews not competent to contest adoption **379**

——— ——— ——— Power to give in adoption **133**

——— ——— ———*Dancing girl—Prostitute—Invalid adoption.*

The adoption of a girl by a Hindu married woman is invalid, even though that woman was once a dancing girl. A dancing girl when married and leading a family life cannot be treated as a dancing girl.

Per *Sadasiva Aiyar, J.*—It is illegal for a prostitute to adopt a minor girl, and the illegality is, if possible, enhanced very much by a woman of the prostitute class, who has followed the practices of a moral family Hindu woman, trying to follow the practices of a prostitute herself and adopt a girl for herself. Such an adoption is a criminal act and on this ground also is illegal.

Prostitution is as repugnant to the Hindu religion as it is to the Christian or Muhammadan religion or laws. GUDDATI REDDI OBALA *v.* GANAPATI, 23 M. L. J. 493; 12 M. L. T. 467; (1912) M. W. N. 1138 **422**

——— ——— ———*Settlement by adoptive mother in favour of her daughter—Consent of natural father of adopted son—Repudiation of agreement by adopted son after majority —Right of daughter to enforce agreement.*

A settlement of immoveable property by an adopting Hindu widow in favour of her daughter, to take effect upon the daughter obtaining majority, assented to by the natural father of the adopted boy at the time of the adoption, cannot be enforced by the daughter against the adopted son who repudiates it on attaining majority. VYASACHARYA NARAYANACHARYA *v.* VENKUBAI RANGACHARYA UPADYA, 14 BOM. L. R. 1109 **741**

———**Alienation** *by widow of whole property to next reversioner—Agreement by reversioner to re-convey portion of property —Consideration.*

Hindu Law—contd.

An alienation by a Hindu widow of the whole of her estate to the next reversioner on the latter's undertaking to re-convey a portion thereof to the widow or her nominee is valid, irrespective of whether any consideration actually passed or not. KARETI BRAHMANAIKUDU *v.* KARETI MAHALAKSHMI **487**

——— ———**Dayabhaga**—*Gift of immoveable property by father to daughter at her marriage*—Stridhan—Yautuka—*Death of daughter without male issue—Inheritance—Daughter of daughter—Original owner's sister's son.*

A Hindu governed by the *Dayabhaga* School, executed a deed of gift in respect of certain immoveable property in favour of his daughter on the occasion of her marriage. A clause in the deed ran thus:—"You do remain in possession of the land held by myself down to your sons, son's son and so on in succession. Your sons, son's son etc., heirs in succession and not your husband or his heirs or any other wife that may be taken by him, shall be competent to own the said property" The daughter died sonless:

Held, that the gift was not limited for the life of the daughter, but was an absolute gift in her favour and, therefore, was not defeasible upon her death without male issue; that the intention of the grantor was not to exclude female children of his daughter from the line of succession, and that the daughter of the grantee was entitled to take the property by right of inheritance and not the grantor's sister's son. NANDA GOPAL SINHA ROY *v.* PARESHMONI DEBI **478**

——— ———**Gift** by Sareen Khatri of Lahore **510**

——— ——— of immoveable property by father to his daughter at her marriage—Inheritance **478**

——— ———**Guardian** or manager binding minor's share—Enforceability of contract against minor's interest—Document, construction of—Evidence of surrounding circumstances—Award of damages **497**

——— ———**Inheritance**—Gift of immoveable property by father to his daughter at her marriage **478**

——— ——— ——— ———*Reversionary heir—Father's brother's daughter's son—Great-great-grandfather's great-grandson—Perferential title.*

The father's brother's daughter's son has a preferential title as reversionary heir, as compared with the great-great-grandfather's great-grandson. KEDAR NATH ROY *v.* AMRITALAL MOOKERJEE, 16 C. L. J. 392; 17 C. W. N. 492 **283**

———**Joint family**—Partition against manager of family—Other members of family bound by it **846**

——— ——— ———Pro-note in name of deceased member—Suit by surviving members **748**

——— ——— ———Suit by or against manager of joint Hindu family—Effect of decree in such suit on other members of family **290**

——— ——— ——— business—Suit on business contracts—Necessary parties—Minor members **193**

——— ——— ——— property — One co-sharer in possession for all—Alienation by co-sharer in possession—Continuance of alienor in possession—Knowledge of exclusion **657**

Hindu Law—contd.

——— **Joint family** — *Alienation — Immoral debts, proof of.*

A general charge of immorality is not sufficient to prove that the debts were contracted for immoral purposes. SRI NARAIN *v.* RAGHUBANS RAI, 17 C. W. N. 124 **729**

——— ——— ——— Benami *purchase—Burden of proof—Shifting of burden—Statement of person as to his rights in property—Not to be lightly set aside.*

Where the head of a Hindu joint family makes a purchase in the name of another member of the family, the *onus* of proving that the purchase was not *benami* lies upon the person who makes the assertion.

In a particular case, however, there may be other considerations which would shift the burden of proof in regard to the nature of the transaction. Thus, where a transactiou is shown to be in the nature of a distribution of property amongst various members of a family, or for the advancement in life of one of them, the initial presumption may cease to exist.

The statements of a person, who is in the best position of all to know about his property, ought not to be lightly set aside on the mere ground that they were made with a fraudulent purpose. If the heir or representative of such a person alleges that these statements were incorrect, the burden of proving that this is so lies very heavily upon him. The idea that false statements may be lightly made at one time, for the advantage of the person who makes them, and then lightly repudiated when they appear to be to his disadvantage or to the disadvantage of his successor's title, ought not to be encouraged. RAJA RAM *v.* FATTEH CHAND, 187 P. L. R. 1912; 248 P. W. R. 1912 **216**

——— ——— ——— ——— *Debt—Loan for immoral purposes, proof of—Self-acquired family property.*

If a debt is contracted for an immoral purpose by a Hindu father, it is not binding against the son, even if the property is acquired by the father himself.

Although in order to prove that a debt was incurred for an immoral purpose, it is not sufficient to prove isolated acts of immorality or even general immorality but there must be clear connection between the immoral life and the debts contracted, yet it is not necessary to show that the proceeds of each loan was separately spent on a specific act of immorality. It would be sufficient to prove that the borrower was at the time living a licentious life, beyond his means, indulging in drink, riot, prostitution and debauchery, and that at the same time, he was without any business or occupation on which the money might legitimately have been spent, without showing on which particular act of immorality the money was spent. If it is proved that at the time of the loan, the borrower was notoriously wasting his substance in riotous living and spending large sums beyond his income and above his station in life, in this way only, the loan contracted in the midst of such living and spent upon it would be a loan contracted for immoral purposes. RAM NATH *v.* BULAQI RAM **735**

——— ——— ——— *Debts—Marriage expenses of twice-born Hindu male.*

Marriage is obligatory on Hindus who do not desire to adopt the life of a perpetual Brahmchari or of a *sanyasi*. Therefore, debts reasonably incurred for the marriage of a twice-born Hindu male are binding on the joint family properties. GOPALAKRISHNAMARAJU *v.* VENKATANARASA RAJU, 23 M. L. J. 288; 12 M. L. T. 292; (1912) M. W. N. 903 **308**

——— **Joint family**—Mitakshara—*Conversion of one member to Christianity, effect of—Migration from Oudh to Bengal—Presumption of carrying succession laws—Conversion not to affect right of inheritance—Family ceases to be joint—Separation of one co-parcener—No presumption that others remain united—Strict proof.*

When a person migrates from Oudh to Bengal, the presumption is that he carries with him the laws and customs as to succession and family relations prevailing in Oudh.

If one member of a joint *Mitakshara* family converted to Christianity, such conversion does not inflict on him forfeiture of rights or property or impair or affect in any way any right of inheritance. He retains his interest in the ancestral property. But the family ceases to be a joint Hindu *Mitakshara* family. He becomes, upon his conversion to Christianity, at once severed from the family, and the Hindu Law ceases to have any continuing obligatory force upon him. He continues to hold the property as joint owner.

There may be no presumption that when one coparcener separated from the others, the latter remaind united; the separation of one may be a virtual separation of all, and in this sense, where it is asserted that the remaining members remained united or agreed to re-unite, the fact has to be established from all the circumstances of the case. KULADA PROSAD PANDEY *v.* HARIPADA CHATTOPADHYAYA, 16 C. L. J. 311; 17 C. W. N. 102 **257**

——— ——— ——— ——— *Nucleus of family property—Acquisition by joint labour—Joint family property.*

If the members of a Hindu family choose to live together, work jointly together, throw all their earnings into a common stock and have one food, in such a case the presumption is that they must have intended their property to be joint family property and the ordinary consequences attach to it and the right of all the members to partition necessarily follows. It is not necessary in such a case that there should be a nucleus of joint family property.

Where the plaintiff's father carried on business jointly with his uncles and cousins without the aid of any patrimony and they lived and acquired properties together and at a partition between them, the plaintiff's father got considerable properties for his share:

Held, the properties were joint family properties in which the plaintiff, as the son of his father, acquired an interest and the plaintiff's father had no right to dispose of the same by Will. MADHAVAIYA CHETTY *v.* DAMODARAM CHETTY, 12 M. L. T. 240; (1912) M. W. N. 972 **347**

——— ——— ——— ——— *Presumption as to jointness—Separation, burden of proof as to—Pleadings.*

Where a Hindu family, and more particularly a family consisting of two brothers, is once proved or admitted to be joint, there is a clear presumption in

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favour of the continuance of such jointness until the contrary is proved. GAYA KUNWAR v. DAL SINGH **296**

——— **Joint family**—*Property acquired in the name of one of the members of a joint Hindu family.*

In the absence of some definite proof of self-acquisition, a purchase of property in the name of one of the members of a joint Hindu family must be presumed to have been made on behalf and for the benefit of that family. NATHU MAL v. MUL CHAND, 183 P. W. R. 1912; 197 P. L. R. 1912 **232**

——— *Self-acquired property.*

Property granted to a person by the Government as a reward for his services is self-acquired property.

Property acquired by a member of a Hindu family becomes the property of the joint family if it is thrown into the common stock, and the income of the whole of the property is devoted to the expenditure of the family, one account being kept of the income from the self-acquired and the ancestral property. INDAR SAHAI v. SHIAM BAHADUR, 13 M. L. T. 156; (1913) M. W. N. 122; 17 C. L. J. 299; 17 C. W. N. 509 **760 P. C**

——— **Khoja Muhammadans** **17**

——— **Marriage** expenses of twice-born Hindu male **308**

——— ——— of divided nephew of husband **366**

——— ——— *Right to give girl in marriage—Paternal uncle—Mother—Will—Construction Right conferred by Will.*

Under Hindu Law, the paternal uncle of a girl cannot betroth her or give her in marriage without the consent and concurrence of her mother.

The mother is, after the death of the father, the legal guardian of the girl and she has the right to be consulted as to the choice of a husband for her daughter.

A Will provided that the testator's brother, to whom the testator devised his property, should get the testator's girl married by expending money out of the testator's property with due regard to his *status*:

Held, that the right of giving the girl in marriage conferred by the Will was no more than the right under the Hindu Law and was, therefore, subject to the same limitations. BAI RAMKORE v. JAMNADAS, 14 BOM. L. R. 766; 37 B. 18 **95**

——— ——— *Unapproved form*—Asura *marriage*—Brahma *marriage*—Kolis—*Marriage of divorced woman without receipt of pecuniary benefit.*

Among *Kolis*, re-marriage of a divorced woman is valid and is not regarded with any social censure or disapproval.

The marriage of a divorced *Koli* woman cannot be regarded as marriage in an unapproved form when the father by whom the woman is given away receives no pecuniary benefit from the marriage.

The distinctive mark of the *asura* form of marriage is the payment of money for the bride, and the absence of such payment of a bride-price is a distinctive mark of the approved form. HIRA v. HANSJI PEMA, 14 BOM. L. R. 1182 **949**

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——— ——— *Means of creating title—Treating near relation without title as co-sharer for many years—Title of that relation—Family arrangement—Registered document, absence of.*

Transfer by way of gift is not the only means of creating title under the Hindu Law apart from inheritance or succession.

If the persons actually entitled to a property agree to treat a near relation as a co-sharer out of affection, and abandon their claim to an exclusive right, they may do so without a registered deed. If the act is unequivocal, it will create title in favour of the person who is taken in as a co-sharer.

On the death of a Hindu widow, her husband's estate came into the possession of five persons, three of whom were the actual reversioners and the other two one degree lower in descent. The reversioners treated the other two on an equal footing and they possessed the property in equal shares for several years, short, however, of the statutory period necessary to give them title by adverse possession. The appellants were the purchasers at an execution sale of the interest of one (P.) of those two persons:

Held, that the conduct of the actual reversioners was a family arrangement, and one of the legitimate means of acquisition of property under the Hindu Law, and that it created title in P. and, consequently, in his transferees the appellants. GIRHI RANI MISRANI v. CHANDRA LAL KANTH, 17 C. W. N. 62 **885**

——— ——— **Minor** — *Guardian — Mortgage of minor's property by guardian—Burden of proof—Necessity—Suit against guardian as well as minor—Guardian confessing judgment—Money-decree.*

The burden of proving that a transaction made by a guardian on behalf of a Hindu minor was for a legal necessity and the benefit of the minor, lies on the alinee or creditor. A person lending money on the security of a minor's estate is bound to exercise due care and attention in seeing that there was a legal necessity of the loan and must satisfy himself about the existence of the necessity and that the guardian was acting for the benefit of the minor's estate.

Where a guardian is sued on the loan together with the minor and the guardian confesses judgment, a money-decree should be passed against the guardian. ANNAMALAY CHETTY v. NA U MA, 5 BUR. L. T. 157 **909**

——— ——— **Mitakshara**—Alienation — Necessity—Marriage of divided nephew of husband **366**

——— ——— ——— father, mortgage executed by—Only son minor at date of mortgage—Mortgage executed before advances made—Sums borrowed for family purposes—Suit on mortgage—Son made party defendant—Liability of son to be sued on mortgage—Decree against son—Mortgagee unable to prove item expended on family purpose—Inability of son to prove item borrowed for immoral purpose—Debt of father binding on son **577**

——— ——— ——— Suit for protecting reversionary estate from waste and rendition of accounts **101**

——— ——— ——— —Dasi—Dasi-putra — *Sudra — Permanent concubine.*

If a Sudra governed by the *Mitakshara* Law has a permanent, continuous and exclusive concubine who lives as a member of his family, she is a *dasi*, and a

Hindu Law—contd.

son born to him by her, who is brought up as a member of the family, is a *dasi-putra* within the meaning of that expression as used in the *Mitakshara*. CHATTURBHUJ PATNAIK *v.* KRISHNA CHANDRA PATNAIK, 16 C. L. J. 335; 17 C. W. N. 442 **276**

——— *Mortgage by father—Foreclosure proceedings and suit against minor sons through their mother—Minor grandson not made party—Right to redeem—Regulation XVII of* 1806, *s.* 8 *—Transfer of Property Act (IV of* 1882).

A. mortgaged certain ancestral property in 1875. After *A.*'s death, foreclosure proceedings under Regulation XVII of 1806 were taken against his sons in 1881; as the sons were minors, the notices were served on them through their mother. At that time, one of the sons had a minor son, *B.*, who was not made a party to the foreclosure proceedings nor to the suit for possession brought by the mortgagee after the expiry of the year of grace. *B.* subsequently sued for redemption of the mortgage on the ground that he was not bound by the proceedings as he was not made a party:

Held, (1) that the case was not governed by the provisions of the Transfer of Property Act;

(2) that *B.*'s interests were adequately represented in the foreclosure proceedings and the suit by his grandmother who was the guardian both of *B.* and his minor father.

If the person, who would naturally be the manager of the family, is incapacitated by minority from acting as manager and the other members are incapacitated by still greater minority, then the person, who is guardian of the minor, who would naturally be manager, takes the place of that manager as regards the other minors and fully represents them. BAJIRAO *v.* GULABSINGH, 8 N. L. R. 136 **141**

——— **Naicken**—Adoption - Will **834**

——— **Non-agricultural** *Banias* of town **36**

——— **Partition** — Revenue partition—Date of effect **144**

——— *Enjoyment in specified shares—Agreement.*

The co-parceners of a joint Hindu family, being in posesssion of defined shares of family property, entered into a written agreement by which they consented to hold the family property in separate, defined and specific shares.

This agreement was acted upon for a considerable number of years:

Held, (1) that the family property must be deemed to have been partitioned from the date of the agreement, although there was no actual division by metes and bounds;

(2) that from that date, the status of the family ceased to be joint. RAGHUBIR SINGH *v.* MOTI KUNWAR, 13 M. L. T. 162; (1913) M. W. N. 127; 11 A. L. J. 146; 35 A. 41; 17 C. W. N. 453; 17 C. L. J. 306 **766 P. C.**

——— **Stridhan**—Gift of immoveable property by father to daughter at her marriage **478**

Hindu Law—contd.

——— **Widow** representing estate of her husband in first suit—Heirs of her husband bound in subsequent litigation—Withdrawal of appeal in first suit—Effect on question of *res judicata* **866**

——— *Re-marriage, effect of—Custom—Re-marriage valid by custom*—Kunbis *of Berar—Porsonal law*—Mitakshara—Mayukha—*—Unchastity of widow after inheritance—Widow's inheritance, essence of—Widow re-marrying, incapable of acting as guardian of sons by first marriage—Adoption, power to give in—Hindu Widows' Re-marriage Act (XV of* 1856), *scope of.*

Among *Kunbis* of Berar, widow re-marriage, by a form called *pat*, is permitted and is treated as a valid union.

The personal law of the Berar *Kunbis* is the *Mitaksdara* as interpreted by the *Mayukha*, called the Bombay School of Hindu Law.

In a community goverened by the general Hindu Law, every custom at variance with that law must be strictly applied and cannot be made the basis of any other variation from the law.

A Hindu widow who contracts a valid re-marriage in accordance with a custom of her caste, is thereby transferred from the *gotra* of her deceased husband to that of her husband by re-marriage, and *ipso facto* forfeits all interest in any estate, which she may have inherited from the former, in favour of the next heir or reversioner of the deceased.

The Hindu Widows' Re-marriage Act applies generally to all Hindu widows, irrespective of caste regulations concerning re-marriage.

Obiter dicta:—

Though unchastity in a wife will prevent her from taking an estate of inheritance from her husband, unchastity by a widow, after she has inherited such estate, will not divest what has already vested in her.

It is of the very essence of inheritance by a Hindu widow, as such, that she is the surviving portion of her husband, that, after physical death, he still lives in her as a sort of incarnation of his spiritual being.

By re-marriage, a Hindu widow becomes incapable of giving in adoption a son of her deceased husband or of being the guardian of her minor children by her former husband by virtue of motherhood. SITARAM *v.* LAXMAN, 8 N. L. R. 128 **133**

——— *Right to inherit—Disqualification—Physical unchastity—Malignant hostility—Refusal to live with husband and co-wife.*

The only disqualification for a widow to inherit her husband's estate is one of physical unchastity.

Where a wife refused to live with her husband and her co-wife:

Held, (1) that, she was not disqualified, in the absence of any misconduct on her part, to inherit her husband's estate after his death:

(2) that the refusal to live was, under the circumstances, no evidence of hostility. KHETTERMONI DASSI *v.* KADAMBINI DASSI, 16 C. W. N. 964 **83**

Hindu Law—concld.

——— **Widow**—*Will by widow—Suit by reversioner to set it aside—Cause of action—Declaratory suit.*

The plaintiffs, who were the reversionary heirs of one *R.*, sued for a declaration that a Will executed by *M*, widow of *R.*, was null and void as against them. In the pleadings, the defendant set up a title in the widow wholly inconsistent with the rights of the reversioners:

Held, that the suit was maintainable. RAM AUTAR DUBE *v.* BADAL PANDEY **586**

——— **Will**—Power of Hindu minor to make Will **86**

——— *Construction—Implied prohibition to adopt—Widow's power in face of such prohibition*—Vatan *lands—Bombay Vatan Act (V of* 1886*), effect of.*

A. died on the 13th March 1885, having made a Will dated the 9th of March of that year. He left a wife and two daughters. The Will provided that the ownership of the lands, most of which were *Vatan* lands, was to go to the daughters; the wife was not to make over the property to any body except to the daughters; the daughters had authority to make over their right of ownership to or to relinquish the same in favour of each other; or else should any occasion arise the right of one might go to the other only, but not to any body else. It also recited that the testator had not taken anybody in adoption. In 1886, Bombay Act V of 1886 (Vatan Act) came into operation, and the effect of section 2 of that Act was to postpone female members of the *Vatan* to male members in the matter of succession. The widow, thereupon, adopted the son of one of the daughters and the nephews of *A.* sued for a declaration that the adoption, being opposed to the terms of the Will, was null and void:

Held, that the adoption could not be upheld without giving the go-by to the testator's expressed wishes inasmuch as the Will had made a complete disposition of all the property in favour of the daughters, and there was no property left upon which an adoption could take effect. MALGAUDA PARAGOWDA PATIL *v.* BABAJI DATTU BHAKARE, 37 B. 107 **746**

Hindu Temple—Scheme for management **441**

Hindu Widows' Re-marriage Act (XV of 1856), scope of **133**

Horse breeding—Grant. *See* GOVERNMENT TENANTS ACT.

Husband and Wife. *See* RESTITUTION OF CONJUGAL RIGHTS.

Hurt. *See* PENAL CODE, ss. 320 TO 336.

Illegitimate children, custody of—Law applicable to them **926**

Immoveable property—*Fruit trees—Growing timber—Transfer of Property Act (IV of* 1882*), s.* 3.

In the absence of any evidence to prove that the character of fruit trees is that of growing timber, such trees fall within the definition of immoveable property. KATWARU CHAMAR *v.* RAM ADHIN UPADHIA, 10 A. L. J. 516 **910**

——— Standing crops **185**

Improvement. *See* MALABAR COMPENSATION FOR TENANTS IMPROVEMENTS ACT.

——— *Compensation for improvements—Costs of defending a suit by third person to establish his right in mortgaged property.*

A mortgagee is entitled to get compensation for improving the mortgaged property if allowed to do so by the mortgagor, and the money due to the former is a charge on the latter's interest in the mortgage-property.

When a mortgagee, with knowledge that a third person had an interest in the mortgaged property, accepted a mortgage of the property he cannot claim from his mortgagor costs incurred by him in the litigation for opposing the claim of that person. RAM DITTA MAL *v. Musammat* KARAM DEVI, 167 P. W. R. 1912; 190 P. L. R. 1912 **243**

——— *Excavation of tank—Burden of proof—Tenant to show purpose of excavating tank—Supply of good drinking water to tenant and his people, if sufficient—Co-sharer landlord, if entitled to bring suit to compel tenant to fill up tank wrongfully excavated—Bengal Tenancy Act (VIII of* 1885*), ss.* 76, 188.

In order to make section 76 of the Bengal Tenancy Act applicable, it must be shown by the tenant in the first instance that the tank in question was excavated for the purpose of agriculture, or for the use of men and cattle employed in agriculture. It is not enough for the purpose of the section if the object of digging the tank was to supply good drinking water to the tenant and his people.

A suit for the purpose of compelling a tenant to fill up a tank which he has wrongfully excavated in one part of his holding and in the alternative for damages, may be instituted by a co-sharer landlord for the suit is not one which the whole body of the landlords is required or authorised to bring under the Bengal Tenancy Act and consequently section 188 of the Act is not applicable to it. GOBINDA CHANDRA BASU *v.* KAMIJUDDI SOYAL, 16 C. L. J. 127 **115**

Inam—*Minor* Inam—Kudivaram *right, presumption as to—Right to eject tenant.*

The terms of a grant were: "We have granted 2½ *kattis* of *manyam* lands..... after having the said land measured and the boundaries marked:"

Held, that the lands themselves were not granted as *inam*.

If a *zemindar* himself has no *kudivaram* rights in land, he cannot grant such land as *inam*.

To establish his *kudivaram* right and necessarily his right to eject the tenants, an *inamdar* must show that he let in the tenants at the beginning of their occupation. PARVATANENI VENKATARAMIAH *v.* PARVATANENI NARAYUDU, 12 M. L. T. 313 **246**

——— Resumption by Government 'Granted or continued' by Government—Non-interference by Government with holder's rights—Whether amounts to 'continuance' **373**

——— *Service* inams, *grant of—Construction of grant*—'Sudda Inam', *meaning of—Grant of* melvaram *right—Enfranchisement of service* inams, *effect of—Abandonment by Government of right of resumption—Madras Act (II of* 1894).

Inam—concld.

The expression '*Sudda inam*, appearing in a deed of grant of a service *inam*, does not show that the *inam* consisted of the land itself and not merely of the *melvaram*. The meaning of the expression is merely that there is nothing payable to Government in consideration of the *inamdar's* possession of the land.

The effect of the enfranchisement of a service *inam* under Madras Act II of 1894, where the Government merely gives up the right of resumption possessed by it and does not resume the *inam*, is that the title rests where it was before. SESHAGIRI AIYAR *v.* TIRUMALAI AMBALAM **481**

Inamdar, *suit against, by pioprietor of estate for* jodi *and* fasli jasti—*Small Cause suit—Jurisdiction of Revenue Court.*

A suit by the proprietor of an estate against an *inamdar* for an amount made up of *jodi* and *fasli jasti* is a Small Cause suit and is not triable, by a Revenue Court. VENKATAPPA NAYANIVARU *v.* RAMI REDDI **39**

Inherent power of Court—Discharge or removal of Receiver **583**

——— ——— ——— ——— to correct obvious errors in records **279**

Injunction, grant of **490**

——— ——— ———Prayer for declaration, granting of —Subsidiary relief **158**

——— ———, suit for, against public officer **876**

——— ———, *temporary—Order to furnish security and submit accounts—Appeal—Civil Procedure Code (Act V of* 1908), *ss.* 94 *(e)*, 115, *O. XXXIX, r.* 1, *O. XLIII, r.* 1, *cl. (r)—Interlocutory order for ends of justice—Revision.*

In a suit for ejectment, the plaintiff prayed for the issue of a temporary injunction restraining the defendant from working mica mines on the disputed property. The Court ordered the defendant to furnish security to the extent of Rs. 5,000 and submit accounts every week. An appeal was filed against that order. Subsequently, the Court directed the issue of an injunction as the security and the accounts had not been furnished. No appeal was preferred against this order:

Held, (1) that the order appealed against did not grant a temporary injunction nor did it stay and prevent the wasting of the property; that it was not an order contemplated by rule 1 of Order XXXIX, and that, therefore, it was not appealable under clause (*r*) of rule 1 of Order XLIII;

(2) that the order was made under clause (*e*) of section 94 of the Civil Procedure Code for the ends of justice, and that the High Court should not set it aside under section 115. SITO MAHTO *v.* F. F. CHRISTIEN, 17 C. W. N. 318 **361**

——— ——— when to be granted **219**

Insolvency. *See* CIVIL PROCEDURE CODE, 1882, s. 351; INSOLVENT DEBTOR'S ACT; PRESIDENCY TOWNS INSOLVENCY ACT; PROVINCIAL INSOLVENCY ACT.

Insolvency Act (11 & 12, Vic. C. 11), s. 7—*Posseseion of after-acquired immoveable property by insolvent—Adverse to Official Assignee—Limitation Act (XV of* 1877), *s.* 28, *Sch. II, Art.* 144.

Insolvency Act—concld.

Where an undischarged insolvent acquires immoveable property subsequent to the insolvency and is in possession of the same for over twelve years, his possession is adverse to the Official Assignee and the right of the Official Assignee to the property is extinguished under setion 28 of the Limitation Act, 1877. BALAKRISHNA PILLAY *v.* NARAYANASAWMY NAIDU, 12 M. L. T. 215 **14**

——— ——— ——— ——— **(11 & 12 Vic. C. 21), s. 24**—*Voluntary and fraudulent transfer.*

C. executed a promissory-note, and in order to secure the amount thereof, executed a mortgage by deposit of title-deeds. Two days after, he absconded whereupon one of his creditors presented a petition to have him adjudged an insolvent. It was found that full consideration for the note had not passed:

Held, that inasmuch as full consideration had not passed the mortgage was voluntary and fraudulent within the meaning of section 24 of the Insolvency Act and void against the Official Assignee. GOLLAPUDI *v.* LAKSHMI NARASIMHAM, (1912) M. W. N. 1001 **393**

——— ——— ——— ——— **(11-12 Vic. C. 21), s. 39**—*Set-off—Right of petitioning creditor to set-off costs payable by him to insolvent as against his debt.*

A petitioning creditor in an insolvency proceeding cannot set-off the costs payable by him to the insolvent as against his debt as the former is an asset of the insolvent's estate in which all the creditors are entitled to share.

Such a case is not a case of "mutual credit." KARRAY MANGIAH CHETTY *v.* KANACHI RAMIAH CHETTY **164**

Instalment-bond—*Limitation Act (IX of* 1908), *s.* 14, *Sch. I, Arts.* 74, 75, 120—*Non-payment of instalments not amounting to default—Waiver—Evidence Act (I of* 1872), *s.* 115—*Estoppel—Inconsistent action in Court.*

In a dispute between plaintiff and defendant as regards their shares in a particular business, the matter was referred to arbitration; an award was passed by which the defendants executed, on 12th December 1904 to plaintiff, an instalment bond payable by monthly instalments. The bond also provided that if the amounts of three instalments be allowed to fall into arrear, the balance of principal and interest then due would at once be recoverable without reference to the instalments. The defendants paid the instalment till May 1906. The instalment for May was returned by the plaintiff as also that for June. In August, the plaintiff filed a suit to set aside the award but the award was upheld by the first Court on 26th February 1908 and by the Appellate Court on the 19th January 1910. In the course of the appeal, plaintiff's Vakil applied to the Court that a decree for the unpaid instalments on the promissory-note might be given. The defendants, through their Vakil, stated they did not deny their liability to pay and that they had always been ready and willing to pay and got the application rejected. After the termination of the appeal, the plaintiffs brought this suit for the recovery of the instalments due under the pro-note. Defendants contended that the amount was barred by limitation under Article 75:

Instalment-bond—concld.

Held, (1) that in the circumstances, there was no default by the defendants in paying the instalments of May, June or July or subsequently before the suit, which could have caused the whole amount to be due:

(2) that there had also been waiver by the plaintiff of the condition that on failure of payment of three instalments, the whole should become due;

(3) that time would run under section 74 of the Limitation Act from the due date of each instalment;

(4) that section 14 of the Limitation Act would not enable the plaintiff to deduct the period, during which he had been conducting the previous suit and appeal, in computing the period of limitation because there was no defect of jurisdiction or any other cause of a like nature and the cause of action was not the same;

(5) that the defendants were estopped, by reason of what passed when the Appellate Court's judgment was being delivered in the previous suit, from setting up this bar of limitation;

(6) that the plaintiffs were entitled to interest on the instalments due as there was nothing that amounted to a true legal tender of those instalments.

Section 115 of the Evidence Act is by no means an exhaustive exposition of the law of estoppel.

A person, who, without mistake induced by the opposite party, has taken a particular position deliberately in the course of a litigation, must act consistently with it; and this principle will apply to a suit other than the one in which the action is taken, where the second suit grows out of the judgment in the first. COTHA KRISHNASAWMY CHETTY *v.* SITARAM CHETTY, 23 M. L. J. 335; (1912) M. W. N. 967 **513**

Insurance. *See* FIRE INSURANCE; MARINE INSURANCE.

——— ——— *Marine insurance—Policy—Perils of the sea, meaning of—Ordinary action of wind and waves—Wear and tear.*

The term "perils of the seas" refers only to fortuitous accidents or casualties of the sea. It does not include the ordinary action of the wind and waves. It is not every loss or damage of which the sea is the immediate cause, that is covered by these words. They do not protect against the natural and inevitable action of the winds and waves, which result in what may be described as wear and tear. There must be some casualty, something which could not be foreseen, as one of the necessary accidents of adventure.

An insured boat sank suddenly in fair weather and smooth water, without any assignable cause

It was not proved that the boat had been deliberately scuttled. The boat was in water tight condition up to the night of accident. It appeared that bottom plates had corroded through natural causes, that is, in consequence of ordinary wear and tear:

Held, that the loss was not caused by perils of the sea under the terms of the policy. STEWART *v.* NEW ZEALAND INSURANCE CO. LD. 16 C. W. N. 991 **188**

Insurance policy—*Transfer of Property Act (IV of 1882 as amended by Act II of 1900), s. 130 (1)—Deposit of policy—Assignment by writing—Deposit by way of security—Priority.*

A. assigned in writing a policy of insurance in the form of an absolute assignment to *B.*, though it was intended only to be by way of security. Previously to this, *A.* had merely deposited the same policy with *C.* by way of security for debts already existing as well as for future debts.

The deposit was not accompanied by anything in writing:

Held, (1) that *C.*, with whom the policy was merely deposited, acquired no title whatever therein or in its proceeds;

(2) that *B.* acquired an absolute right to the proceeds of the policy.

Section 130 (1) of the Transfer of Property Act covers actionable claims and transfers by way of security as well as absolute transfers.

The principle of the English law that "a deposit of a document of title without either writing or a word of mouth" creates 'in equity' a charge upon the property to which the document relates to the extent of the interest of the person who makes the deposit, does not apply in India in view of the positive language of section 130. MULRAJ KHATAU *v.* VISHWANATH, (1912) M. W. N. 1247; 12 M. L. T. 152; 11 A. L. J. 7; 24 M. L. J. 60; 17 C. W. N. 209; 15 BOM. L. R. 9; 17 C. L. J. 162 **627 P. C.**

Interest—Calculation **370**

——— ———Construction of bond **9**

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Investment—Trust—Minor's money **597**

Issues—*Object of framing issues—Several issues should not be tried together.*

The whole object of framing issues is to keep the various points arising for decision separate and distinct; and to lump them all up together in the judgment defeats the object of the law and cannot but lead to confusion. The practice of dealing with all the issues in a case together is, therefore, condemned. RAJANI KANT MUKERJI *v.* RAM DULAL DAS, 17 C. W. N. 55 **881**

Jhelum Canal Colony. *See* GOVERNMENT TENANTS ACT.

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——— ———*Suit for refund of land revenue—Land revenue, nature of—Madras Revenue Recovery Act (II of* 1864), *s.* 58.

Jurisdiction—concld.

Land revenue is a tax imposed on lands by virtue of the prerogative of the State. The liability to pay land revenue does not rest on contract or some relation resembling contract.

It is entirely a matter for Government to decide what amount of revenue should be levied on any land and Civil Courts have no jurisdiction to try any question relating to it.

A suit for refund of land revenue on the ground that as the Government failed to supply water for raising wet crops, it was not entitled to levy the revenue assessed on it, does not lie in a Civil Court. SECRETARY OF STATE *v.* PENUMACHA VENKATAPATHA RAJU, 23 M. L. J. 746; (1912) M. W. 1242 953

—— —— **of Civil or Revenue Court.** *See* PUNJAB TENANCY ACT, s. 77.

——— ———Defendant to Civil suit establishing his tenancy in Revenue Court, during the pendency of Civil suit—Civil Court bound by decision of Revenue Court 302

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Jury—*Charge—Misdirection—Death caused by injury with weapon—Omission to put case of grievous hurt before Jury—Penal Code (Act XLV of* 1860), *ss.* 304 (2), 320 (8).

Where death has been caused by a blow with a weapon, that does not necessarily suggest an intention to cause such bodily injury as would, in the ordinary course of nature, cause death, and it is presumed, in the accused's favour, that he had no knowledge that the injury which he intended to cause was likely to cause the death of the person injured. In such cases, if the circumstances are such that an intention merely to cause hurt dangerous to life might not unreasonably be inferred, the Jury should be directed that it is open to them to find the accused guilty of the lesser offence, namely, of causing grievous hurt under section 320 (8) of the Penal Code.

Section 304 (2) is not appropriate to a case where there was a deliberate intention to inflict bodily injury to the person whose death resulted from such injury. EMPEROR *v.* CHAGAN RAJARAM, 6 S. L. R. 116; 13 CR. L. J. 750 62

Jury—concld.

——— *Misdirection—Questions of law—Rioting—Common object—Suggestion by Judge that real case might be between cases alleged by both sides—Penal Code (Act XLV of 1860), ss. 146, 147—Violence, if includes that against inanimate object—Minutest details, whether necessary for Judge to go into—Statement by prosecution witness that accused had been bound down, whether admissible—Evidence of bad character—Evidence Act (I of 1872), s. 54.*

In a case of rioting in which one common object was alleged throughout, the Judge suggested to the Jury that the case might not be precisely as the prosecution alleged, nor what the defence set up, but something between the two:

Held, that there was no misdirection; that the Judge left it entirely open to the Jury as to whether they would accept his suggestion or not; and that the acceptance of it by the Jury would not destroy the case for the prosecution.

In section 146, Indian Penal Code, violence includes violence against inanimate objects, such as pulling down a man's house.

In his charge to the Jury, it is not necessary for the Judge to go into the minutest details in the evidence.

In a prosecution for riot, the statement by a prosecution witness that he had brought a case under section 107 of the Criminal Procedure Code against some of the accused who had been bound down, is admissible, if introduced not for the purpose of proving the bad character of the accused, but as part of the *res gestæ*, the events which had transpired before, and which eventually led up to, the riot with which the accused were charged. SAMARUDDIN *v.* EMPEROR, 13 CR. L. J. 821 **565**

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Khot. *See* KHOTI SETTLEMENT ACT.

Khoti Settlement Act (Bom. I of 1889), ss. 33 (c), 40 (a)—*Rules under section 40 (a), rr. 1-8—Khot—Occupancy tenant—Rent—Crop-share—Gross annual produce how determined—Appraisement—Admission of defendant—Rule 8, intra vires.*

Rule 8 of the rules framed under section 40 (*a*) of the Khoti Settlement Act is *intra vires*.

The only rent, which the occupancy-tenant under a *khot* can be liable to pay, is the rent as prescribed by section 33 (*c*), that is, a crop-share by way of a fixed proportion of the gross annual produce of the land and of the produce of the fruit trees, if any.

The crop may be appraised according to the provisions of the rules framed under section 40 (*a*).

If the provisions of the rules are not observed, then the appraisement admitted by the tenant himself is to be taken as determining the gross annual produce.

Apart from the provisions of the rules and the admission of the tenant, it is not open to the Court to estimate the amount of rent on an equitable basis from other materials. VINAYAK BALKRISHNA *v.* SITARAM, 14 BOM. L. R. 1173 **943**

Khoti Settlement Act—concld.

——— ——— ——— ——— **s. 40 (a), rules under, rr. 1 to 8** **943**

Kudivaram. *See* INAM **353**

Lambardar and co-sharers—*Suit for profits—Pendency of partition suit no bar—Civil Procedure Code (Act V of 1908), O. II, r. 2—Principle for awarding interest—Discretion.*

The pendency of a suit for partition is no bar to a suit for profits against the *lambardar*.

Two suits were brought for profits, one in respect of the share owned by the plaintiff as owner and the other as an assignee of another co-sharer:

Held, that the second suit was not barred by Order II, rule 2 of the Code of Civil Procedure.

There is no provision of law regulating what interest ought to be allowed to a successful plaintiff suing for profits against the *lambardar*. The rate depends on the discretion of the Court. In fixing the rate of interest, the analogy of what is allowed in favour of a landlord against a defaulting tenant is not an unreasonable one. MUHAMMAD ABDUL AZIZ *v.* RAFI-UN-NISSA BIBI, 10 A. L. J. 469 **833**

——— ——— ——— Suit for profits **914**

——— ——— ——— *Apportionment of compensation money—Zemindar and patnidar—No abatement of rent for acquisition of land within patni tenure—Compensation, whole of, to go to patnidar.*

Where there is no abatement of rent by the landlord to the *patnidar* in respect of lands within the *patni*, acquired by the Government, the landlord is entitled to no portion of the compensation. RAM RANJAN CHAKRAVARTY *v.* BUNWARI LAL MITTER, 16 C. L. J. 211 **170**

Land Acquisition—*Apportionment of compensation money—Zemindar and patnidar—No abatement of rent for acquisition of land within patni tenure—Compensation, whole of, to go to patnidar—Chance of patni coming to end, monetary value of.*

Where the terms of a *patni* lease debar the *patnidar* from claiming any abatement of rent on account of diminution of his tenure by reason of compulsory acquisiton, he is entitled to the whole compensation money. It is difficult to appreciate the monetary value of the chance of the *patni* lease coming to an end by sale or forfeiture. BIPRODAS PAL CHAUDHURI *v.* SARAT CHANDRA SINGHA, 16 C. L. J. 209 **168**

——— ——— ——— *Apportionment of compensation—Lands in patni—Transferee of patni tenure—Non-registration of name in zemindar's book, effect of—Zemindar not allowing abatement of rent to patnidar—Claim to portion of compensation money—Chance of forfeiture of patni—Remoteness—If chance may be valued.*

The rights of a transferee of a *patni* are perfected upon the transfer by the *patnidar*, and are not in any way contingent for their validity upon the payment of the fee and the security under section 6, paragraph 1, of the Patni Regulation.

The only effect of his failure to secure registration of his name by the payment of the fee and the security, is that the landlord is not bound to recognise his purchase, and may sell up his tenure in execution of a decree for arrears of rent obtained against the registered tenant.

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Therefore, where lands included in a *patni* tenure are acquired by the Government, the purchaser of the *patni* tenure is entitled to claim the compensation money even though he has not registered his name in the books of the *zemindar*.

A *zemindar* is not entitled to any share of the compensation money when he has not allowed any abatement of rent to the *patnidar*.

The chance of forfeiture of the *patni* is very remote and it was held that the *zemindar* in the present case wholly failed to establish the value of this remote chance of possible loss. GANPAT SINGH BAHADUR *v.* MOTI CHAND, 16 C. L. J. 301 **171**

Land Acquisition Act (I of 1894)—*Compensation—Different interest in land acquired—How to apportion compensation.*

When different persons hold different interests in the land acquired under the Land Acquisition Act, the Court should ascertain the value of the respective interests and apportion the compensation in proportion to such interests. HIRDEY NARAIN *v.* POWELL, 10 A. L. J. 403; 35 A. 9 **672**

——— ——— ——— **s. 18 (2) (b)**—*Collector's award when complete—Application for reference to Court—Limitation.*

The actual payment of the compensation awarded under the Land Acquisition Act is not part of the Collector's award, and is not necessary to the completion of it: the award is complete as soon as the Collector apportions the amount of the compensation between the parties concerned.

An application, therefore, to make a reference to Court made more than six months after this latter event is barred by section 18 (2) (*b*) of the Land Acquisition Act. MIRAN BAKHSH *v.* FEROZE DIN, 232 P. L. R. 1912 **395**

——— ——— ——— ——— **s. 24, fifthly**—*Agricultural land acquired for* Mandi—*Compensation how determined—Proof—Sale of land requiring sanction of Deputy Commissioner—Appeal by Secretary of State against Court's award—Court-fee—Court Fees Act (VII of* 1870*), s.* 8, *Sch. II, Art.* 17 (4).

Where agricultural land is acquired for a *Mandi*, the compensation should be assessed at the amount which similar land in the neighbourhood is likley to fetch for purposes of agriculture. The purpose for which the land is required should not influence the award of compensation.

The fact that a shop-keeper is willing to pay a large price for a shop in a *Mandi*, or so near a *Mandi* as to enable him to enjoy the benefit enjoyed by the proprietors of the shops in the *Mandi*, in the event of his being fortunate enough to receive sanction for the purchase under the Alienation of Land Act, should not be considered in assessing the value for the purposes of the Land Acquisition Act unless it is shown that the sanction would be granted for the purchase.

The evidence of witnesses, who merely give opinions as to the value of land or express their willingness to purchase it, should be excluded in determining the amount of compensation.

Where a District Board acquired land at a high price by private purchase for the enlargement of a *Mandi* in order to obviate the delay caused by

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proceedings under the Land Acquisition Act, the fact should not be taken into consideration in assessing the value of other land subsequently acquired through Government.

Section 8 of the Court Fees Act is applicable only to appeals by persons claiming compensation. An appeal by the Secretary of State against the award of the Court requires a Court-fee of Rs. 10 only under Article 17 (4), Schedule II of the Act. SECRETARY OF STATE *v.* BASAWA SINGH, 19 P. W. R. 1913 **764**

——— ——— ——— ——— **s. 30** — *Exclusive jurisdiction to determine right to, and apportionment of, compensation—Civil Procedure Code (Act XIV of* 1882*), ss.* 521, 522—*Separable parts of award—Void and valid portions—Court discovering before decree its incompetency to try suit—Dismissal of suit—Amount of compensation—Apportionment—Estoppel.*

A. died about 1902. He left two pieces of land, (1) at X and (2) at Y. Mutation in respect of this property took place in favour of *A.*'s three sons, *B.*, *C.* and *D.* The land at X. was acquired by Government, and the Collector's award was delivered in August 1903. Objections were put in and referred to the Court, which gave its final decision in August 1907, to the effect that *D.* was not separated from the family, and was entitled to ⅓rd share of the compensation awarded. This decision formed the subject of an appeal to the Chief Court.

After the reference by the Collector to the Court, *B.* and *C.*, on the 4th January 1905, instituted a suit in the Court of the Subordinate Judge in respect of both pieces of land to have it declared that on the death of *A.*, their father, they were exclusive owners of the land and that *D.* was not entitled to a share of the land, or to a share of the compensation awarded by the Collector in respect of the X. land. The suit was referred to arbitration by the parties and the umpire's award, delivered on 22nd June 1906, declared *B.* and *C.* to be exclusive owners of the land and alone entitled to receive the compensation. Objections were put in under section 521 of the old Code of Civil Procedure and in addition a plea was raised that as the point in dispute was exclusively within the jurisdiction of the Land Acquisition Court, the Court of the Subordinate Judge had no jurisdiction to entertain the suit. On this plea alone, the suit was dismissed without any inquiry into the objections under section 521 and any adjudication on the award. On appeal, the Divisional Judge upheld the Subordinate Judge's decision in regard to the X land, but finding that the Court of the Subordinate Judge had jurisdiction in regard to the Y land, enforced the award of arbitration and allowed the claim of *B.* and *C.* in respect of that piece of land. This decree of the Divisional Judge formed the subject of two cross-appeals by the parties concerned.

The first appeal under the Land Acquisition Act and the two cross-appeals mentioned above were heard together by the Chief Court:

Held, (1) that as regards the Y land, the decree of the Subordinate Judge not being in accordance with the arbitration award, the Divisional Judge

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had jurisdiction to entertain an appeal which was not barred by section 522 of the old Civil Procedure Code; on the other hand, the decree of the Divisional Judge in respect of that piece of land being in accordance with, and not in excess of, the award, an appeal from it was barred by section 522;

(2) that there was no reason for interference on revision in respect of Y land, the grounds urged being unsustainable, because (*a*) the award relating to the Y land was separable from the award relating to the X land, and (*b*) *D.* had by his silence abandoned his objections to the award in the Divisional Court;

(3) that the Subordinate Judge had no jurisdiction to try the claim in respect of X land;

(4) that the Subordinate Judge having discovered, before passing a decree, that he had no jurisdiction to entertain the suit as regards the X land, or to pass a decree which would be binding on the Land Acquisition Court, he had no option under the circumstances but to dismiss the suit in regard to that land;

(5) that *D.*, by his agreement to the reference to arbitration, was not, under the circumstances of the case, estopped from questioning the Court's jurisdiction or from defending his rights in the Land Acquisition Court;

(6) that the Land Acquisition Court was competent to go into the question of apportionment, as the objections referred to the Court included one by *B.* and *C.* that they alone were entitled to the portion of the compensation awarded by the Collector to their brother, *D.*

A decision of the Chief Court in the previous appeal on the question of the amount of compensation does not bar the Land Acquisition Court from disposing of the point of apportionment which, in its first decision on the matter of compensation, it had expressly left for future decision.

In a claim disposed of by the Collector in the course of Land Acquisition proceedings under the special procedure prescribed by Act I of 1894, the Collector's order or adjudication of the rights of the owners or claimants to the property for which compensation was assessed and awarded, cannot be questioned otherwise than by a reference to Court under the provisions of the Act, and the Civil Courts are not competent to re-open and determine matters disposed of in accordance with the Act in a separate suit. AMOLAK SHAH *v.* CHARAN DAS, 16 P. W. R. 1913 **684**

——— ——— ——— **ss. 49, 54**—*"Award or any part thereof"—Decision of Court under section 49, whether an award—Appeal.*

The words "award or any part of the award" in section 54 of the Land Acquisition Act, 1894, do not include the decision of the Court on a reference under section 49.

The decision of the Court on a reference under section 49 of the Land Acquisition Act, 1894, is not appealable.

Obiter:—A decision by the Court under section 49, would not prevent a claimant obtaining compensation for severance under section 23, sub-section (1) clause (3). GILES SEDDON *v.* DEPUTY COLLECTOR OF MADRAS **117**

——— ——— ——— ——— **s. 54** **117, 952**

Land Acquisition award—Claim of objector absurdly extravagant—Pleader's fees **901**

Landlord and Tenant. *See* AGRA TENANCY ACT; BENGAL TENANCY ACT. CENTRAL PROVINCES TENANCY ACT; CHOTA NAGPUR TENANCY ACT; PATNI REGULATION; PUNJAB TENANCY ACT.

——— ——— ——— ———Improvement—Excavation of tank—Burden of proof—Tenant to show purpose of excavating tank—Supply of good drinking water to tenant and his people sufficient—Co-sharer landlord, if entitled to bring suit to compel tenant to fill up tank wrongfully excavated **115**

——— ——— ——— ———Lease to company **976**

——— ——— ——— ———Lease by mortgagee in favour of mortgagor for the mortgaged property—Suit for rent of mortgaged property, maintainability of **424**

——— ——— ——— ———Person settled as *raiyat* by trespasser—Recorded as *raiyat* in Record of Rights—Settling fair rent—Relationship of landlord and tenant—Whether consent of both parties essential **587**

——— ——— ——— ———Suit for rent for a certain *fasli*—Issue as to propriety of *patta* tendered—Adjudication—Subsequent suit for rent for another *fasli*—Issue as to extent of holding—*Res judicata* **445**

——— ——— ——— ———*Zemindar* and *patnidar*—No abatement of rent for acquisition of land within *patni* tenure—Compensation, whole of, to go to *patnidar*—Chance of *patni* coming to end, monetary value of **168, 170, 171**

——— ——— ———*Adverse possession — Non-payment of rent.*

Mere non-payment of rent by a tenant does not make him owner of the land by adverse possession, unless the tenant does some act which is inconsistent with the owner's title and thereby turns his possession, as tenant into possession adverse to that of the owner. VINAYAK BALKRISHNA *v.* SITARAM **943**

——— ——— ——— ———*Decree for arrears of rent—Sale in execution—Purchaser to acquire property free from incumbrances—Decree should be one for arrears due in respect of under-tenure—Single decree obtained for rents of two tenures—Sale in execution of such decree—Rights of purchaser—Rent Recovery Act (X of 1859), s. 105—Sale of Under-tenures Act (VIII of 1865 B. C.), ss. 4, 6, 16.*

Section 4 of Bengal Act VIII of 1865 makes it essential in order that the purchaser may acquire the property free from all incumbrances under section 16, that the decree under execution should be one for arrears of rent due in respect of the under-tenure brought to sale.

If a single decree is obtained for arrears of rent of two distinct tenures, it operates as a decree for money when in execution thereof either tenure is brought to sale.

The rent is not regarded as due from the person against whom the decree is obtained, but is due in respect of the tenure.

Therefore, if the landlord seeks to recover by the sale of a tenure, not merely arrears due therefor, but an additional sum not realisable in respect of that tenure, the purchaser at the execution sale does not acquire the special status mentioned in section 16 of Act VIII of 1865 B. C. KANTA LAIK *v.* LACHMAN OJAH, 16 C. L. J. 197 **165**

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——— ——— ——— ——— *Fraud—Person affected by fraud—Right of suit—Non-transferable holding, purchaser of—Rights of purchaser—Suit by purchaser to set aside fraudulent decree obtained by landlord against plaintiff vendor, whether maintainable.*

It is open to any person affected by fraud to impeach it and to sue to set aside the results accruing from such fraudulent conduct.

The purchaser of a portion of a non-transferable holding has a subsisting right in spite of the non-recognition of the same by the landlord.

The purchaser of a non-transferable holding has sufficient interest to maintain an action for declaration that certain rent decrees were collusively and fraudulently obtained by the landlord against the purchaser's vendor, that the plaintiff is not bound by those decrees, and that the holding cannot be sold in execution thereof. He should not be shut out from showing that there was collusion between his vendor and his vendor's landlord. GADADHAR GHOSE *v.* MIDNAPUR ZEMINDARI CO., 16 C. L. J. 141 **126**

——— ——— ——— ——— *Ground rent—Permanent tenancy—Evidence—Non-liability for enhancement of rent—Rights of permanent tenants—Buildings.*

Long possession at uniform rent, erection of expensive buildings without interference for many years by the landlords, transfers by sale, gift, mortgage and succession, execution of several receipts of rent in which it is described as *dawani* or permanent, are indications to show that the tenure was permanent from the first.

In the case of a permanent tenancy at a fixed-rate of rent, no enhancement can be allowed.

Permanent tenants of sites, which are let for building purposes, cannot be restrained from building or re-building their houses thereon in the absence of any express conditions to the contrary. ABDUL KARIM *v.* ALLAH BAKHSH, 197 P. W. R. 1912; 209 P. L. R. 1912; 121 P. R. 1912 **208**

——— ——— ——— *Grove planted with permission of zemindar on payment of rent—Right to transfer such grove—Agra Tenancy Act (II of 1901), s. 4.*

A. planted a grove and constructed a *pacca* well with the permission of the *zemindar* and agreed to pay a yearly rent. Subsequently *A.* sold the grove and the well to the defendants:

Held, that the transfer was a valid transfer, the position of *A.* being that of a grove-holder.

Per Banerji, J. (contra)—A grove-holder is a tenant under section 4 of the Agra Tenancy Act and has no right to transfer the grove in the absence of a custom or contract to the contrary. MUHAMMAD ISMAIL KHAN *v.* MITHU LAL **656**

——— ——— ——— *Lease—Assignee from lessee—Liability for rent—Apportionment of rent—Privity of estate—Transfer of Property Act (IV of 1882), ss. 36, 108.*

As an assignee from the lessee becomes the lessee from the date of assignment, he must be held liable only for the rent accruing *after* the assignment.

Privity of estate being the ground of assignee's liability, the liability should not be made heavier than the extent of that privity would justify.

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An assignee of a lease can claim as against the lessor an apportionment of the rent, accruing after the date of his assignment, according to the period before and after his assignment, as the rent is deemed accruing from day to day as between him and the lessor. RANDIPURAZIL KUNHISOW *v.* ALUKANDIYIL PARKUM MULLOLI CHATHU, 23 M. L. J. 695 **933**

——— ——— ——— *Lease for long term of years—Leased land planted up as garden—Forfeiture condition on non-payment of rent—Relief against forfeiture—Deposit of rent in Court—Discretion—Revision—Failure to exercise jurisdiction—Transfer of Property Act (IV of 1882), s. 114—Punjab Tenancy Act (XVI of 1887), ss. 48, 84.*

A. took from *B.* certain land on 20-year lease at a rent of Rs. 400 payable in half-yearly instalments. The lease contained a condition providing that *A.* would be liable to ejectment should at any time the rent for one year be in arrears.

The area leased was planted up by *A.* as a garden and contained many fruit trees which were about to reach their prime. *B.*, alleging default in payment of rent in respect of two half-yearly instalments, sued for ejectment. *A.* pleaded tender of rent and further paid into Court the amount of rent then due. The first Court declined to grant ejectment, but the Collector on appeal, finding that the tender was not valid, held that he was bound to enforce the forfeiture condition of the lease:

Held, (1) that section 48 of the Tenancy Act did not bar or exclude relief against forfeiture for non-payment of rent, if under the general law governing lease contracts, such relief was claimable by lessees;

(2) that the case called for the exercise of the discretion, conferred by section 114 of the Transfer of Property Act, to give relief against forfeiture under the condition of the lease, which was objectionable and unconscionable;

(3) that as the Collector failed to exercise the jurisdiction to grant relief against forfeiture for non-payment of rent, his order was liable to revision.

Such of the sections of the Transfer of Property Act as lay down principles of law which are in consonance with the principles of equity, good conscience and justice should be followed by the Courts of the Punjab. Section 114 of the Act embodies such a provision of law. AZIZ-UD-DIN *v.* BHAGWAN DAS, 6 P. R. 1912 REV.; 36 P. L. R. 1913 **991**

——— ——— ——— *Lease prior to 1882—Forfeiture for non-payment of rent—Relief against forfeiture—Landlord's act—Lease not providing for period of grace—Loss of improvements—Equitable relief—Plea of payment not proved.*

In the case of a lease made prior to the coming into operation of the Transfer of Property Act, an act on the part of the landlord, showing that he elects to take advantage of the forfeiture, is not a condition precedent to his right to sue for ejectment.

The question whether a tenant is entitled to relief against forfeiture for non-payment of rent must depend on the facts of the particular case.

Where no period of grace for payment of arrears of rent is provided and the lessee has agreed to deliver back the property, without demanding the value

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of his improvements, the lessee is entitled to relief against forfeiture for non-payment of rent.

The fact that the tenant sets up a plea of payment which he fails to prove, does not necessarily disentitle him to equitable relief. RAMAKRISHNA MALLAY v. BABURAYA, 28 M. L. J. 715; 12 M. L. T. 656 **947**

——— *Non-payment of rent for over 12 years—Presumption—Adverse possession.*

The mere non-payment of rent by a tenant is generally insufficient to show that the tenant has acquired proprietary title against his landlord. A denial of landlord's title must be shown. But non-payment of rent, if proved to have continued for a *very long* period, might give ground for the inference that the landlord had been ousted or had transferred his right to the tenant.

Where *parjawat* (a kind of ground-rent) was not paid by the tenant or collected by the landlord for fifty years but the amount of the *parjawat* was very small, *i. e.*, only 2 pice per mensem :

Held, that the tenant could not be taken to have been in adverse possession of the site of the house. DEOKINANDAN PERSHAD v. BINDESWARI PARSHAD **523**

——— *Non-transferable holding, purchaser of portion of—Rights of purchaser—Collusive decree by landlord against recorded tenant to defeat purchaser's right—Payment of decretal amount by purchaser—Suit by purchaser for amount paid by him and for declaration that the decree was fraudulent, whether maintainable—Fraud—Right of suit.*

A purchaser of a portion of a non-transferable holding cannot be ejected. He has a subsisting right which cannot be denied, though the landlord may not recognise him and only looks to the recorded tenant.

Therefore, a suit for a declaration that a decree obtained by the landlord (defendant No. 1) against his recorded tenant (defendant No. 2) for arrears of rent, is fraudulent and inoperative against the plaintiff who is the mortgagee of a portion of the non-transferable holding of the tenant, and for recovery of the sum of money paid by the plaintiff for satisfaction of the said decree, is maintainable. BRAHAMDEO NARAIN v. RAMDOWN SINGH, 16 C. L. J. 139 **125**

——— *Non-transferable holding—Transfer by raiyat—Suit by landlord to eject purchaser—Plaintiff to prove what—Abandonment and disclaimer, whether necessary to be proved positively as fact—Inference from transfer of holding and giving possession to purchaser—Parties—Whether raiyat necessary party to suit—Custom of transferability—Proof—Recognition by landlord without nazar or with nazar fixed by custom.*

The *raiyat* of a non-transferable holding transferred his interest in the entire holding, and the landlord brought a suit for *khas* possession of the holding against the purchaser :

Held, (1) that it was not necessary for the plaintiff to prove positively as a fact that the *raiyat* had left the holding and disclaimed any interest in it, as this was a direct inference from the fact that he had sold the entire holding and given possession of it to the purchaser;

(2) that the *raiyat* was not a necessary party to the suit.

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In order to prove a custom of transferability, it is necessary to prove that the transfers had been made with the knowledge and without the consent of the landlord and that they have been recognised by him either without the payment of *nazar*, or upon payment of *nazar* fixed by custom. SEKH CHAND v. ROMONI MOHAN ROY **603**

——— *Occupancy holding—Transferability—Custom, proof of—Registration of transferee's name on payment of nazar—Consent of landlord.*

Where there was evidence that *nazars* were as a rule paid to the landlord by the transferees of occupancy-holdings, and on payment of the *nazar*, the purchaser was usually recognised by the landlord as his tenant:

Held, that it was not evidence of any custom by which an unwilling landlord was bound, or evidence that the landlord was compelled, to recognise the purchaser on payment of *nazar*, whether he wished to do so or not. BHOGIRATH CHANDRA MANDAL v. SITAL CHANDRA SARKAR, 16 C. W. N. 955 **15**

——— *Relationship of—Kabuliat executed by one of two brothers—Whether other brother becomes tenant—Intention of parties—Conduct of parties to be considered—Subsequent knowledge of landlord that brothers agreed to share tenancy, effect of—Novation of contract—Bengal Tenancy Act (VIII of 1885), s. 5—Prasumption—Tenure-holder—Holding more than 100 bighas—Occupancy-rights before commencement of Act—Whether presumption to be made.*

Where one of two brothers executed a *kabuliat*, the question whether the other brother became a tenant of the landlord depends on what was the intention of the parties. If the landlord knew that he was letting the land to both, but took the *kabuliat* in the name of one alone merely for the sake of convenience, then the relation of landlord and tenant was constituted between him and the other brother. But if the landlord knew nothing of the arrangements made between the two brothers that they would equally share the tenancy, and believed himself to be contracting with the brother executing the *kabuliat* only, then those arrangements could not bind him in any way and would not create any relation between him and the other brother.

To decide what was the intention and knowledge of the parties, their conduct must be taken into consideration.

If the landlord came to know afterwards that the brother executing the *kabuliat* had allowed the other brother an interest in the tenancy, that would not amount to a novation of their contract.

Although the presumption referred to in section 5 of the Bengal Tenancy Act that if a man holds more than 100 *bighas*, he must be supposed *prima facie* to be a tenure-holder, is not applicable to the rights of occupancy acquired by a *raiyat* before the Act came into operatien, yet when the question is whether a tenant was or was not a *raiyat*, the area of the land held should be taken into consideration though it is not necessary to adhere to the exact standard of 100 *bighas*. SARAT CHANDRA ROY v. RATUBUDDIN, 16 C. L. J. 271 **227**

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——————— 'Savaram' — Melvaram — Kudivaram—*Madras Estates Land Act (I of 1908), s. 185—Leases granted after 1st July 1898, admissibility of.*

Per *Sundara Aiyar, J.*—The word '*Savaram*' does not necessarily import the absence of *kudivaram* right in the cultivating *ryot*—*Savaram* was compensation granted to a *zemindar* or Revenue Officer under the Muhammadan Government. In some cases land exempt from payment of rent was granted to him. But if no land was available, the grant to the *zemindar* would consist merely of the revenue on a portion of the lands for the assessment of which the *zemindar* was responsible to the State.

Per *Sadasiva Aiyar, J.*—In consequence of certain land being known as *savaram*, the Courts need not necessarily presume that both *melvaram* and *kudivaram* belong to the *zemindar*, but the Courts *may* presume such land to be of the above character.

Per *Sundara Aiyar, J.*—Under section 185 of the Madras Estates Land Act, 1908, it is the date of the contract that is material in deciding whether the evidence is admissible. The Act does not lay down any rule as to all the kinds of evidence that may be produced to prove that the land in question is the *zemindar's* private land, and evidence of dealings subsequent to 1st July 1898 is not altogether excluded.

Per *Sadasiva Aiyar, J.*—The leases granted after 1st July 1898 are shut out as evidence by section 185 of the Madras Estates Land Act if they are sought to be used for the purpose of proving the character of the tenure of the land and even if such leases are sought to be proved merely in order to show that the land was treated in the same manner after July 1898 as before July 1898. Leases granted before 1st July 1898, though they were only to come into force after 1st July 1898, are admissible in evidence. MULPURA LAKSHMAYYA *v.* VARADARAJA APPAROW, 23 M. L. J. 624; (1912) M. W. N. 1193; 12 M. L. T. 561 **353**

——————— *Surrender of portion of holding—Subsequent sale of same portion—Subsequent execution of* kabulyat *by* raiyat *to landlord—Suit by landlord to eject purchaser—*Kabulyat, *whether in fraud of purchaser, or legal fiction validly resorted to by landlord—Unauthorized purchase of portion of holding, if incumbrance—Abandonment—Surrender Bengal Tenancy Act (VIII of 1885), ss. 86, 87, sub-ss. (6) and (7).*

In December 1906, a *raiyat* surrendered a portion of his holding to his landlord, and sold this very portion to the defendant in February 1907. In December 1907, he executed a *kabulyat* in favour of the landlord in respect of the holding. Eleven days after that, a suit was brought by the landlord to eject the purchaser on the ground that the holding was not transferable by custom:

Held, that the execution of the *kabulyat* was not an act done by the tenant in fraud of the purchaser to which the landlord made himself a party by taking the *kabulyat*, but the contract was a legal fiction to which the landlord was entitled to resort to in order to recover from the purchaser who had no title as against him; that unless it was shown that the landlord acted fraudulently in excess of his rights for the purpose of defeating the rights of the purchaser, the *kabulyat* could not be inoperative; that the unauthorized purchase of a portion of the holding by the defendant could not create an incumbrance on the tenancy within the meaning of section 86, sub-sections (6) and (7), of the Bengal Tenancy Act; that the landlord in this case could accept the tenant's surrender of the whole or a portion of the holding under section 86, sub-section (7); that the effect of the *kabulyat* was to surrender the whole original holding and create a new holding altogether; that although the tenant might be answerable to the purchaser for damages and compensation for breach of contract, the landlord could not be bound to recognize any right in the transferee; and that the landlord was entitled to eject the purchaser. RAMONI MOHAN RAY *v.* KALIMUDDI **682**

——————— *Tenancy — Acquisition by prescription—Limitation — Central Provinces Tenancy Act (XI of 1898), ss. 39, 44, 62 (1)—Limitation Act (IX of 1908), Sch. I, Arts. 142, 144.*

A tenancy cannot be acquired by prescription in the Central Provinces.

A person, occupying land without the consent of the landlord, and claiming to hold it as a tenant, does not hold even the limited right of a tenant adversely to the landlord.

Article 142 of the Limitation Act does not apply if the possession taken by the defendant of even a limited interest in land is not adverse to the plaintiff landlord.

Limitation time under Article 144 does not begin to run until possession becomes adverse. KANHAYALAL *v.* DULARSINGH, 8 N. L. R. 163 **606**

——————— *Tenant suing to recover his holding from person settled by landlord—Regulation VII of 1822 and Regulation IX of 1825—Settlement proceedings—Collector's jurisdiction to decide disputes as to title between* raiyats*—Decision whether "award"—Regulation VII of 1822, s. 14—Limitation Act (XV of 1877), Sch. II, Arts. 14, 46.*

Under the decision in *Binad Lal Pakrashi* v. *Kalu Pramanik*, 20 C. 708, a proprietor may not be able to eject tenants settled on the land by his rival, even though his rival is found to be a trespasser. But this principle could never be applied and was never intended to be applied to a tenant seeking to recover his own holding.

It was not intended by the provisions of Regulation VII of 1822 that Collectors should decide disputes as to title between *raiyats*, in which the *zemindars* or *Sadar Malguzars* had no interest, and which could in no way affect the assessment.

A decision by a Collector, therefore, as to the title between two *raiyats* is not an award under the Regulation or within the meaning of Article 46 of Schedule II of the Limitation Act of 1877.

Section 14 of Regulation VII of 1822 gives the Collectors jurisdiction to decide, not all disputes but disputes in regard to the *nature* of any tenancy. But the section does not apply to a case in which rival tenants claim, not only a tenancy of the same nature, but the same land under the same nature of tenancy.

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An order of the Collector by which the lands belonging to the plaintiff have been given to the defendant without any warrant of law, does not require to be set aside by the plaintiff, and, therefore, Article 14 of Schedule II of the Limitation Act of 1877 does not apply to a suit by the plaintiff for possession of the lands. RAJANI KANT MUKERJI *v.* RAM DULAL DAS, 17 C. W. N. 55 **881**

——— ——— ——— *Transfer of entire holding without landlord's consent—Original tenant remaining on land as sub-tenant of purchaser—Liability of purchaser to ejectment—Abandonment—Forfeiture.*

Where the defendant purchased the entire rights of the original tenants to certain *jote* lands without obtaining the consent of the landlord, the plaintiff, to the transfer, and the original tenants remained in possession as sub-tenants of the purchaser:

Held, that the principle laid down in *Kabil Sardar's* case, 20 C. 590, did not apply, and the landlord was entitled to a decree for ejectment against the purchaser. NAGAR ALI JOARDAR *v.* KALA CHAND SARDAR **654**

Land Revenue, nature of **953**

——— ——— ——— **sale**—Fraudulent transfer **878**

Land, suit for. *See* SUIT FOR LAND.

Lease. *See* LANDLORD AND TENANT.

———Assignee from lessee—Liability for rent—Apportionment of rent—Privity of estate **933**

——— granted after 1st July 1898—Admissibility **353**

——— from mortgagor after mortgage suit—*Lis pendens*—Transfer of Property Act (IV of 1882), s. 52—Lease after mortgage but before mortgage suit—Lease valid if granted on usual terms in ordinary course of management—Burden of proof **1**

———Landlord's arrears—Possession by liquidator—Landlord's acquiescence — Landlord, whether secured creditor **976**

——— for long term of years—Leased land planted up as garden—Forfeiture condition on non-payment of rent—Relief against forfeiture—Deposit of rent in Court—Discretion **991**

——— prior to 1882—Forfeiture for non-payment of rent **947**

———Privity of contract between lessor and lessee **500**

———Transfer of occupancy rights—Sale—Burden of proof **889**

———Usufructuary mortgage—Subsequent execution of *mulgeni* lease to stranger—No change of character as lessee—Lessor entitled to possession—Merger **265**

———*Claim for rent—Advance of* kattakonam *to lessor by lessee—Assignment by lessor of his reversion*—Kattakonam, *whether can be set-off—Assignor or assignee liable for* kattakanom.

On the execution of a lease deed, the lessee advanced a certain sum as *kattakanom* to the lessor, whereby the interest due on the latter was to be deducted from the rent due every year and the principal amount of the *kattakonam* was re-payable at

Lease—contd.

the termination of the lease, which was a lease from year to year. Soon after the lease, the lessor assigned his reversion to a third party. The lessor then sued for rent:

Held, (1) that the lessee could not set off the *kattakanom* as against plaintiff's claim;

(2) that the tenant was entitled to proceed for his *kattakanom* against either assignor or assignee and;

(3) that in the absence of a special agreement, the right to enforce the *kattakanom* did not accrue due on the date of the assignment; but on the termination of the tenancy. VEERARAYAN *v.* PARAKAL GOPAL MENON **623**

——— *Covenant for renewal—Permanency—Lease for term of years—Option of renewal—Option exercisable by lessee and his representative—Where no terms stated, lease to be renewed on former terms—Perpetual renewal—Covenant for renewal, if runs with land—Suit in ejectment—Lessee ready to accept renewal on proper terms—Covenant still specifically enforceable—Construction—Grant to be construed in favour of grantee.*

A lease recited the prior settlements upon the termination of the last of which the lease was renewed at enhanced rent. It then provided that if the lessee stood in need of constructing any house, he could build on obtaining sanction therefor from the lessor, the Collector. If the lessee failed to pay rent, the Government might realise the arrear under the laws in force, and take possession of the land. The lessee, his heirs and representatives, would have the right to dwell on the land. After the expiry of the term, the Government would have power to re-settle the land with the lessee on a fair rent:

Held, that the last clause was intended to be a covenant for renewal.

A renewal clause in a lease does not necessarily import permanency; but if it did, the clause requiring sanction of the Collector to the erection of a building, is not necessarily inconsistent with the theory of a permanent grant; the object of such sanction may be not so much to prevent the erection of a building as to secure that the building should be of a suitable type from a sanitary or architectural or other similar point of view.

An express covenant to renew in appropriate technical language is not essential, and the *habendom* may be so framed as to amount in substance to a covenant for even perpetual renewal.

A lease, which creates a tenancy for a term of years may yet confer on the lessee an option of renewal.

If the lease does not state by whom the option is exercisable, it is exercisable by the lessee only.

The option is exercisable not merely by the lessee personally but also by his representative-in-interest.

If the option does not state the terms of renewal, the new lease will be for the same period and on the same terms as the original lease, in respect of all the essential conditions thereof, except as to the covenant for renewal itself.

There is no sort of legal presumption against a right of perpetual renewal. The burden of strict

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proof is imposed upon a person claiming such a right. It should not be inferred from any equivocal expressions which may fairly be capable of being otherwise interpreted. The intention in that behalf should be clearly shown; otherwise, the agreement is satisfied and exhausted by a single renewal.

A covenant for a renewal runs with the land.

The position of a lessee, who has been always ready and willing to accept a renewal on proper terms, is the same in equity as if a proper lease had been granted. Where the covenant for renewal was still specifically enforceable at the commencement of a suit for ejectment against the lessee, the position of the lessee in equity is the same as if it had been specifically enforced.

Per *Beachcroft, J.*—A meaning must be given to every clause where possible, and if there is ambiguity in a grant, it must be construed in favour of the grantee. SECRETARY OF STATE *v.* FORBES, 16 C. L. J. 217 **180**

Leave to sue—Suit to remove Granthi **270**

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Legal Practitioners Act (XVIII of 1879), s. 13—*Professional misconduct—High Court Rules, Chapter XV, rule 25—General Civil Courts Rules,* 1911, *Chapter XXI, rule* 37—*Civil Procedure Code (Act V of* 1908), *O. XXI, r.* 73.

If a Pleader, acting for a decree-holder, purchases the property sold in execution of his client's decree, he is guilty of professional misconduct. The evil is equally great if he purchases the property for other persons.

Therefore, where, in execution of his client's decree, a Pleader made a purchase on behalf of his father, the Court *held* him guilty of misconduct.

Per Chamier, J.—Rule 37 of Chapter XXI of the General Rules, Civil, 1911, applies even to a Pleader of the High Court, when he is practising in the Subordinate Courts. HAR PRASAD SINGH, *In the matter of,* 13 CR. L. J. 794 **539**

——— ——— ——— **s. 13**—*Professional misconduct—Advocate—Grave moral turpitude—Instituting false case and supporting it by gross perjury—Evidence—Conviction.*

Where an Advocate was found guilty of having committed gross perjury and where the course of his conduct displayed great moral turpitude in having instituted a false case and having supported it by false statement:

Held, that he was unfit to remain an Advocate any longer and should be ordered to be struck off the rolls.

In proceedings under the Legal Practitioners Act, the High Court will not go into the merits of the conviction but will ordinarily accept the findings of Criminal Courts as final. M. M. J., *In the matter of,* 5 BUR. L. T. 191; 13 CR. L. J. 875 **811**

——— ——— ——— **s. 13** — *Legal Practitioners Act Rules by Madras High Court, rule 27—Professional misconduct—Failure to appear for client in Court after receiving fee—Failure to make arrangements for professional help to client—False defence—Negligence, when amounts to misconduct—Transfer of Property Act (IV of* 1882), *ss.* 3, 136 *—Purchase of actionable claim by Pleader during pendency of suit—Evidence—Admissibility of judgment in civil suit between parties relating to same subject-matter—Whether conclusive proof—Pleader engaging in trade*

Legal Practitioners Act—contd.

—Carrying on family trade—Misconduct—Failure to report to High Court—Punishment.

A Pleader is amenable to the disciplinary jurisdiction of the High Court for failure to appear for his client at the trial of the cause after receiving the fees thereof or, in the event of unavoidable circumstances precluding his appearance, for failure to make the necessary arrangement for his client.

The judgment in a civil suit between the Pleader and his client, relating to the subject-matter of the inquiry against the Pleader under the Legal Practitioners Act, is admissible in the latter inquiry to establish at least a *prima facie* case against the Pleader but such judgment will not be conclusive proof and the Pleader is entitled to adduce additional evidence in such proceedings in rebuttal of the charges against him.

The purchase of an actionable claim by a Pleader amounts to professional misconduct, the more so when the claim has been put in Court and is ripe for judgment.

Failure to obtain the sanction of High Court before a Pleader engages in trade, is in contravention of rule 27 of the rules under the Act.

Per *Sundara Aiyar, J.*—In the absence of an agreement that the fee promised should be previously paid, it is doubtful whether a plea of non-payment of a part of the fee would be of any avail in an action against the Pleader under the Legal Practitioners Act.

Mere negligence, as the omission by a Pleader to do his duty, may not amount to misconduct. But where the negligence is gross or where the Pleader falsely repudiates an agreement that he had entered into with his client, he is amenable to the disciplinary jurisdiction of the High Court.

The judgment in the civil suit will be relevant under section 11 of the Evidence Act.

The judgment will not be admissible where the conduct of the Pleader was not the direct issue in the Court which found him guilty of misconduct, but only arose incidentally in a litigation between other parties.

A Pleader, who belongs to a trading family should not be regarded as trading simply because other members carry on the trade, the benefit of which would go to all the members of the family, including the Pleader. But if all the members enter into a partnership and carry on a family trade as partners, then all of them must be regarded as carrying on the trade.

Per *Sankaran Nair, J.*—A Vakil is bound to appear in Court and conduct his client's case even if the fee or any portion thereof remains unpaid, in the absence of any agreement to the contrary or at least notice to that effect to the client in sufficient time to enable him to make other arrangements.

The High Court has not declared, under section 13 of the Legal Practitioners Act, that it is unprofessional for a Pleader to follow any trade or business, especially where Pleaders belong to a joint family which is carrying on a family trade, but the omission to report this circumstance under rule 27 of the High Court Rules brings the defaulting Pleader under clause (*b*) or (*f*) of section 13 of the Legal Practitioners Act and renders him liable to punishment. MUNIREDDI *v.* VENKATA RAO, 23 M. L. J. 447; (1912) M. W. N. 1023; 12 M. L. T. 615; 13 CR. L. J. 800 **544**

Legal Practitioners Act—contd.

——— ——— ——— **ss. 13, 14** — *Grossly improper conduct*—Muktear *adding his own name to list of* Muktears *in* vakalatnamah *at request of person representing executant of* vakalatnamah —*Absence of improper motive*—*Apology by* Mukhtear.

A *Muktear* added to the names, that were given in a *vakalatnamah*, his own name, and also altered certain words in the body of the *vakalatnamah*, at the request of the person who appeared to represent the individual who had executed the *vakalatnamah*, without any improper motive. He pointed out to that individual, who came to engage him to file a criminal appeal, that he could not do it unless the *vakalatnamah* contained his name, and thereupon at the request of this person he added his name:

Held, that although the *Mukhtear* was wrong in making the alteration in the *vakalatnamah*, yet in doing so, he was not actuated by any improper motive which would constitute grossly improper conduct under the Legal Practitioners Act, and that, therefore, there was no reason for passing any order under section 14 of the Act.

The *Mukhtear* in an apology expressed his regret for what he had done:

Held, that the apology might be accepted. PURNA CHANDRA CHATTERJEE, *In the matter of*, 17 C. W. N. 328; 13 CR. L. J. 846 **718**

——— ——— ——— **s. 14** **718**

——— ——— ——— **s. 36**—*Tout*—*Legal evidence necessary.*

Before a person can be declared a tout under section 36 of the Legal Practitioners Act, there should be legal evidence to show that he is a tout or that he is reported as such. The mere report of a Bar Association is insufficient. *In re* SOMAYAJULU RAMAMURTHI, 12 M. L. T. 259; (1912) M. W. N. 959 **251**

——— ——— ——— **rules by Madras High Court, r. 27** **544**

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Letters of Administration **4**

——— ——— ——— obtained by heir after testator's property dealt with by executor appointed by testator—Effect of such Letters **868**

——— ——— ——— Debuttar *property*—*Whether Letters should be granted where no estate to be administered*—*Device to secure decision on contested question of title*

Where there is no estate which stands in need of administration, no suggestion that any creditors have to be paid or any debts due to the estate have to be collected, and an application for Letters of Administration is a transparent device to secure from the Probate Court a decision upon a contested question of title to the estate, there is no occasion for the grant of Letters of Administration. PROSONNO KUMARI DEBI *v.* RAM CHANDRA SINGHA, 17 C. L. J. 66 **155**

Letters Patent (Bom.), cl. 12—*High Court*—*Jurisdiction*—*"Suit for land"*—*Suit for recovery of title deeds of immoveable property at Mauritius*—*Nature of suit.*

A suit for the recovery of title-deeds of immoveable properties situate at Mauritius is not triable on the Original Side of the Bombay High Court.

Letters Patent—contd.

In order to ascertain the true nature of a suit, a Court is bound to look further than the four corners of the plaint.

The words "suit for land" do not mean only suits for the *recovery* of land. The words include a suit which, having regard to the real object of the suit and the rights and contentions of the respective parties is substantially a claim in respect of land.

A suit for recovery of title-deeds of land is substantially a suit for land and is in effect and in reality a suit for establishing title to that land and the recovery of possession thereof. ZULEKABAI *v.* EBRAHIM, 14 BOM. L. R. 846 **198**

——— ——— ——— **cl. 39**—High Court decision in Land Acquisition Act **952**

——— ——— ——— **(Cal.) cl. 12**—*High Court*—*Jurisdiction*—*"Suit for land"*—*Trespass*—*Wrongful breaking through mine and carrying away coal*—*Covenant to keep barrier between lessor and lessee*—*Privity of contract between lessor and sub-lessee*—*Cause of action*—*Suit for damages for erection of buttresses.*

A suit to recover damages for breaking through plaintiff's mine or land and carrying away coal belonging to the plaintiff, is a suit for land or immoveable property within the meaning of clause 12 of the Calcutta Letters Patent.

Such a suit is founded on the ordinary case of a trespass *quare clausum fregit* and necessitates the decision of the question of title as to the coal.

The venue of a suit on a covenant by reason of a privity of estate is local.

A., an under-lessee, covenanted that he would leave a certain barrier as was provided in the under-lease. Subsequently, *A.* assigned his rights or granted an under-lease to *B.*, who granted an under-lease to *C.* The representative of the original lessor sued *C.* for damages for breach of the covenant to leave the barrier and for damages to which plaintiff would be put in erecting masonry buttresses to protect his mine:

Held, (1) that there was no privity of estate between *C.* and the plaintiff, that *C.* was not personally liable on the covenant in the original sub-lease, and that the plaint did not disclose any cause of action against *C.* on the covenant in the original sub-lease;

(2) that the claim for damages for erecting masonry buttresses was a claim for land, within the meaning of clause 12 of the Letters Patent. LODNA COLLIERY CO. LD. *v.* BIPIN BIHARI BOSE, 39 C. 739 **500**

——— ——— ——— **(Mad.), cls. 11, 12**—*Transfer of Property Act (IV of 1882), s. 53*—*Suit to declare a mortgage of property outside Madras fraudulent*—*Suit for land*—*Suit to avoid incumbrance*—*Jurisdiction*—*High Court*—*Original jurisdiction*—*Extent considered.*

A suit to avoid an incumbrance on land is a suit for land within the meaning of the Letters Patent.

Where the Official Assignee sues for a declaration that a mortgage of properties situate in the North Arcot District, executed by an insolvent in favour of another person, is fraudulent and not binding on him, the suit is not within the jurisdiction of the original side of the Madras High Court, as the landed property is situate outside its jurisdiction.

Letters Patent—concld.

The High Court, in the exercise of its original jurisdiction, is merely a Local Court, and the general principle of construction applicable to an enactment conferring jurisdiction is that it must clearly appear that a particular case falls within the provisions of the enactment and that the jurisdiction should not be extended by implication. OFFICIAL ASSIGNEE OF MADRAS *v.* RAMASAMY IYENGAR, 12 M. L. T. 229; (1912) M. W. N. 974; 23 M. L. J. 726 **342**

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Lien—License—Equitable mortgage—Assignment—After-acquired property—Covenant to re-place goods sold by other goods **31**

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——— ———Execution of decree—Petition by transferee to enter up satisfaction **617**

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——— ———Suit for fresh partition after private partition found to be invalid **10**

——— ———Suit for refund of excess amount realised by landlord without claiming penalty **504**

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——— ———Whether a good ground for revision **470**

——— ——— *Custom—Alienation by widow—Next heirs not contesting alienation—Suit for possession by remote heirs after death of nearer heirs—Starting point of limitation—Limitation Act (IX of 1908), Sch. I, Arts. 140, 141, 144.*

On the death of *N.*, his widow *S.* succeeded to the land in suit and she sold it in 1890. On her death *H.* was entitled to claim the land. He did not claim it nor did his son *D.* *D.*'s widow too made no claim and died in 1907. Plaintiff, after her death, became entitled to the land and sued for possession:

Held, that the right to sue accrued to the plaintiff on the death of *D.*'s widow and the suit was consequently not barred.

The anomalous condition of the law pointed out. SHAMAN *v.* ARI JANG, 172 P. W. R. 1912; 208 P. L. R. 1912 **503**

——— ——— *Decree for rent obtained by co-sharer landlord without joining co-sharers—Money decree—Execution—Special limitation, if applicable—Bengal Tenancy Act (VIII of 1885), ss. 148A, 158A, Sch. III, Art. 6.*

A decree obtained by a co-sharer landlord for his share of the rent in a suit, not brought under section 148A or section 158A of the Bengal Tenancy Act, and in which the other co-sharers are not joined as parties, is a simple money-decree.

Consequently, to an application for the execution of such a decree, the special limitation prescribed by Article 6 of Schedule III of the Bengal Tenancy Act does not apply. MR. K. B. DUIT *v.* GOSTHA BEHARY BHUIYA, 16 C. W. N. 1006; 16 C. L. J. 279 **207**

——— ——— *Mortgage decree for sale—Execution—Time when limitation begins to run.*

Limitation for the execution of a decree for sale in a suit on a mortgage, runs from the date when the first decree or decree *nisi* for sale is made absolute. VENKATA PERUMAL RAJU *v.* AUDIKESAVALU REDDI, 23 M. L. J. 675; 12 M. L. T. 652 **759**

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——— *Mortgage decree—Claim by second mortgagee for lien—Rejection of claim—Suit to establish mortgage—Parties—Mortgagor necessary party—Exclusion of time occupied by conciliation proceedings—Limitation Act (XV of 1877), Sch. II, Art. 11—Dekkhan Agriculturists' Relief Act (XVII of 1879), ss. 47, 48—Transfer of Property Act (IV of 1882), s. 85.*

A, an agriculturist under the Dekkhan Agriculturists' Relief Act, mortgaged his property to *B*. Subsequently, he mortgaged the same property to *C*. *B*. obtained a decree on his mortgage against *A*. without impleading *C*. When *B*. sought to sell the property in execution of his decree, *C*. intervened claiming a lien on the property. *C*.'s claim petition was rejected on 19th June 1907. On the 15th July 1908, *C*. brought a suit against *A*. and *B*. to establish his mortgage and to get rid of the order made against *C*. in claim proceedings. Before filing the suit, *C*. had to obtain a conciliator's certificate as *A*. was an agriculturist. If the period taken up in conciliation proceedings were deducted, the suit was within time. *B*. contended that this period could not be deducted as *A*. was not a necessary party to the suit:—

Held: (1) that although *A*. was not a party to the order of 19th June 1907, he was, as a person interested in the mortgaged property, a necessary party to the suit to establish the mortgage;

(2) that the period occupied by conciliation proceedings should be deducted in computing the period of limitation prescribed for the suit;

(3) that the suit was, therefore, within time. EKNATH PANDOBA KOSTI *v.* DAGDURAM, 14 BOM. L. R. 750; 36 B. 624 **87**

——— ———, *question of—Court's duty to decide—Practice—Pleadings—Appeal — Suit found time-barred—Limitation Act (IX of 1908), s. 3—Civil Procedure Code (Act V of 1908), O. XLI, rr. 2, 33.*

A question of limitation, when it arises upon the facts before a Court, must be heard and determined, whether or not it is directly raised in the pleading or in the grounds of appeal.

In such a case, section 3 of the Limitation Act, 1908, is not controlled by any rule of pleadings, *e. g.*, Order XLI, rule 2, Civil Procedure Code

Where the claim, or any part thereof, has been decreed in a suit, which, on appeal from such decree, is found to be barred by limitation, the Appellate Court is not only competent, under Order XLI, rule 33, Civil Procedure Code, but is compelled, by section 3 of the Limitation Act, to dismiss the suit whichever party may have made the appeal. GANESHDAS *v. Musammat* NIMBI, 8 N. L. R. 174 **638**

——— ———*Restitution of conjugal rights, suit for—Demand and refusal—Failure to bring suit for two years after refusal while old Limitation Act in force—Suit brought after fresh demand and refusal while new Act in force—Limitation Act (XV of 1877), Sch. II, Art. 35—Limitation Act (IX of 1908)—General Clauses Act (X of 1897), s. 6.*

A., the wife of *B*., left her husband in 1896 and lived with her mother since then. In 1906, *B*. sent to *A*. a formal demand to return to him; she equally formally refused to do so.

Limitation—contd.

On 16th June 1911, *B*. sent to *A*. a fresh notice to return to his house and allow him to exercise the conjugal rights. As the notice was not complied with, *B*. sued *A*. on 20th June 1911 for restitution of conjugal rights:

Held, (1) that the suit was barred;

(2) that *B*.'s right to sue had become barred by virtue of Article 35 of the Limitation Act, 1877; and

(3) that the right could not be revived by the passing of the Limitation Act, 1908, which repealed Article 35 of the old Act. MAHOMAD MEHDI FAYA THARIA *v.* SAKINABAI, 14 BOM. L. R. 908 **629**

——— ——— *Rent suit—Institution of suit after interest of landlord had ceased—Relation when right to sue accrued—Bengal Tenancy Act (VIII of 1885), Sch. III, Art. 2 (b)—Limitation Act (IX of 1908) Sch. I, Art. 110.*

The question whether a suit for the recovery of arrears of rent is a suit brought by a landlord within the meaning of Article 2 (*b*), Schedule III of the Bengal Tenancy Act, ought to be determined with reference to the relation in which the parties stood when the right to sue accrued, that is, when the arrears of rent claimed fell due.

Therefore, the provisions of that Article apply to a suit for the recovery of rent of a holding by one whose interest as landlord has ceased to exist before the institution of the suit, provided that the arrears claimed accrued due to him when he was the landlord of the defendant. BALMUKUND SAHAI *v.* TARINI SINGH, 16 C. L. J. 360 **343**

——— ———*Suit against Railway Company for compensation for loss of goods—Limitation Act (IX of 1908), Sch. I, Arts. 30, 31—Burden of proof of time of loss—Sufficiency of notice of claim—Railways Act (IX of 1890), s. 75—Modes prescribed by rules.*

In a suit for compensation for the loss of goods against a Railway Company, the burden of proving when the goods were lost is on the Company.

Where it is not proved that the goods were lost more than one year before the institution of the suit, neither Article 30 nor Article 31 bars such a suit if it is brought within one year from the date of refusal to deliver.

The modes of service of notice prescribed by the Railways Act are not exhaustive.

Where a mode of service of notice of a claim for compensation is prescribed by the rules of a Railway Company, and such rules are complied with, the Company cannot plead insufficiency of notice. Notice to the Traffic Manager is good notice when allowed by the rules of the Railway Company.

Section 75 of the Railways Act does not apply where the value of a package entrusted to a Railway Company is not more than Rs. 100. MADRAS AND SOUTHERN MAHRATTA RY. CO. *v.* BHIMAPPA, 23 M. L. J. 511 **419**

——— ———*Suit by mortgagee for compensation for injury to specific moveable property—Limitation Act (IX of 1908), Sch. I, Arts. 36, 49.*

A suit by a mortgagee to recover compensation from a third person for injury to specific moveable property mortgaged to the former is governed by Article 49 of Schedule I, Limitation Act.

Article 36 of the Act relates to such cases as are not specially provided for in the Schedule. SITHAMBARAM CHETTY *v.* U KHA GYI, 5 BUR. L. T. 156; 6 L. B. R. 75 **906**

Limitation—concld.

——— ———*Suit for damages for trespass—Setting fire to and destroying pepper vines on one's land—Limitation Act (XV of 1877), Sch. II, Arts. 36, 39.*

A suit for damages for unlawfully setting fire to and destroying pepper vines on one's land is governed by Article 39 of the Limitation Act.

Trespass includes the mischief which the trespasser commits after entering on the land.

Article 36 can apply only to cases of malfeasance, misfeasance or non-feasance not provided for by other Articles. KAYAKOOL NATUVLAPURAYIL MOIDIN KUTTI *v.* POTTARKULAR KOMAN NAIR, 12 M. L. T. 535; 23 M. L. J. 618; (1912) M. W. N. 1229 **605**

——— ———*Wrong entry in Settlement Record—Subsequent correction of entry—Declaration of right—Cause of action.*

Plaintiffs were in proprietary possession of a certain land and were recorded as such in the revenue papers. At the Settlement of 1901, however, they came to be recorded as proprietors of a smaller area than what they were in possession of. They, however, remained in undisturbed possession of what they were entitled to. In 1909, the Collector ordered that the Settlement entries of 1901 should be corrected and plaintiffs' share recorded as before that date. The Commissioner, on appeal, set aside the order of the Collector. The plaintiffs then brought a suit for declaration of their rights to the land:

Held, that the Commissioner's order of 1909 gave them a fresh cause of action for the declaration of their right, notwithstanding that it was passed on appeal from the Collector's order, and the suit, having been brought within six years from that date, was within time. SHEOPHER SINGH *v.* SHEO NARAIN SINGH, 10 A. L. J. 413 **675**

Limitation Act (XV of 1877), s. 5 **99**

——— ———— **s. 28** **14**

——— ———— **Sch. II, Art. 11** **87**

——— ———— **art. 14** **504, 881**

——— ———— **art. 35** **629**

——— ———— **arts. 36, 39**—Destruction of pepper vines **605**

——— ———— **art. 44**—Suit by legatee to recover alienated property **4**

——— ———— **art. 46** **881**

——— ———— **art. 47** **589**

——— ———— **arts. 62, 120, 132, 142**—*Purchase of property by mortgagee—Subsequent sale of property for Government revenue Suit by mortgagee to recover surplus sale-proceeds withdrawn by registered owner—Limitation.*

In execution of a mortgage decree, the plaintiff purchased one of the *mouzahs* within estate *K*. The entire estate *K*. was sold for arrears of Government revenue a few months after the plaintiff's aforesaid purchase. After payment of the arrears, a surplus was left with the Collector, who paid it to the defendant, the registered owner, on March 31, 1904. The plaintiff brought this suit on May 23, 1907, for recovery of the money as representing the mortgaged property purchased by him:

Limitation Act—(1877)—contd.

Held, (1) that the money received by the defendant, which belonged to the plaintiff, was money received by the defendant "for plaintiff's use" within the meaning of Article 62 of Schedule II of the Limitation Act of 1877, and that the suit was, therefore, barred, being brought after three years from the date on which the defendant received the money;

(2) that the suit was not governed by Article 132, for the plaintiff having already purchased the property, could not be said to be seeking to pursue against the surplus sale-proceeds the remedy for the recovery of the money charged upon the immoveable property. LACHMI NARAIN *v.* DHANUKDHARI PROSAD SINGH **351**

——— ———— **Sch. II, Art. 91**—Suit by legatee to recover alienated property **4**

——— ———— **arts. 120** **337, 351**

——— ———— **arts. 120, 125**—*"Land"—"Alienation of land"—Sale of equity of redemption—Declaratory suit—Limitation.*

The word "land" in Article 125 of the Limitation Act does not cover the equity of redemption in immoveable property.

A sale of equity of redemption is not an alienation of land within the meaning of Article 125.

Consequently, a suit for a declaration of invalidity of a sale of equity of redemption by a Hindu female is governed by Article 120 and the period of limitation is six years. *Musammat* RALLI *v.* SUNDAR SINGH, 108 P. R. 1912; 29 P. L. R. 1913 **864**

——— ———— **art. 125**—Alienation of land **864**

——— ———— **art. 127**—Adverse possession between co-sharers **657**

——— ———— **art. 127**—*Joint property—Suit for partition by one co-sharer—Decree ascertaining plaintiff's share—Co-parcenary between defendants not destroyed—Exclusion to knowledge of co-parcener—Possession—Adverse possession.*

A., *B.* and *C.* were co-parceners in a joint Hindu family. *A.* was excluded to his knowledge from all enjoyment of the family property since 1890. The property was in possession of *B.* In 1895, *C.* sued *B.* and *A.* for his one-sixth share of the property and obtained a decree for this share in 1898. The decree decided that the family was a joint one, that the property in suit was joint family property and that *B.* was entitled to one-sixth share. In 1907, *A.* sued *B.* to recover his share by partition of the family property. *A.* contended that as against him, the possession of *B.* should only be considered adverse after 1898. Both the lower Courts held that the suit of *A.* was barred under Article 127 of the Limitation Act, as he had been excluded from all enjoyment of the property since 1890:

Held, that the suit was barred by time because,

Per *Chandavarkar, J.*—

(*a*) the co-parcenary between *A.* and *B.* was not destroyed by the decree of 1898;

(*b*) the judgment and the decree of 1898 did not disturb, as between *A.* and *B.*, the previous state of things and stop the limitation that had begun to run from 1890;

Limitation Act—(1877)—contd.

Per *Batchelor, J.*—

(c) the finding of fact that *B.* held adversely from 1890 was wholly independent of, and unaffected by the decree of 1898, which only decided that the family and the property were joint and the property was consequently partible; and

(d) though *A.* had a good title to possession in 1898, the possession was actually with *B.*, who was ousting *A.* to his knowledge and inspite of his title since 1890.

Per *Chandavarkar, J.*—For a judgment in partition suit brought by one co-parcener for his share, to operate as a severance of interest not only as to him but also as between the other co-parceners sued, the judgment must contain a clear adjudication that each co-parcener either should have or is entitled to a share definitely fixed.

Per *Batchelor, J.*— Possession is a mere matter of fact, and adverse possession means possession held by some person on his own behalf or on behalf of some person other than the true owner, the true owner having a right to immediate possession. BABAJI AKOBA *v.* DATTU LAXMAN, 14 BOM. L. R. 923 37 B. 64 **642**

——— ——— **Sch. II, Arts. 132, 142** **351**

——— ——— ——— **art. 144**—Insolvent's possession of after-acquired property **14**

——— ——— ——— ——— **art. 144** — Adverse possession between co-sharers **657**

——— ——— ——— **art. 144** **589**

——— ——— ——— ——— **art. 147, scope of** **467**

——— ——— ——— ——— **art. 164** **420**

——— ——— ——— ——— **art. 179** — *Step-in-aid of execution—Application for extension of time to file extract from Collector's record—Civil Procedure Code (Act XIV of* 1882), *s.* 238.

An application by a decree-holder for an extension of time within which to produce an extract from the Collector's record to be filed with a pending *darkhast* for execution, is a *step-in-aid* of execution.

Such an application is not the less a step-in-aid of execution, because its immediate effect may be to defer the satisfaction of the decree. It is not necessary that it should be a step in expedition or acceleration of the execution as against its retardation.

The law requires only that it should be a step-in aid and if the decree cannot be executed at all otherwise than by means of a temporary delay, a step which ensures the ultimate execution, though at the expense of a temporary delay, may well be described as a step-in-aid of execution. SHESHDASACHARYA *v.* BHIMACHARYA, 14 BOM. L. R. 1204 **969**

——— ——— ——— ——— **art. 179, (4)**—*"Applying in accordance with law"—Execution of decree—Application when in accordance with law Relief sought outside decree—Omission to file inventories.*

All that Article 179, Schedule II of the Limitation Act, 1877, requires the Court to see, for the purposes of limitation, is whether the *darkhast* itself, whatever its merits on the evidence, is an application made in due conformity with the requirements of the law relating to execution.

An application for execution would not be bad in itself even if it seeks relief not strictly claimable.

If a person other than one entitled to apply applies for execution, or if the person entitled applies for execution in a mode and for a relief outside the decree, the application is not in accordance with law for the plain reason that the decree of which execution is sought is not in reality the decree to which the application professes to relate but some other decree, one not existing and, therefore, incapable of execution according to law.

Where, on the other hand, a decree gives certain reliefs, and the application for execution seeks some or all of them, it may be that, after going into the merits of the application, and considering on evidence all the circumstances and equities of the case, the Court comes to the conclusion that the particular relief or reliefs shall not be granted. Such a decision, however, cannot affect the application for the purposes of the question whether it is by itself in accordance with law, provided it meets in substance the requirements of the Code of Civil Procedure or any other law relating to execution.

Because a decree-holder does not ask by his application for execution for that relief to which he is entitled under the decree in a certain event, and asks for a relief given by the decree until the happening of that event, it does not follow that he has applied for relief outside the decree.

The omission to file inventories with the *darkhast* is a purely technical defect, which cannot affect the question whether the *darkhast* itself is substantially in accordance with law.

Per Batchelor, J.—The words "in accordance with law" have no reference to the likelihood of the application succeeding or to the Court's competency to grant any particular relief which has been prayed.

The words are merely an adverbial qualification of the word "applying," and look only to the form or procedure of the application.

If the applying complies with the forms and procedure prescribed in that behalf, the applying is in accordance with law, and not the less so, because, on the merits of the application, whether for one reason or another, the application had to be refused. BANDO KRISHNA KANBARGI *v.* NARSINHA KONHER DESHPANDE, 14 BOM. L. R. 861; 37 B. 42 **210**

Limitation Act (IX of 1908), effect on suits for conjugal rights **629**

——— ——— ——— **s. 3** **638**

——— ——— ——— **s. 5** **7**

——— ——— ——— **s. 10, scope of** **689**

——— ——— ——— **s. 12**—*Time required for obtaining copy of judgment.*

An appellant is entitled to deduct the time occupied in obtaining a copy of the judgment in addition to the time requisite for obtaining a copy of the decree. KARNAM NARASIMHULU *v.* SECRETARY OF STATE, 12 M. L. T. 360 **393**

——— ——— ——— **s. 14**—*Time requisite for obtaining copy—Copy applied by post—Period between completion of copy and delivery to applicant—Central*

Limitation Act—(1908)—contd.

Provinces Courts Act (II of 1904), s. 8 (1) (c), rules under.

A decree was passed by a Munsif on 12th May 1911. On 15th May, defendant applied by post for copy of Munsif's judgment and decree.

The application did not reach the office till after it had closed for the vacation and, consequently, the application was treated as received on 16th June when the Courts re-opened after vacation. The copy was ready on 3rd July but it was not despatched by post to the defendant, as the latter took delivery on 4th July in person. The appeal was filed in the District Judge's Court the same day:

Held, (1) that the 3rd and 4th July should be included as part of the time requisite for obtaining the copy;

(2) that the appeal was within time. PAGA *v.* SADASHEO, 8 N. L. R. 172 **624**

——— ——— ——— **s. 14**—*"Civil proceeding in a Court of Appeal"—Whether includes revision petition to the High Court—Plaint returned for presentation to proper Court—Appeal against order—Confirmation of original order by Appellate Court—Revision to High Court—Limitation.*

A revision petition presented to the High Court under section 622, Civil Procedure Code, 1882, is a "Civil proceeding in a Court of Appeal" within the meaning of section 14 of the Limitation Act.

The expression 'Court of Appeal' in section 14 should be understood in the broad sense of a Court which has the power to bring under review the decision of an inferior Court, whatever may be the extent of jurisdiction that the superior Court may possess in reviewing the decision of the inferior Court.

A plaint was returned for presentation to the proper Court; the plaintiff, having unsuccessfully appealed against that order, moved the High Court in revision under section 622, Civil Procedure Code (Act XIV of 1882), and the High Court dismissed the revision petition:

Held, that plaintiff was entitled to deduct the time during which the revision petition in the High Court was pending in computing the period of limitation for his suit. VENKATRAGAYYA APPA ROW *v.* MURALA SRIRAMULU **593**

——— ——— ——— **s. 14** **513**

——— ——— ——— **s. 18** **972**

——— ——— ——— **s. 18, Sch. I, Art. 127**—*Fraud—Knowledge of fraud—Burden of proof—Nature of evidence—Partition—Private partition found to be fraudulent—Suit for fresh partition—Exclusion of plaintiff—Limitation.*

Where a Court finds that a partition, effected between the co-parceners of a joint family, was unfair and inequitable, as one of the co-parceners had been imposed upon, the case is reduced to one of a fraudulent partition, and the cause of action for a suit for partition is then, in substance to set aside that partition on the ground of fraud and to treat the family as joint and seek for a fresh partition of the family estate.

For the purpose of limitation, such a case is taken out of Article 127 of the Limitation Act.

Where fraud is found and the Court has to apply the Limitation Act in order to see whether the suit is within time, the Court ought to have evidence of a definite character to show the point of time at which the plaintiff had not merely suspicion but definite knowledge of fraud. In order to make limitation operate when a fraud has been committed by one who has obtained property thereby, it is for him to show that the injured plaintiff has had clear and definite knowledge of the facts constituting the fraud, at a time which is too remote for the suit to be brought. VITHAPPA DEVAPPA PATIL *v.* BASAGOWDA DEVAPPA PATIL, 14 BOM. L. R. 771 **10**

——— ——— ——— **s. 19** — Acknowledgment of debt **722**

——— ——— ——— **s. 20**—*Payment by a donor—How far keeps debt alive against universal donee—"Party liable."*

Where a person was sought to be made liable as a universal donee on a debt contracted by his donor and payments made by the latter after the gift were relied on as saving the bar of limitation:

Held, that the debt was kept alive against the donee by the payments made by the donor.

Section 20 of the Limitation Act requires that the payer should be one liable to pay the debts and provides that the result of the payment would be to give to the creditor a fresh period of limitation from the date of payment; it does not restrict the benefit accruing to the creditor with respect to his debt to his remedy against the payer alone. The debt being kept alive, the result must be to make it enforceable against any one liable for it.

The 'party liable' includes any person or persons against whom an action on the debt could be brought whether liable originally or as representing or taking the estate, real or personal, of the obligor. VELAYUDAM PILLAI *v.* VAITHYALINGAM PILLAI, 12 M. L. T. 610; 24 M. L. J. 66 **619**

——— ——— ——— **s. 22**—New party—Party not signing or verifying pleading **580**

——— ——— ——— **s. 29 (b)** **653**

——— ——— ——— **Sch. I, Arts. 7, 102**—*Wet-nurse—Domestic servant—Suit for wages—Limitation.*

A wet-nurse does not come within the definition of a house-hold servant; hence a suit by her to recover her wages does not fall under Article 7 of the Limitation Act, but falls under Article 102 of the Act. MOHAN LAL *v. Musammat* JUMERAT, 10 A. L. J. 395 **658**

——— ——— ——— **arts. 11 (a), 12,** *applicability of—Sale of third person's interest after discharge of decree.*

In execution of a decree of *A.* against *B.*, *C.*, a nephew of *A*, purchased a house on the 22nd September 1908. Three days before the auction-sale, *B* had sold another house to *A.*, the decree-holder, the consideration of which had been set off against the decretal amount. When the auction-purchaser attempted to get possession, he was resisted by one *D*, grandson of *B*. *D.*'s objection was disallowed on the 26th of February 1910. *D.* then brought a suit to set aside the auction-sale, so far as his interest was concerned, on the 26th of April 1910:

Held, that the suit was governed by Article 11 (*a*) of the Limitation Act and that it was not barred by limitation. GOPAL DAS *v.* CHEDI LAL **591**

Limitation Act—(1908)—contd.

——— **Sch. I, Art. 12** 591

——— ——— **arts. 30, 31** 419

——— ——— ——— **art. 36** – Injury to mortgage property 906

——— ——— ——— **art. 36** 185

——— ——— ——— **art. 49** – Injury to mortgage property 906

——— ——— ——— **art. 62** 185

——— ——— ——— **art. 62**—Suit by auction-purchaser for recovery of purchase-money 437

——— ——— ——— **arts. 62, 120**—*Limitation—Suit to recover interest from holder of Government Promissory-Notes — Pendency of previous litigation—Money had and received to plaintiff's use.*

On 1st December 1898, *A.*, the proprietor of a firm, assigned all his rights in certain Government Promissory-Notes to *B.* Shortly after, certain creditors of the firm attached these Notes; *B.* objected to the attachment, but his objection was disallowed, whereupon in May 1900, he sued the decree-holders to establish his right to the Notes and impleaded *C.*, in whose name the Notes stood, as a defendant. The suit was decreed by the Divisional Court on 10th November 1904 and this decree was affirmed by the Chief Court on 18th May 1908. Neither *A.* nor *C.* contested *B.*'s right in this suit. In execution of the decree of the Divisional Court, *B.* recovered the Notes in October 1905.

During the pendency of this litigation, *C.* realised the interest due on these Notes for the period, 1st November 1898 to 30th June 1905; the interest was first realized on 13th August 1903. On the 22nd January 1909, *B.* sued *C.* for recovery of the interest so realised:

Held, (1) that Article 62 of the Limitation Act, 1908, provided the limitation for the suit;

(2) that the suit was barred by time having been brought three years after the date of realization of interest;

(3) that the fact that the right of *B.* to the Notes was finally settled on 18th May 1908 in the previous litigation did not give *B* any extension of time, as

(*a*) the litigation was not really between *B.* and *A.* or *C.*, and

(*b*) *B.* had recovered the Notes in execution of the Divisional Court decree in 1905 and the payment of interest was endorsed on the Notes at the time.

Article 62 applies whenever a person actually or constructively receives money for another person's use; in other words, when the receipt by the defendant is in law a receipt to the use of such other person to whom the money at the time of the receipt lawfully belongs. CHAND MAL *v.* SANSAR CHAND, 16 P. L. R. 1913 311

——— ——— ——— **arts. 74, 75**—Instalment bond—Default 513

——— ——— ——— **art. 102** 658

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Limitation Act—(1908)—contd.

——— **Sch. I, Art. 120**—Suit by auction-purchaser for recovery of purchase-money 437

——— ——— ——— **art. 120**—Suit to recover interest from holder of Government Promissory-note 311

——— ——— ——— **art. 127** — Suit for partition 10

——— ——— ——— **arts. 140, 141** 503

——— ——— ——— **art. 141** — *Property held by widow—Suit by reversioner to recover after death of widow—Adverse possession—Limitation—Tenant-in-common—Right to recover whole property.*

One *R*, the holder of an impartible *zemindari*, died leaving two illegitimate sons, *viz.*, 1st plaintiff and the father of plaintiffs Nos. 2 and 3, a brother, 1st defendant, and a widow, *P.*

The *zemindari* fell to the 1st defendant. In a previous litigation relating to the private property of *R.*, it was decided that the 1st plaintiff was entitled to one-fourth, the father of plaintiffs Nos. 2 and 3 to one-fourth and *P.* to the other half. In the present suit to recover *P.*'s half share after her death:

Held, (1) that the suit was not barred under Article 141 of the Limitation Act, as *P.* did not hold her half share absolutely and plaintiffs' claim was as heirs of *R.*;

(2) that, though defendant's adverse possession might bar any suit by *P.* to recover her share after the expiration of 12 years, it would not bar the plaintiffs' right to recover half the share as heirs of *R.* after the death of *P.*

The right of a tenant-in-common to recover the whole property as against a trespasser is a right which he is entitled to assert only on behalf of himself and his co-tenants. He cannot do so in the assertion of a right to the whole property in himself.

A tenant-in-common is not bound to make a claim on behalf of his co-tenants. PONNAYA TIRUMALAI VANDAYA THEVAR *v.* KANDASAMI VANDAYA THEVAR 136

——— ——— ——— **art. 142** — Defendant claiming to hold land as tenant 606

——— ——— ——— **art. 142**—*Suit for alluvial land—Burden of proving title and possession within limitation—Nature of proof—Presumption—Settlement Records, entries in.*

Where in a suit for possession of certain land as having accreted to plaintiff's village by alluvion, the defendants deny plaintiff's title and also plead that the claim is barred by limitation, it lies on the plaintiff to prove both title and possession within limitation. To bring his claim within limitation, it is open to the plaintiff to prove that the land in suit had accrued by alluvion within limitation, or that although it had accreted more than 12 years before the institution of the suit, it had remained, within the limitation period, waste or jungle land, in respect of which the presumption would arise that possession went with title.

There is a presumption until the contrary is proved that the possession of the parties is correctly shown in the Settlement Records. HABIBULLAH KHAN *v.* LALTA PRASAD, 10 A. L. J. 190; 34 A. 612 94

Limitation Act—(1908)—concld.

——— **Sch. I, Art. 144** — Defendant in possession as tenant 606
——— ——— **art. 144** 503
——— ——— ——— **art. 152** 653
——— ——— ——— ——— **art. 158** 7, 320, 431
——— ——— ——— ——— **art. 166** — Starting point—Date of sale 884
——— ——— ——— ——— **art. 179** — *Execution of decree—Limitation—Step-in-aid of execution—Application for time to procure copies of judgment and decree.*

An application for time, made by a decree-holder after presenting a petition for execution of a decree, for procuring copies of the decree and judgment, is a step-in-aid of execution. HARIDAS *v.* VITHALDAS, 14 BOM. L. R. 765; 36 B. 638 30

——— ——— ——— **art. 180**—*Civil Procedure Code (Act XIV of 1882), ss.* 311, 314—*Court sale—Application for delivery,* 3 *years after confirmation of sale, barred.*

A Court sale was confirmed on 28th July 1906 and an application for delivery of the property was not made till the 19th January 1910:

Held, that under section 314, Civil Procedure Code, 1882, the sale became absolute on 28th July 1906 and not on the day on which a petition filed by a third party under section 311 of the Civil Procedure Code, 1882, was dismissed.

The application for delivery of the property, having been made after three years from that date, was barred under Article 180, Schedule I, of the Limitation Act. ARUNAGIRI MUDALIAR *v.* UTHANDO MUDALI, 12 M. L. T. 315; (1912) M. W. N. 1136 242

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Loan and Trust—Advance to broker on pro-note 824

Lunacy Act (XXXV of 1858)—*Malabar Law and Usage*—Tarwad *property, nature of*—Karnavan *of a Malabar* tarwad, *declaration of, as lunatic—Appointment of manager in his stead—Powers of* karnavan.

The property of a Malabar *tarwad* is not the individual property of the *karnavan* and a manager appointed for him obtains no rights over the *tarwad* property. His powers of management may be modified by a *karar* entered into by the other members of the family. The members concurring with each other may dispose of the property as they please. The right of disposition is the crucial mark of ownership. If any one of the members does not join, the alienation, unless justified by family necessity, would be invalid because the ownership is as much in any one dissenting member as in all the other members together.

No application can lie for a declaration of lunacy of the *karnavan* of a Malabar *tarwad* under Act XXXV of 1858 and for the appointment of a manager in his stead for property other than his separate property. Lunacy of a *karnavan* is a conclusive ground on which the next Anandravan could claim to have the *karnavan* removed. Act XXXV of 1858 cannot be applied to a member of a Hindu *Mitakshara* family who owns no separate property.

Per *Sundara Aiyar, J. Quære:*— Whether the lunacy of a *karnavan* would automatically work a forfeiture of his right of management or whether it would be necessary to get him removed by Court? GOVINDAN NAIR *v.* NARAYANAN NAIR, 23 M. L. J. 706; 12 M. L. T. 585; (1913) M. W. N. 79 473

Madras Act (II of 1894) 481
——— ——— **s. 17**—*Service* Inam—*Resumption by Government—'Granted or continued' by Government—Non-interference by Government with holder's rights—Whether amounts to 'continuance.'*

Under section 17 of Madras Act II of 1894 Government has no right to resume land granted by the proprietor of an estate. In order that Government may have the rights of resumption, the right to the land must, in the first instance, either have emanated from Government, or the continuance of the right must have been due to an act of Government. Mere sufferance by Government, or forbearance from taking steps which it might have been open to the Government to take, will not amount to a 'continuance' by the Government of the land in respect of the office. Mere collateral expressions of opinion which were not intended to be a recognition or confirmation of the right of the holder would equally be insufficient to amount to a continuance. SECRETARY OF STATE *v.* CHINNAPRAGADA BHANUMURTY 373

Madras City Municipal Act (III of 1904), s. 172, *meaning of—"Shall ordinarily be resident in"—Direction not imperative.*

Section 172 of the Madras City Municipal Act does not require that one of the Commissioners, hearing an application for revision of assessment, should *always* be one who is resident in or representative of the division in which the applicant resides or carries on business or in which the property assessed is situate. The meaning of the section is that *ordinarily* one of the Commissioners hearing the application should be resident in or representative of the division. NARAYANA RAO *v.* PRESIDENT OF THE CORPORATION OF MADRAS, 23 M. L. J. 591 945

Madras District Municipalities Act (IV of 1884), s. 168 (1) 158

Madras Estates Land Act (Mad. Act (I of 1908), s. 3, clauses (3) & (5), s. 189 and Sch. A. No. 8—*Rent, meaning of*—Inamdar *of certain lands in village, whether a land-holder—Suit for rent by* Inamdar—*Jurisdiction of Revenue Court.*

An *Inamdar,* to whom a grant only of some lands in his estate has been made by the *zemindar,* is a 'land-holder' within the meaning of section 3, clause (5 of the Madras Estates Land Act, 1908, and a suit by him for rent against a *ryot* is cognizable by the Revenue Court. SIVINI APPALANARASIMHULU *v.* MURADA SANYASI 120
——— ——— ——— ——— **s. 185** 353
——— ——— ——— ——— **s. 189, Sch. A, No. 8** 120

Madras Rent Recovery Act (VIII of 1865) 445
——— ——— ——— **s. 58** 953

Maintenance, form of—Widow—Daughter—Khattars of Fatehjang 903

——— ——— ———*Right to receive money—Interest in estate out of which annuity paid—Personal right or interest in property—Saleable property—Civil Procedure Code (Act V of 1908), s. 60, cl. (n), proviso—Restraint on alienation—Involuntary sale—Payer's property vested in Court of Wards—Whether manager under Court compellable to bring money to Court month by month—Whether Receiver may be appointed.*

A well marked distinction has been recognised between a right to receive a sum of money for purposes of maintenance properly so called, and a right or interest in property which really forms a fund or estate out of which an annuity is periodically paid to the grantee; in the former case, a purely personal right is created which may be properly deemed inalienable; in the latter case, an interest in property is created which can rightly be deemed alienable. Whether a particular grant falls within the scope of the one principle or the other, must depend upon its terms.

A father, finding himself unable to pay his creditors, conveyed to his son all his properties for the consideration of paying off his debts. The transferee agreed to pay to his father, the transferor, during his life a monthly sum and two annual sums. These sums were made first charges upon the estate in the hands of the son, subject to the then existing mortgages executed by the father. The deed contained a covenant that the allowances were payable to the vendor personally and would be absolutely incapable of transfer in any form whatever:

Held, that the right of the father to receive the annuity was a valuable interest in property and saleable property within the meaning of section 60 of the Civil Procedure Code of 1908, and could not be regarded as a right to future maintenance within the meaning of clause (*n*) of the proviso to that section; that the clause in the document seeking to impose a restraint on alienation, was illegal; that a restraint on voluntary alienation, even if validly imposed, did not necessarily imply a restraint against involuntary alienation, and that the restraint did not bar a compulsory sale at the instance of the father's creditors.

The father's decree-holder is entitled to attach and sell the right to receive the allowance. The purchaser at the sale will acquire the right of the judgment-debtor. Before that event takes place, the manager under the Court of Wards, in whom the estate of the son has vested, cannot be called upon to pay the money into Court month by month.

Nor can a Receiver be appointed to receive the money month by month. PADMANAND SINGH BAHADUR *v.* RAMA PRASAD MALVI, 16 C. L. J. 354 **284**

Majority Act (IX of 1875), s. 3—*Hindu Law—Will—Power of minor Hindu to make Will—"Minor," meaning of.*

A Hindu is not competent to make a Will, unless he has attained majority under the Majority Act.

The Majority Act has modified the Hindu Law on the question of minority except in respect of marriage and adoption. BAI GOLAB *v.* THAKORLAL, 14 BOM. L. R. 748; 36 B. 622 **86**

Malabar Compensation for Tenants' Improvements Act (Mad. Act I of 1900), s. 5—*Compensation to tenant—Improvements effected by third party.*

In order to entitle a tenant to compensation under section 5 of the Malabar Compensation for Tenants Improvements Act, it is not necessary that the improvements should be effected by the tenant himself. It is quite sufficient that, at the time of ejectment, the improvements are on the land, even if they were made by some previous occupant. THUPRAN *v.* MAMAD KASIM SAIT **433**

——— ——— ——— **ss. 6, 15**—*Tables prepared under clause 2 of section 15, object of—Tables prepared after disposal of suit and pending appeal—Remand of suit—Re-valuation—Admissibility of tables.*

The preparation by Goverment of tables under section 15, of the Malabar Tenancy Improvements Act I of 1900, is not intended to create any fresh right in favour either of the tenant or of the landlord. They are admissible in evidence to prove the compensation to which the tenant is entitled and are presumptive evidence of the proper amount of compensation. The compensation, however, is itself determined by the provisions of section 6, *viz.*, by the market-value.

Where the tables are prepared after the disposal of a suit and pending an appeal, the Appellate Court should not remand the suit for the purpose of determining the compensation according to the tables, though, if a re-valuation became necessary in execution or otherwise, the tables might be received in evidence. VELUTHEMANA *v.* PATHUMA **131**

——— ——— ——— **s. 15** **131**

Malabar Law and Usage—*Tarwad* property, nature of—*Karnavan* of a Malabar *tarwad*, declaration of, as lunatic—Appointment of manager in his stead—Powers of *karnavan* **473**

——— ——— ———*Tarwad* property—Self-acquisition of *karnavan*—Survivorship—Notice—Order to make inventory—Jurisdiction—Direction of deceased **429**

——— ——— ———*Self-acquisitions of a female member of* tarwad, *whether devolve on* tarwad *or her* tavazhi.

The self-acquisitions of a female member of a Marumakkattayam *tarwad*, on her death, do not lapse to the *tarwad* of which she dies a member, but descend to her *tavazhi*, *i. e.*, to her issue, if she has any, and, if not, then to the *tavazhi* to which she would, in that case, belong according to the Customary Law of Malabar. KRISHNAN NAIR *v.* DAMODARAN NAIR, 13 M. L. T. 166 **769**

——— ——— ———Tavazhi—*Medical expenses incurred by member of* tavazhi—*Right to recover from* karnavan *of* tarwad.

A member of a Malabar *tavazhi*, who has incurred expenses for his medical treatment, cannot claim the same as against the *karnavan* of the *tavazhi*, but can enforce its payment from the *karnavan* of the *tarwad*. KELU ACHAN *v.* UMALA ACHAN **704**

——— ——— ———*Uralans of temple—Sawatham, grant of, by devaswom to* tarwad *whose Karnavan is an uralan.*

Malabar Law and Usage—concld.

The grant of a Saswatham is *prima facie* an improper act and where it purports to be granted by a Devaswom to a *tarwad*, the Karnavan of which is himself the Uralan of the Devaswom, the Courts should ordinarily not enforce it.

Any transaction by which a trustee obtains an interest in properties belonging to the trust is to be deprecated, and where it can be set aside without injury to the trust, the Court should do so. NEELAKANDAN NAMBUDRI *v.* NARAYANAN NAMBUDRI **128**

Malicious prosecution—*Reasonable and probable cause—Damages.*

A., who dealt in sugar at Lakhiserai, in compliance with a written order from *B.*, sent a consignment of sugar to him at Agra. *B.*, however, did not pay for it. *A.* went to Agra and found the sugar in the shop of *C.* he accordingly lodged a complaint of cheating against *B.* and *C.* *B* and *C.* were acquitted, whereupon *C.* sued *A.* for damages for malicious prosecution:

Held, that there was no reasonable and probable cause which justified *A.*'s complaint and, consequently, he was liable for damages for malicious prosecution. KESHO PARSHAD *v.* RAM KISHEN DAS **316**

——— ——— ——— ———*Suit for damages—Reasonable and probable cause.*

In a suit for damages for malicious prosecution what the Court has to see is what was the conduct of the complainant before and after making the charge and whether the charge was false to his knowledge.

The mere fact that one Criminal Court has believed in the truth of the complaint is not sufficient evidence of the existence of reasonable and probable cause. PADARATH *v.* DULAM, 10 A. L. J. 423 **879**

Mamlatdars' Courts Act (II of 1906), s. 28 **676**

Marine Insurance Policy—Perils of the sea **188**

Marriage. *See* HINDU LAW—MARRIAGE.

Master and servant—Possession—Servant fetching gun for licensed master **796**

——— ——— ——— ———*Contract of service for definite term—Discontinuance of service by the servant during term—Right to claim compensation for period of work—Contract Act (IX of 1872), ss. 39, 64, 65, 73 and 74.*

The plaintiff entered defendant's service under an engagement to work for a period of one year on a salary of Rs. 18 per month, the same being payable in a lump sum at the end of the year. He discontinued his services just 10 days before the expiry of the year without any justification and sued to recover the wages for the period during which he had actually worked:

Held, that the plaintiff was entitled to recover for that period.

A servant who without excuse abandons his employment before the expiry of the term may, after its expiration, recover the value of the services performed less the master's damages for the breach of the contract.

Where one party hires himself to another for a given period of time and leaves his services before the

Master and servant—concld.

expiration of the term without any fault on the part of the employer, the former may recover the value to the services performed as upon a *quantum meruit* without showing that he performed his entire contract or that he left the services of his employer without any good cause.

In cases between master and servant, Courts should not be too strict in treating the contracts of service for a certain period and for a certain wage as indivisible unless the nature of service raises a strong presumption that the servant intended not to claim wages for a broken period.

In calculating the reasonable remuneration for the broken period, the broken contract is admissible to prove the nature of the service for the broken period. CHOKALINGAM MUDALIAR *v.* MAHOMED SHERIFF, (1912) M. W. N. 1212; 12 M. L. T. 594; 23 M. L. J. 680 **894**

——— ——— ——— ———*Liability of servant for wrong done on behalf of master.*

Inasmuch as the law holds the doer of a wrong liable for it, a wrong-doer cannot escape liability on the ground that he was a servant acting for the benefit of his master. DAJI *v.* RUKHMA, 8 N. L. R. 159 **378**

——— ——— ———*Monthly servant—Wages for broken period—Pleadings—Case not set up in plaint.*

A monthly servant who leaves without notice is entitled to be paid down to the date when wages were last due but not for the broken period he has served since that date.

In a suit by a monthly servant, the Court cannot make out a case of wrongful dismissal, not set up in the plaint, and not supported by plaintiff's witnesses. STEWART *v.* SIMON GONSALVES, 5 BUR. L. T. 167; 6 L. B. R. 74 **900**

Material alteration—Pro-note **281**

Maxims - *Actio personalis moritur cum persona* **226**

Melvaram **353**

Merger of colorable transaction in decree **39**

——— ———Usufructuary mortgage—Subsequent execution of Mulgani lease to a stranger **265**

——— ———*Proprietor possessing* nij jote *lands—Interest of proprietor, sale of—Whether right to* nij jote *subsists—Mortgage of interest of mortgagor—Express reservation—Presumption—Construction of deed—Deed to be construed in favour of grantee.*

When a proprietor is in possession of *nij jote* lands, it cannot be said that he has, in respect of such lands, an interest subordinate to the proprietary interest, so that when his interest as proprietor disappears, along with it must disappear his interest in the *nij jote* lands.

It is a maxim in law that every man's grant shall be taken by that construction of law which is most forcible against himself. Therefore, the words of a deed executed for a valuable consideration ought to be construed, as far as they properly may, in favour of the grantee.

Therefore, when a person effects a mortgage of his interest in the mortgaged property, unless there is express reservation, the presumption would follow that he has given by way of security all interests of whatever kind he possessed in the land. BHOJOHARI DAS ADHIKARI *v.* BHAGABATI DASI **494**

S. N. DAR, B. A. LL. B.,
Vakil High Court,
SRINAGAR (Kashmir)

Mesne profits, decree, for, obtained by evicted tenant, whether revives claims for rent—Defaulting *patnidar* purchasing tenure—Evicting *dar-patnidar*—Annulment of *dar-patni* **238**

——— ——— ———*Execution of decree for mesne profits—Interest.*

In execution of a decree for mesne profits, the decree-holder is entitled to claim interest on mesne profits, as the definition of the term includes interest on such profits. BANWARI LAL *v. Musammat* RAMA, 10 A. L. J. 533 **915**

Migration—Presumption of carrying of personal law **257**

Minerals lying on surface of soil **490**

Minor. *See* HINDU LAW—MINOR.

———, contract by, is void **979**

———*De facto* guardian mortgaging minor nephew's property—Suit for possession—Right of nephew and sons of mortgagor to resist claim on the ground of no necessity—Joint and several liability **247**

———, meaning of **86**

———'s money—Investment—Trust **597**

———Next friend's disobedience—Party to suit—Order for personal appearance—Power of Court **762**

———*Custody—Father's right—Adoption without father's consent not valid—Acquiescence.*

A. sued *B.* for custody of his child. It was found that *A.* had deserted the mother of the child; the latter had given it in adoption to *B.* to save its life and *B.* had brought it up. It was contended that the plaintiff had relinquished his right of custody or had lost it by acquiescence in adoption:

Held, (1) that the plaintiff could not be said to have relinquished his right inasmuch as there was nothing to show that he was in a position to look after the child at the time of the alleged adoption and that such adoption being without his consent was not valid;

(2) that even if he had acquiesced, he would have been entitled to cancel the adoption. MA THET *v.* MG PO TUN, 5 BUR. L. T. 171 **962**

———*incurring debt—Subsequent conduct in raising another loan from the same creditor—Ratification—Apparent necessity at the time of incurring debt.*

Where a person contracts a loan while a minor, and, after attaining majority, takes further advances from the same creditor, this subsequent conduct of his constitutes a ratificatinn on his part of the original debt incurred during minority.

If a creditor knows that his debtor has sufficient justification for requiring money, both being residents of the same village, he acts rightly in advancing it, and is entitled to recover the sum thus advanced with interest. JAWAHRI MAL *v.* DHANPAT, 163 P. W. R. 1912; 170 P. L. R. 1912 **223**

———*Ex parte* decree against minor is null and void **263**

———*Guardian—Power of natural guardian—Sale of minor's property—Validity discussed—Necessity—Benefit.*

Per *Sundara Aiyar, J.*—Where the mother of a Hindu minor sells his property for the discharge of certain debts due by the minor's father, the validity of the sale must depend upon the general powers and duties of a guardian under the Hindu Law apart from the provisions of the Guardians and Wards Act.

There is a difference between the powers of a natural guardian and one appointed by the Court. The latter class of guardian is under the supervision of the Court, the powers of guardianship are in large part exercised by the Court itself and the appointed guardian can only act subject to its supervision and control. Definite restraints are put upon an appointed guardian by Statutes. These restraints will not be applicable to a natural guardian whose duties must be regulated by considerations of what should be regarded as best in the interests of the minor.

The powers of a manager for an infant heir to charge his estate not his own is under the Hindu Law a limited and qualified power. It can only be exercised rightly in the case of need or for the benefit of the estate. The question in each case would be whether any alienation or other transactions for the benefit of the minor is necessary so as to satisfy the phrase 'in a case of need.' Again, if a person dealing with a guardian acts *bona fide* and after due inquiry believes that the transaction is for the minor's benefit or necessary, it can be upheld against him though a ward may have good reasons to complain of the conduct of the guardian.

The words 'necessity' and 'benefit' really import two different ideas. Necessity seems to connote the idea of warding off an evil or the doing of something that cannot be avoided or of something which is one's legal duty to do, such as avoiding a sale of a minor's property for a debt, conducting necessary repairs, maintenance of a minor and performance of his father's funerals, but over and above all these acts that are necessary, there may be acts which are positively beneficial to the minor and an alienation which would conduce positively to the benefit of the minor would be upheld apart from any necessity unless, of course, it is accompanied by other evil.

Demand is not necessary to justify an alienation to discharge a debt. A debt may be a pressure on the estate even though the creditor has not yet demanded payment of it. Whether it would be so, would depend on the circumstances.

It is the duty of the guardian to pay off debts incurred by the father. As a natural guardian has in this country no right to ask the advice of the Court like a statutory guardian, the discretion as to how the duty of discharging the debts binding on the minor should be performed, must rest with him. The question in each case would be, whether the discretion vested in a guardian has been exercised properly. He would be taken to have done so, if he acted with due prudence and caution. As to the degree of prudence required, the right view to take is, whether in the circumstances that existed at the time of the alienation, the act would be regarded as a prudent one by men of ordinary prudence in dealing with the property of a ward.

If the guardian consulted proper advisers, that would be a good test whether the act would be prudent but the mere consultation of others would not be a ground for upholding a transaction if the

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Court is convinced that both those consulted and the guardian made a grave mistake.

The powers of a manager of a Hindu family, a guardian of an infant and a trustee, contrasted.

Per *Sadasiva Aiyar, J.*—If the guardian of a Hindu minor alienates the minor's property because he considers it, after weighing all the then existing circumstances, to be in the best interests of the minor to make that alienation, the minor is clearly bound by that act of alienation.

Even if the guardian has acted wrongly, the alienee is protected if he acts in good faith after making due inquiry and if he is satisfied, on the representations of the guardian and on his own independent inquiry, that the guardian's act appears then to be clearly for the minor's benefit.

Any comparison between the powers of a natural guardian and of a guardian to whom the Guardians and Wards Act applies is of very little utility in deciding as to the powers of a natural guardian under the Hindu law. The Legislature is not bound to follow the common law and can give powers and impose restrictions on certain kinds of guardians according to pleasure. VEMBU IYER *v.* SRINIVASA IYENGAR, 23 M. L. J. 638; 12 M. L. T. 847 **609**

Misdirection. *See* JURY.

Misjoinder of parties—*Objection taken for first time in appeal—Inadmissible.*

An objection as to misjoinder of parties cannot be taken for the first time in appeal, especially when the suit is decided upon the merits in the first Court. RAGHAVA AIYAR *v.* MURUGESA MUDALI **97**

Mortgage. *See* EQUITABLE MORTGAGE.

——— ——— by *Mitakshara* father. *See* PARTY **577**

——— ———Agreement between mortgagor and mortgagee as to disposal of rents and profits—Admissibility of previous negotiations to vary terms **737**

——— ——— **by co-sharer**—Default in paying revenue by other co-sharers—Payment of their share by mortgagee—Suit by mortgagee for recovery of sums paid—Whether suit maintainable without specifying share of revenue payable by each co-sharer **45**

——— ———Estoppel—Denial of mortgagee's right by representatives of mortgagors—*Waqf* property—Simple mortgage—Adverse possession against mortgagor, whether extinguishes mortgage security **632**

——— ——— of interest of mortgagor—Express reservation—Presumption—Construction of deed—Deed to be construed in favour of grantee **494**

——— ———Mortgage by customary owner—Part of consideration for mortgage not for necessity—Incomplete mortgage—Incompetency of mortgagee to get possession **247**

——— ——— **by pattadar**—Relinquishment—Decree and sale by mortgagee after relinquishment, whether binds new *pattadar* **253**

——— ———Priority—Puisne mortgagee, whether personally responsible for re-payment of mortgage-debt **927**

Mortgage—contd.

——— ———Property subject to mortgages—Covenant by vendor to discharge previous mortgages—Pre-emption suit **318**

——— ———Splitting up **837**

——— ———Tender of mortgage money—Mortgagor claiming to split up the mortgage—Dispute as to extent of mortgagor's right—Refusal of mortgagee to receive tendered amount—Mortgagor's claim for mesne profits—Interest **368**

——— ——— **by conditional sale**—*Foreclosure—Limitation—Regulation XVII of 1806—Limitation Act (XV of 1877), Sch. II, Art 147, scope of—Transfer of Property Act (IV of 1882).*

The limitation for an application for foreclosure under Regulation XVII of 1806 is 12 years.

Article 147, Schedule II, Limitation Act of 1877, applied not to foreclosure proceedings under the Regulation but to such *suits* for foreclosure as under the law then in force could be brought.

Where a right to make an application for foreclosure had come to an end by reason of efflux of time, before the enactment of the Transfer of Property Act, the subsequent enactment of the Act could not resuscitate that right.

Where a mortgage by way of conditional sale, governed by Regulation XVII of 1806, has not provided for possession of the mortgagee, the latter has no right to take possession unless foreclosure proceedings have been taken under the Regulation.

A mortgage by conditional sale, executed in 1865, provided for payment of mortgage-money with interest on 31st March 1866. The mortgagee made no application for foreclosure under Regulation XVII of 1806. In 1910, he brought a suit for foreclosure:

Held, that the suit was barred. SHYAM CHANDRA SINGH *v.* BALDEO, 10 A. L. J. 522 **467**

——— ——— **Construction of deed**—Zar-i-marhuna—Hamrah—*Personal remedy of mortgagee as to interest—Redemption—Interest.*

The operative part of a mortgage-deed ran as follows:

'*Rihn bashrait-i-zail karte hain ke qabza kasht wa muamala Sarkar zimme murtahinan hoga. Zar-i-marhuna se chhih sau pachchas bila sud rahega. Iwaz sud zar-i-bala wa muamala Sarkar paidawar arazi murtahinan lenge. Baqi chhih sau pachchas ke* hamrah *sud bahisab ek rupia fisadi mahwari denge. Zar-i-sud salana ada hoga. Basurat adam adai sud salana sud dar sud bahisab bala denge. Kasht arazi bamarzi murtahinan muzhiran karenge ... ... Miad koi muqarrar nahin hai. Jab bad darau fasl bamah-i-Har khud kasht murtahinan talab karen* zar-i-marhuna *dekar zamin chhura lewenge. Zar-i-*marhuna *batafsil-i-zail ... ... wasul pai. Qabza diya gaya ... ... Nisbat zar-i-sud salana bala* hamrah *chhih sau pachchas rupia murtahinan ko ikhtiyar hoga ke sud dar sud lewen ya muzhiran se ba irja-i-nalish wasul karlewen.*'

Held, (1) that the words *zar-i-marhunah* in the redemption clause in the above extract meant the mortgage-money without any reference to the interest due on it;

(2) that the words *hamrah chhih sau pachchas rupia* in the last clause of the above extract

meant calculated or due on Rs. 650 and in the light of the context were susceptible of no other meaning. The clause was one relating to interest and compound interest, and stood by itself, having nothing whatever to do with the redemption of the land. Under the clause, the interest or compound interest was agreed to be received or recovered from the mortgagors personally;

(3) that, under the terms of the mortgage-deed, as set forth in the above extract, the mortgagors were entitled to claim redemption on payment of the principal mortgage-money only, and the mortgagees had only a personal remedy against them in respect of their claim for interest or compound interest. AULIA KHAN *v.* KANSHI RAM, 25 P. W. R. 1913 **677**

—— ——**Foreclosure**—Suit for valuation **886**

—— —— —— ——*Foreclosure of same property twice under separate mortgages—Mortgage of undivided share of village—Mortgagee's right to* sir—*Nature of* sir *right—Proprietary and cultivating rights—Cenrtal Provinces Tenancy Act (IX of* 1883), *s.* 42—*Applicability to mortgages—Central Provinces Tenancy Act (IX of* 1898, *as amended by Act XXI of* 1899), *s.* 45 (6)—*Transfer of Property Act (IV of* 1882), *s.* 8.

A mortgagee is fully entitled to foreclose twice on the same property. Where a mortgagee holds two mortgages by conditional sale over the same property, he can get a separate foreclosure decree under each of them, whether at the same time or one after the other.

The cultivating or occupancy-rights in the *sir* land do not come into existence on loss of the proprietary right in the land. The proprietary and cultivating rights are co-existing and component parts of the *sir* right.

Consequently, a mortgagee, entitled to proceed against a mortgagor's rights in the *sir* land, can get a decree against what is left of those rights—the ex-proprietary cultivating rights in the land, although the proprietary right may have passed to the same mortgagee or to another person.

Section 42 of the Central Provinces Tenancy Act of 1883, applies only to sales of three specified kinds and not to mortgages, whether by conditional sale or of any other kind.

Although a mortgage in India is not a transfer of property but only of an interest in property, yet section 8 of the Transfer of Property Act is applicable to mortgages.

A mortgage of an undivided share in a village includes the *sir* rights and all other rights, which the mortgagor is capable of transferring, in the absence of any words showing an intention to retain or exclude them. SHIOLAL *v.* NANHELAL, 8 N. L. R. 123 **129**

—— ——*Lease from mortgagor after mortgage suit*—Lis pendens—*Transfer of Property Act (IV of* 1882), *s.* 52—*Lease after mortgage but before mortgage suit—Lease valid if granted on usual terms in ordinary course of management—Burden of proof.*

A person who obtains a settlement from a mortgagor after the commencement of a suit upon the mortgage, is affected by the doctrine of *lis pendens*, and may be ejected by the purchaser of the property in execution of the mortgage decree.

A mortgagor in possession may make a lease conformable to usage in the ordinary course of management; for instance, he may create a tenancy from year to year in the case of agricultural lands, or from month to month in the case of houses. But he is not competent to grant a lease on unusual terms, or to alter the character of the land, or to authorize its use in a manner or for a purpose different from the mode in which he himself had used it before he granted the mortgage.

A person, who has obtained a settlement from a mortgagor after the mortgage but before the mortgage suit, can resist a claim for ejectment made by the purchaser in execution of the mortgage decree, only if he can establish that the lease in his favour was granted on the usual terms in the ordinary course of management.

Such a person acquires an interest in the equity of redemption and can claim to redeem on that footing. MADAN MOHAN SINGH *v.* RAJ KISHORI KUMARI 17 C. L. J. 384 **1**

—— ——*Mortgage-deed providing for appointment of Receiver—Inability of Receiver to pay any interest—Direction by Court to Receiver to pay money to mortgagor to prefer appeal from mortgage-decree—Order of Court, whether justifiable—Order, whether appealable—Appeal—Civil Procedure Code (Act V of* 1908), *O. XL, r.* 1 *cl.* (1) (*d*). *O. XLIII, r.* 1 *cl.* (*s*).

A mortgage-deed provided that *G.* was to be appointed manager of the mortgaged properties on behalf of the mortgagors and was to hold charge of them until he had paid off the principal and interest due to the mortgagee, and that if the manager failed to discharge his duties, the mortgagees might appoint a Receiver of the rents and profits of the mortgaged premises.

The manager was unable to obtain possession of the properties, and a suit upon the mortgage was instituted and a Receiver was appointed. A decree was made in the suit.

The mortgagors-judgment-debtors obtained an order from the Court on the Receiver to pay over to them certain sums of money to enable them to appeal from the decree passed against them in the mortgage suit:

Held, (1) that Order XLIII, rule 1, clause (*s*), gave an appeal in the case of an order like the present passed under clause (1) (*d*) of rule 1 of Order XL;

(2) that the mortgage-bond and the order passed for the appointment of the Receiver did not provide for the payment of any sum to the mortgagors for the purpose of instituting appeals from decrees obtained against them on the basis of the mortgage, and the Court below ought not to have allowed them the amounts.

It appeared that the mortgagee had not received anything as interest:

Held, that under the circumstances, the order of the Court below could not be supported. EASTERN MORTGAGE AND AGENCY CO. LD. *v.* FAKURUDDIN MAHOMED CHOWDHURY, 17 C. W. N. 1 **849**

—— ——*Prior and subsequent mortgages—Father impleaded as party to suit—Effect of decree on son.*

A. mortgaged his share in 1887 to *B.* In 1892, he mortgaged the same share to *C.* In 1893, he again

Mortgage—contd.

mortgaged that share along with other properties to *B*. A part of the consideration of the mortgage of 1893 was the sum due under the mortgage of 1887. In 1899, the heirs of *C*. brought a suit on the basis of the mortgage of 1892 and impleaded *B*. as subsequent mortgagee. At the time of the suit, *B*. was in Jail and had a son who had not been impleaded as a party to the suit:

Held, that *B*.'s son, who was not impleaded in the suit, was not bound by the decree obtained therein as he was not effectively represented in the suit. PRAG *v.* RAM NIRANJAN, 11 A. L. J. 36 **734**

——— ——— *Priority—Transfer of Property Act (IV of 1882), ss. 79, 80—Notice of prior mortgage—Maximum amount—Release of property of one of mortgagors, effect of.*

Under section 79 of the Transfer of Property Act, two elements have to be considered; *first*, whether the subsequent mortgagee took with notice of the prior mortgage, and, *secondly*, whether the prior mortgage expresses the maximum secured thereby.

A deed stated that a lease had been granted and that the lessees had hypothecated their properties for the payment of the annual rent and interest on defaulted instalments:

Held, that the deed expressed the maximum to be secured thereby within the meaning of section 79 of the Transfer of Property Act, and would be enforceable against a subsequent mortgagee, if the latter took with notice.

A mortgagee cannot release the properties of one of the mortgagors to the detriment of the others.

If the mortgagee relinquishes a valuable property for an inadequate consideration, he cannot be permitted to throw the burden of the balance of the debt upon the remaining properties. DALIP NARAIN SINGH *v.* CHAIT NARAYAN SINGH, 16 C. L. J. 401 **931**

——— ——— *Refusal to deliver possession—Suit for mortgage-money and interest.*

The refusal by a mortgagor to deliver possession gives the mortgagee the right to sue for the mortgage-money and interest. SHER MUHAMMAD *v.* NIKKA MAL, 21 P. L. R. 1913 **362**

——— ——— **decree**—Claim by second mortgagee for lien—Rejection of claim—Suit to establish mortgage—Parties **87**

——— ——— ——— for sale — Execution—Time when limitation begins to run **759**

——— ——— ——— Successful party — Personal decree for costs **244**

——— ——— **deed** executed by *parda nashin* lady —Presentation for registration by husband—Validity of presentation **274**

——— ——— ——— Recital—Admissibility **644**

——— ——— **Redemption** — Construction of deed—Interest **677**

——— ——— ——— Mortgage by Hindu father —Foreclosure proceedings and suit against minor sons through their mother—Minor grandson not made party—Right to redeem **141**

——— ——— ——— Suit—Court-fee **442**

Mortgage—contd.

——— ——— **Redemption**—*Mortgage for term of years—Failure of mortgagee to perform essential part of contract—Right of mortgagor to redeem before expiry of period.*

Where property subject to prior encumbrances is mortgaged with possession for a term of years, and the mortgagee covenants to pay the prior encumbrancers out of the mortgage-money but does not do so, the mortgagor has, on equitable grounds, the right to redeem the mortgage before the expiration of the period for which the property has been mortgaged, as the essential part of the contract, so far as the mortgagors are concerned, has not been performed by the mortgagee. CHHAKTU RAI *v.* BALDEO SHUKUL, 10 A. L. J. 330; 34 A. 659 **340**

——— ——— ——— *Owner of share of equity of redemption, whether entitled to redeem the whole mortgage—Transfer of Property Act (IV of 1882), ss. 60, 91.*

A person who is entitled only to a part of the equity of redemption has not, under all the circumstances, the right to insist on redeeming the whole mortgage. If there are several persons in whom the equity of redemption is vested, one of them and the mortgagee acting together are entitled to deal with the former's interest in the equity of redemption and the mortgagee's rights as against him, provided the rights of the other owners in the equity of redemption are not thereby injuriously affected. But nothing done either by a mortgagor or a mortgagee behind the back of the other can affect the right of that other so as to injure him in any way.

Where the mortgagee has dealt with one of those entitled to the equity of redemption, a person entitled to the remainder may claim to redeem his share only of the equity of redemption.

The objection to a mortgagee splitting up a mortgage is entitled to weight only where the owner of a part of the equity of redemption is prejudicially affected by the splitting.

If some of the co-owners of the equity of redemption should desire to continue the mortgage of their shares, one of the co-owners cannot be held entitled to redeem the whole of the mortgage.

The question whether the Court will allow redemption of the whole of the mortgage at the instance of a person entitled to a part only of the equity of redemption, must depend on the circumstances of each case.

Per *Sadasiva Aiyar, J.*—A mortgagee has the right to release any portion of the mortgaged property or to sue for a sale of a portion thereof, though such release or abstention will not affect the rights and liabilities as between themselves of the owners of the different portions of the equity of redemption in the mortgaged properties. RATHNA MUDALI *v.* PERUMAL REDDY, 12 M. L. T. 484; (1912) M. W. N. 1168 **837**

——— ——— ——— *Prior mortgagee obtaining decree for sale without impleading puisne mortgagee —Purchase of property in execution by prior mortgagee—Suit for redemption by puisne mortgagee—Amount due—Interest.*

Where a prior mortgagee has obtained a decree for sale without impleading the puisne mortgagee in his

Mortgage—concld.

suit, and has in execution of the decree purchased the mortgaged property himself, the puisne mortgagee, when seeking to redeem the prior mortgage, is bound to pay the prior mortgagee interest at the mortgage rate and not at the decree rate.

The puisne mortgagee cannot treat the prior mortgagee as a mortgagee for one purpose and a decree-holder for another. PONNAMBALA CHETTI *v.* MUTHUSAMI PILLAI, 23 M. L. J. 284; (1912) M. W. N. 1119 **291**

——— ——— **suit.** *See* CIVIL PROCEDURE CODE, 1908, O. XXXIV; TRANSFER OF PROPERTY ACT, s. 85.

——— ——— ———Alteration of law. **577**

——— ———*Usufructuary mortgage -- Lease—Subsequent execution of* mulgeni *lease to stranger—No change of character as lessee—Lessor entitled to possession—Merger.*

Sundara Aiyar, J.—Where, at the time of the execution of a usufructuary mortgage, the mortgagor takes a lease from the mortgagee of the mortgaged properties, the position of the mortgagor is that of a tenant of the mortgagee and the value of the possession is not changed, till the mortgage is redeemed, by the execution of a *mulgeni* lease or by the assertion of any *mulgeni* right in himself. SUBRAYA KINI *v.* RAMAPPA AIDGE, (1912) M. W. N. 907 **265**

——— ———*Usufructuary mortgage, meaning of—Mortgage in which possession is postponed to be delivered on a date subsequent to the mortgage, interpretation of.*

The word "*deliver*" in section 58 does not necessarily mean "*deliver immediately*" and where the mortgagor is not in a position to give immediate delivery of possession it is sufficient if he gives the right to possession though he cannot give delivery of possession.

Therefore, where under the terms of a mortgage-deed, the possession is to be delivered to the mortgagee subsequent to the date of the mortgage, the transaction is an usufructuary mortgage as defined in section 58 of the Transfer of Property Act.

If there is a condition in the mortgage-deed by which the mortgaged property cannot be redeemed until a certain period elapses after the date of execution of the deed, the deed is nevertheless a usufructuary mortgage. BISHESHAR BAKHSH SINGH *v.* DEBI BAKHSH SINGH **329**

Mortgagee—Compensation for improvement **243**

Mortgagor and mortgagee—Possession—Burden of proof **913**

——— ——— ———Purchase from mortgagor—Duty to pay revenue—Land Revenue Sale—Fraudulent purchase **878**

——— ——— ——— ———*Lease by mortgagee in favour of mortgagor for the mortgaged property—Suit for rent of mortgaged property, maintainability of—Landlord and tenant.*

If a mortgagee chooses to put the mortgagor in possession of the mortgaged premises on payment of rent, the mortgagee is at perfect liberty to recover the arrears of such rent as arrears of rent, and it is not necessary for the mortgagee to include these sums in a suit upon the deed of mortgage. MAHADEI *v.* BHIKHAN **424**

Mosque—Right to worship **386**

Muhammadan Law—*Gujars* of Kharian **21**

——— ——— ———*Kanjars* of Jagadhri **214**

——— ——— ———*Mushaa* **857**

——— ——— ———*Shafei*—Life-estate **689**

——— ——— ———**Custom** — *Muhammadan family adopting Hindu worship—Females, rights of—Estoppel—Representation by males.*

A Muhammadan family, governed by Muhammadan Law, adopted the Hindu religion in matters of worship.

There was no evidence of any custom in the family by which the Muhammadan Law in respect of descent of property had been altered or varied:

Held, (1) that the family did not cease to be governed by Muhammadan Law in matters of succession;

(2) that the females succeeded to proprietary interest in accordance with that law.

In the absence of any proof or suggestion that *parda nashin* ladies of a family have misled, by word or conduct, any alienee from the male members, the mere fact that the ladies left the management of the property in the hands of males is insufficient to show that the male members represented the females or that the latter are estopped. AZIMA BIBI *v.* SHAMALANAND, 17 C. W. N. 121; 13 M. L. T. 159; (1913) M. W. N. 125; 11 A. L. J. 169; 17 C. L. J. 303 **758**

——— ——— ———**Gift**—*Acceptance—Gift by registered deed—Formal possession—Undivided property—Effect of transfer of possession*—Mushaa—Wakf—*Written instrument not necessary—Trusts Act (II of* 1882), *ss.* 1, 5.

The Trusts Act does not affect the rules of Muhammadan Law as to *wakf*.

Therefore, it is not necessary to execute an instrument in writing in order to create a valid *wakf*.

A gift under the Muhammadan Law is not invalid merely because there is no formal acceptance by the donee at the time of the execution or registration of the deed of gift.

It is not necessary for the validity of gift that the signification of the acceptance must be at any particular moment of the transaction.

A declaration by the donor in the deed of gift that possession has been given binds the heirs of the donor and possession once taken cannot be invalidated by any subsequent change of possession.

In the case of a gift of undivided property possession given and taken under such gift effectually transfers such property.

A gift by a person by means of a registered deed, in favour of his sons, wives and grandson, as to property of which the donor was in joint possession with the donees and of which he made over entire possession to the donees, is valid under the Muhammadan Law. NUR MUHAMMAD *v.* BHAGWAN DAS, 106 P. R. 1912; 31 P. L. R. 1913 **857**

——— ——— ———**Mosque**—*Right to worship—Religious institution—Right to offer prayers—Right to recite Koran.*

Every Muhammadan worshipper has the right both to offer prayers and to recite the Koran as a part of his right of worship in a mosque.

There is nothing to prevent a worshipper from receiving at the mosque money offered to him there by others or from distributing sweetmeats. But no worshipper can claim to use the mosque as of right for such purposes. MUTHALA KANDI *v.* PALLI VEETIL ABU BAKER, (1912) M. W. N. 1059 . **386**

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——————**Pre-emption.** *See* PRE-EMPTION.

——————**Succession** to trusteeship how determined **124**

——————**Wakf** — Written instrument not necessary **857**

——————Waqif *not owner of property at creation of* waqf—*No subsequent ratification by real owner—Validity of* waqf.

A Muhammadan made a *waqf* of property of which he was not the owner at the time of dedication. The true owner did not ratify the *waqf*:

Held, that the *wakf* was invalid under the Muhammadan Law. NASIR-UD-DIN *v.* BALLABH DAS, 10 A. L. J. 501; 35 A. 608 **471**

——————**by user**—*Punjab Land Revenue Act (XVII of* 1887*)*, *s.* 44—*Record of Rights.*

Where a graveyard existed from time immemorial, in which the Muhammadan community of Multan used to bury their dead, and in the Record of Rights of the last Settlement, the said graveyard was described as "in the possession of the Muhammadans, and as *ghair mumkin kabristan*:"

Held, (1) that the entry in the Record of Rights was conclusive under section 44 of the Punjab Land Revenue Act, 1887, and that the land in question, being a graveyard, was *wakf* by user, if not by dedication;

(2) that land unoccupied by graves within the area of the graveyard could not be held to be private property. COURT OF WARDS *v.* ILAHI BAKHSH, 1 P. W. R. 1913; 11 A. L. J. 265; 13 M. L. T. 318; (1913) M. W. N. 270; 17 C. L. J. 360; 27 P. R. 1913 **744 P. C.**

——————**Widow's** *possession in lieu of dower—Right of husband's heirs to oust her.*

Where the widow of a deceased Mahomedan is proved to have obtained possession of her husband's property after his death peacefully, quietly and without fraud in lieu of her unsatisfied dower-debt, his legal heirs are not entitled to oust her until that debt has been satisfied. HASAN RAZA *v.* BASTI BEGAM, 15 O. C. 257 **81**

——————**Will**—Naikin **834**

——————*Probate not required—Bequest exceeding one-third of testator's property—Validity of such bequest—Letters of Administration obtained by heir after testator's property dealt with by executor appointed by testator—Effect of such Letters—Probate and Administration Act (V of* 1881*)*, *ss.* 42, 43, 44.

It is not necessary for the executor of a deceased Muhammadan to take out Probate.

A Muhammadan can make a Will. It may be either oral or written. His power of testamentary disposition is limited to the extent of ⅓rd of his estate and any bequest in excess thereof requires the consent of heirs whose rights are infringed by the bequest. Also a bequest to a person entitled to inherit is void unless the other heirs give their consent after the testator's death to its taking effect.

Where, *A.*, an executor appointed by the testator, has dealt with certain properties belonging to the testator and where *B.* has, subsequently, obtained Letters of Administration, the latter will be confined to the properties other than those dealt with by the executor. MAUNG LU MAUNG *v.* MAUNG PE, 5 BUR. L. T. 255 **868**

Murder. *See* PENAL CODE, ss. 299 TO 304.

Mutation entries *-Object—Nature of inquiry—Possession—Title—Record of Rights, object of—Inheritance cases—Transfer cases—Summary inquiry—Customary Law considerations — Punjab Land Revenue Act (XVII of* 1887*)*, *ss.* 34 (4), 36 (1), 37 (*a*), 44—*Minor, contract by, void—Contract Act (IX of* 1872*)*, *s.* 11—*Interpretation of statutes—Intention.*

In construing statutes, no matter what the intention of the Legislature may have been, the Courts are bound to follow the wording of an enactment and to disregard evidence as to intention, when inconsistent with the language actually used in the Act as passed, if the latter is clear and unambiguous.

The Record of Rights is a record of titles and not a record of possession. Mutations are not to follow possession in all disputed cases but should be based primarily on title.

The procedure of the Revenue Officer in dealing with mutations is determined by the nature of the mutation. If the proposed entries are agreed to by all the parties interested therein or are supported by a decree or order binding on these parties, possession may be disregarded. In disputed cases, the facts as to possession are relevant to the decision of the dispute, but they are relevant not for the purpose of making mutation follow possession, but for the purpose of ascertaining whether facts are proved or admitted to have occurred which would justify a variation in the existing Record of Rights.

The extent to which possession or the absence of possession should be regarded as proof, for mutation purposes, that a fact has or has not occurred, depends mainly on whether the case is one of transfer or of inheritance.

In succession cases, a mutation of some sort must be effected; there is in these cases no such thing as a rejected mutation; the dispute is between rival heirs. In disputed cases of inheritance, comparatively little stress should be placed on possession as it is not true evidence of right.

In disputed cases of transfer, the issue is not only what the true entry shall be, but whether a new entry shall be made at all or not. In such cases, possession counts for a very great deal.

Investigations in mutation proceedings should be of a very summary character. In transfer cases, where anything more elaborate than a summary inquiry is necessary to decide whether a fact is proved to have occurred, it will be best to refuse mutation and refer the parties to the Courts. In inheritance cases, where a new entry must be made, the scope of the inquiry must be left to the discretion of the mutation officer but it must necessarily be summary.

A minor is incompetent to enter into a contract and a contract, one of the parties to which is a minor, is not merely voidable but void and cannot be validated by the transfer of possession. A transfer by minor, even if accompanied by possession, should not be followed by mutation.

A mutation of sale should not be rejected merely because the mutation officer considers that the vendor has exercised a power of alienation opposed to his Customary Law.

When possession has taken place in pursuance of such transfer, the mutation officer should sanction mutation irrespective of Customary Law considerations. GHULAM MUHAMMAD *v. Musammat* ZEWARO, 5 P. R. 1912 (REV.); 35 P. L. R. 1913 **979**

Naikin—*Adoption of daughters—Will—Construction—Persona designata—Practice—Hindu Law or Muhammadan Law.*

A., a professional prostitute of the class known as Naikins, made a Will in favour of *B.*, a daughter of one of her near relatives. The Will declared that as the testatrix had no issue of her own, she had adopted *B.*, but in the subsequent passages of the Will, sometimes the adjectival phrase 'adopted daughter' occurred, and sometimes it did not occur in relation to the name of *B.* *B.* claimed the property of *A.* as her adopted daughter and also as *persona designata* under the Will:

Held, that the adoption was invalid;

(2) that according to the Will, *B.* was not to take the property as being the adopted daughter, but that *B.* was the adopted daughter and was to take the property because she was the special object of *A.*'s bounty.

Where in a case, there is no specific evidence to show whether the parties are to be reckoned as Muhammadans or Hindus, but from the very beginning of the litigation to its appearance in the High Court in second appeal, the assumption, which throughout was accepted by both parties, was that they were to be governed by Muhammadan Law, the High Court would not allow any of the parties in the second appeal to disturb that assumption. HIRA NAIKIN *v.* RADHA NAIKIN, 14 BOM. L. R. 1129; 37 B. 116 **834**

Negligence—Damage done to crop by animal **899**

——— when amounts to misconduct **544**

Negotiable Instruments Act (XXVI of 1881), s. 20—*Blank promissory-note, suit on—Payee's name not filled in—Endorsement.*

A payee can fill in a blank inchoate instrument and sue on it himself after filling it or endorse it to some one; but no decree can be passed on a blank instrument not containing the name of the *payee*; nor is such an instrument transferable by endorsement. M. N. P. L. FIRM *v.* KIRWAN GYAN, 5 BUR. L. T. 162 **915**

——— ——— ——— **ss. 35, 37, 38**—*Endorser, liability of.*

An endorser is liable to every subsequent holder in case of dishonour by the drawer, provided he has received due notice of his dishonour, unless (*a*) there is a contract to the contrary or (*b*) he expressly excludes or limits his liability in the indorsement itself.

He is liable as a surety for the maker, but he is also, in the absence of a contract to the contrary, liable as principal to his endorsee. A holder having duly presented the instrument and given notice of dishonour is not bound to sue the drawer before he sues his immediate indorser; he has a right at once to sue the indorser without impleading the drawer in the same suit. SOMASUNDARAM CHETTY *v.* LAKSHMAN CHETTY, 5 BUR. L. T. 173 **951**

——— ——— ——— **ss. 37, 38** **951**

——— ——— ——— **s. 79** **309**

——— ——— ——— **s. 87**—*Material alteration—Private International Law.*

A suit was brought upon two documents executed in Mysore, and not stamped according to the Stamp Law of Mysore, and, consequently, were inadmissible in evidence and could not be acted upon there. The documents were described in the plaint as bonds, but in the documents themselves, they were described as promissory-notes; the documents were torn in several places and had been pieced together in such a manner that the name of the payee and the words "or order" were missing with the result that the documents could be described as bonds:

Held, that this was an alteration of a material character, whereby documents, which could not be sued upon in the only Court where any suit upon them was likely to be maintainable, were converted into documents which could be sued upon, and that, apart from the express provisions of section 87 of the Negotiable Instruments Act, the suit on these documents must fail.

The question whether the plaintiff's suit, which was not maintainable in Mysore owing to the failure to conform to the Stamp Law there, was maintainable in India, considered. LAKSHMAMMAL *v.* NARASIMHA-RAGHAVA IYENGAR, 12 M. L. T. 333 **281**

N.-W. P. Rent Act (XII of 1881), s. 209 **914**

N.-W. Ry. Tariff Rule No. 464 (V) **37**

Notice. *See* U. P. COURT OF WARDS ACT.

———Appeal dismissed in absence of both parties—Restoration **292**

——— of prior mortgage **931**

———Pledge of deposited goods **663**

———Suit for injunction against public officer **876**

———Suit against Railway Company—Modes prescribed by rule **419**

Oaths Act (X of 1873), s. 10—*Oath taken in absence of other party.*

The defendant offered to be bound by the oath of plaintiff taken in the mosque on the Koran; the parties went to the mosque but defendant refused to hand over the Koran to plaintiff. Next day plaintiff went to the mosque with a Court peon in the absence of the defendant and took the oath as agreed. The suit was decreed. DAR BUX *v.* DAR MEAH, 5 BUR. L. T. 165; 6 L. B. R. 60 **930**

——— ——— **ss. 11, 12**—*Agreement to abide by oath of opponent—Imposition of fresh conditions at time of taking oath—Right of party agreeing to take oath to enforce original agreement.*

Where one of the parties to a suit agrees to abide by the statement made on oath by his opponent, but at the time of taking the oath, the former imposes fresh conditions as to the form of taking the oath, the party agreeing to take the oath has a right to enforce the agreement originally entered into by the party offering to abide by the oath. If he takes the oath according to the original agreement, the evidence so given will be conclusive aganist the other party. THUKKU GOUNDAN *v.* KUPPAUDA GOUNDAN **339**

——— ——— **s. 12** **339**

Occupancy-holding. *See* LANDLORD AND TENANT.

Occupancy rights—Transfer — Transferee in possession—Suit for declaration—Defendant admitting transfer by lease—Plaintiff pleading sale **889**

Occupancy-tenancy. *See* PUNJAB TENANCY ACT.

——— ———, *transfer of—Civil Procedure Code (Act V of 1908), ss. 102, 115—Small Cause suit—Second appeal—Revision—Money-bond and lease of holding.*

P. executed a bond in favour of *J.* for Rs. 400 and on the same day gave him a lease of his occupancy holding in which it was provided that the rent was to be retained by *J.*, on account of interest payable under the bond. *J.*, having been ejected from the occupancy holding, brought a suit for the recovery of Rs. 400 due under the bond. The Munsif dismissed the suit, but the District Judge on appeal decreed the suit. Defendant preferred a second appeal:

Held, (1) that the transaction carried out by means of the two documents, *viz.*, simple money-bond and the lease of the occupancy holding, was illegal and the plaintiff could not sue for the recovery of the money due under the bond;

(2) that as the District Judge had decreed the plaintiff's suit in appeal and as the suit was one of the nature cognizable by the Small Cause Court, no second appeal lay to the High Court;

(3) that as the District Judge had not failed to exercise a jurisdiction vested in him or exercised a jurisdiction not vested in him or acted in the exercise of his jurisdiction illegally or with material irregularity, the High Court could not interfere in revision. POORAN SINGH *v.* JAI SINGH **522**

Occupancy tenant — Rent — Crop-share—Gross annual produce how determined—Appraisement—Admission of defendant **943**

Official liquidator, appointment of **853**

Othidar—Pre-emption **337**

Oudh Rent Act (XXII of 1886), s. 3 cl. (6) **334**

——— ——— ——— **s. 127** **464**

Pakka Adatia, *position of—Suit by* Pakka Adatia *—Wagering, defence of—Evidence—Surrounding circumstances—Interrogatories, questions to be asked.*

A *pakka adatia* is a person who enters into a contract of employment with his constituent for reward. He obtains instructions from his client what contracts to enter into. But, generally speaking, the constituent is not concerned with the method in which his instructions are carried out.

In the Bombay Presidency, it is open to the constituent to prove, in a suit by the *pakka adatia*, that the contracts made by the latter were wagering contracts.

A party relying on the defence of wagering must prove that at the time the contract was entered into, it was the common intention of both parties neither to give nor receive delivery, but merely to pay or receive differences according to the market-rate at the due date. In determining the question what was the common intention of parties at the time of the contract, the Court can look to the surrounding circumstances, as it hardly ever occurs that there is direct evidence of a common intention to wager.

Pakka Adatia—concld.

A party seeking discovery by interrogatories is entitled to put questions for the purpose of extracting from his opponent information as to the facts material to the questions between them, which he has to prove on any issue raised between them, or for the purpose of securing admissions as to such facts in order that expense and delay may be saved or to destroy his opponent's case or to support his own case.

The mere fact that the questions would be admissible in cross-examination of a witness, does not make them good as interrogatories.

Interrogatories must not be exhibited unreasonably or vexatiously, nor be prolix, oppressive, unnecessary or scandalous. Nor should interrogatories be allowed which are sought to be administered obviously for the purpose of fishing out a case.

In cases where the defence of wagering has been set up, the party setting up this defence should not be allowed to interrogate his opponent generally as to his business transactions apart from the particular transactions in suit. It is manifestly unfair to compel a man to disclose his general dealings on the chance that thereby his opponent may discover something which will support his case. BHAGVANDAS *v.* BURJORJI, 14 BOM. L. R. 807 **152**

Panchnama—Destruction of rough drafit—Offence **1003**

Pardanashin lady—Mortgage-deed executed by lady—Presentation for registration—Validity **274**

——— ——— ——— ———*Hard terms of mortgage.*

An Indian lady, who does not ordinarily appear in public, but goes about the Bazar to make purchases for the household, can hardly be described as *parda nashin* in the strict sense of the term.

Such a lady cannot be relieved from a transaction on the ground that its terms are unusually hard, particularly where she had the opportunity of taking independent advice. RAM DITTA MAL *v.* KARAM DEVI, 167 P. W. R. 1912; 190 P. L. R. 1912 **243**

Pardon. *See* CRIMINAL PROCEDURE CODE, s. 337.

Partition. *See* HINDU LAW—PARTITION.

——— ——— *See* HINDU LAW—SEPARATION **390**

——— ———Private partition found to be fraudulent—Suit for fresh partition—Exclusion of plaintiff—Limitation **10**

——— ———Revenue partition—Date of effect **144**

——— ——— ——— **suit**—Decree declaring right to partition—Actual partition not effected—Execution of decree barred—Subsequent suit for partition **955**

——— ——— ———*Final decree in the first instance—Decree for possession of share, whether executable.*

There is no reason why in a partition suit, where the claim is for a certain share in joint property, a final decree should not be passed in the first instance, especially where the subject-matter of the suit is a house and the share can be ascertained without difficulty in execution.

A decree in a partition suit directing the plaintiff to receive possession by partition of a definite share in a house is not merely declaratory and is capable of execution. SULTAN SINGH *v.* BAHADUR SINGH, 246 P. L. R. 1912 **390**

Partition Act (IV of 1893), s. 10—*Whether applicable where preliminary decree has been made.*

Section 10 of Act IV of 1893 is applicable to a case where a preliminary decree for partition has been made but the final partition has not been effected. SEPAHDAR KHAN SANTHOJI v. BADI BI, 12 M. L. T. 337; (1912) M. W. N. 943 **284**

Partnership *in business—Business brought to end—Adjustment of accounts—Dissolution of partnership—Separate suit to recover sums which one partner may have realised.*

Where two parties had been partners in a business which had been brought to an end, and the only dispute between them, is with reference to the division of the property, that dispute can only be finally settled in a proper suit for dissolution of partnership and for adjustment of accounts. It is not desirable that each of the parties should proceed by separate suits in order to recover from the other any sums due to the partnership business which he alone may have realised. RAM CHANDRA PAL v. KRISHNA LAL PAL, 17 C. W. N. 351 **600**

Party. *See* CIVIL PROCEDURE CODE, 1908, O. XXXIV; MISJOINDER OF PARTIES; TRANSFER OF PROPERTY ACT, s. 85.

——, addition of **641**

——Necessary and proper party—Distinction between **921**

—— not allowed to set up procedure successfully objected to by him **420**

——Not signing or verifying pleading **580**

——Suit to establish mortgage by second mortgagee—Mortgagor necessary party **87**

—— waiting to be produced as witness by opposite party **363**

—— not allowed to assume inconsistent positions **936**

——Suit by landlord to eject purchaser from tenant—Whether tenant necessary party **603**

——*—Hindu Law—Joint family business—Suit on business contracts—Necessary parties—Minor members—Plaint—Amendment—Development of original cause of action—Date of institution of suit.*

It is not necessary, in the case of a Hindu family, to join in a suit upon a business contract the minor members of the family who in fact take no share in the business which is carried on on behalf of the family.

The only necessary parties are those who actually contracted with the defendant.

Where the allegations introduced in a plaint by amendment are mere development of plaintiff's position and original cause of action and do not introduce any new cause of action, the suit must be taken to have been instituted on the date of the original plaint. LALJI NENSEY v. KESHOWJI, 14 BOM. L. R. 840 **193**

——Mitakshara *father, mortgage executed by—Only son minor at date of mortgage—Mortgage executed before advances made—Sums borrowed for family purposes—Suit on mortgage—Son made party*

Party—concld.

defendant—Liability of son to be sued on mortgage—Decree against son—Mortgagee unable to prove item expended on family purpose—Inability of son to prove item borrowed for immoral purpose—Debt of father binding on son—Alteration of law—Procedure in mortgage suit—Joinder of defendant—Transfer of Property Act (IV of 1882).

The plaintiffs sued on a mortgage-bond executed by *J.*, and they made his only son *B*, who was a minor at the date of the mortgage, a defendant in the suit. The sums covered by the bond were expended on legitimate family purposes; but the mortgage was executed before the advances were made. *J.* and *B.* formed a *Mitakshara* joint family, and the mortgage purported to charge the entire interest in the property mortgaged:

Held, that *J.*, as the managing member of the family, had implied authority to execute the mortgage so as to make it unimpeachable by his minor son against whom as well as against his father, the mortgage could be enforced.

The plaintiffs were unable to show how an item of Rs. 600 was expended and the defendants refrained from throwing any light on the point:

Held, that as the defendants failed to show that the item was used for an immoral purpose, it was a debt of the father binding on the son, and he could not be permitted to redeem the mortgage except on paying the Rs. 600.

After the passing of the Transfer of Property Act, a mortgagee must, in a suit on a mortgage of the joint property of a *Mitakshara* family executed by the father, join as a party the executant's son though he was a minor at the date of the instrument. But it was not necessary to make the son a party to such a suit before that Act was passed. The son's remedy was that he could sue to recover the property provided he could show that the debt was contracted for immoral purposes and the purchaser had notice that they were so contracted. BISSONATH PROSAD MALITA v. BRINDESRI PROSAD SINGH **577**

——*Record of Rights—Suit for declaration that plaintiff not tenure-holder but* raiyat*—Court adding persons recorded as* raiyats, *as defendants—Plaintiff not prejudiced—Persons recorded as* raiyats, *whether necessary parties.*

The plaintiff sued for a declaration that he was not a tenure-holder as he had been described in the Record of Rights, but a *raiyat*. The Munsif, during the hearing of the case, thought it desirable, in the interest of justice and to prevent a multiplicity of suits, to add *suo motu*, as defendants the persons who had been recorded in the Record of Rights as *raiyats* of the land under the plaintiff as tenure-holder. The plaintiff's case was that these persons were mere tenants-at-will:

Held, (1) that as by the law the status of the tenants under the plaintiff was made to depend on his status, they were as vitally interested in the Record of Rights, as he himself and were proper parties to the suit;

(2) that the order did not prejudice the plaintiff in any way and that, therefore, it should not be set aside. DIGAMBAR NANDA v. SECRETARY OF STATE, 16 C. L. J. 381 **917**

Patni Regulation (VIII of 1819), ss. 9, 13 cl. (3) (4) —*Payment of* patni *rent by* darpatnidar—*No* darpatni *rent due at the time—Payment from private fund—Possession taken by* darpatnidar—*Suit for arrears of* darpatni *rent—Set off, whether can be claimed by* darpatnidar *without rendering account—Eviction by landlord—Suspension of rent—What is necessary to constitute eviction—Actual physical expulsion, if necessary—Mesne profits, decree for, obtained by evicted tenant, whether revives claims for rent—Defaulting* patnidar *purchasing tenure—Evicting* darpatnidar—*Annulment of* darpatni.

The plaintiffs were the *patnidars* and the defendants *darpatnidars* under them. The defendants, to preserve their own interest, made certain payments to save the *patni* from sale for arrears of rent under Regulation VIII of 1819, section 13. While making the payments, the defendants stated that the rent due from them had been paid in full and that what was paid was an advance from private funds. They then obtained possession of the *patni taluk*. The plaintiffs brought a suit for rent in respect of the *darpatni*. The defendants did not offer to render an account of the sums collected by them during their possession of the tenure but asked that the amount sought to be recovered by the plaintiffs may be set off against the amount deposited by them:

Held, that the defendants' plea must be overruled, that they could not drive the plaintiffs to a separate suit to determine whether they had or had not by means of their possession already realised the amount advanced by them, and that the defendants were not entitled to claim a set-off.

The principle of law is that a landlord who has evicted his tenant is not entitled to claim rent from him in respect of the period of eviction.

To constitute an eviction within the meaning of the above rule, it is not necessary that there should be an actual physical expulsion from any part of the premises; any act of a permanent character done by the landlord with the intention of depriving the tenant of the benefit of the enjoyment of the demised premises or any part thereof will operate as an eviction.

The fact that the evicted tenant has obtained a decree for mesne profits, does not revive the claim for rent which was extinguished by reason of the misconduct of the landlord, the decree for mesne profits in his favour does not necessarily restore him to all the advantages he would have enjoyed, had his possession not been illegally disturbed.

A defaulting *patnidar* purchased in the name of another person, the *patni* in arrears, in contravention of the express provisions of section 9 of the Patni Regulation, and took possession of the *dar-patni* tenure in the name of the ostensible purchaser:

Held, that the *patnidar* was not entitled to annul the *dar-patni* tenure created by himself and as he, under colour of law, evicted the *dar-patnidar*, he was not entitled to get any rent from the latter for the period of dispossession. KALANAND SINGH *v.* JARAO KUMARI, 17 C. L. J. 96. **238**

——— ——— ——— **s. 13 cl. (3)** **378**

——— ——— ——— **s. 14**—Collector's power to determine summarily rent of tenure then payable—No power to determine rent payable in future **504**

Patnidar. *See* LAND ACQUISITION.

Pattadar, *mortgage by—Relinquishment—Decree and sale by mortgagee after relinquishment, whether binds new* pattadar—*Contract Act (IX of 1872), ss. 69, 70—Assessment paid by mortgagee—Right to recover.*

A., to whom the Government granted a *patta*, executed a mortgage to plaintiff and later on relinquished the land to the Government, who subsequently granted a *patta* to the defendant. After this the plaintiff sued on the mortgage after the relinquishment by *A.*, got a decree, purchased the land covered by the *patta* in execution and obtained a *patta* from the Revenue Authorities.

In a suit by the plaintiff to recover the land from the defendant on the strength of the *patta* granted to him:

Held, (1) that as *A.* relinquished in favour of Government before the plaintiff instituted the suit on the mortgage, the plaintiff's decree and sale could give him no right to recover the land against the defendant, who claimed under a title granted by Government;

(2) that the plaintiff could not recover from the defendant the assessment paid by him after he got his *patta*, because he did not make the payment on defendant's behalf. MOOLINTI VEERANA GOWD *v.* DEVARINTI BHIMA REDDY, 12 M. L. T. 261; (1612) M. W. N. 880 **253**

Penal Code (Act XLV of 1860), ss. 10, 352, 354—*Girl six years old—Assault with intent to outrage modesty—Woman.*

The accused took a girl six years old to his room; he made her lie down and he lay on her. The girl screamed and ran away:

Held, (1) that the girl, though young, was a "woman" for the purposes of section 354 of the Penal Code;

(2) that the facts amounted to an offence under section 354, and that the accused should be convicted of that offence. EMPEROR *v.* TATIA MAHADEV, 14 BOM. L. R. 961; 13 CR. L. J. 888 **794**

——— ——— ——— **s. 34** **1001**

——— ——— **ss. 85, 86, 387, 398**—*Drunkenness—Particular knowledge or intention necessary to constitute offence—Imputation of knowledge to voluntary drunkard—Intention—Burden of proof—Presumption—English law—Extortion—Attempt at robbery.*

The general presumption of law is that a man is taken to intend the ordinary and natural consequences of his acts; if a drunken man relies on his drunkenness as absolving him from a crime, he must show that his mind was so affected by the drink, he had taken, that he was incapable of forming the intention necessary to constitute the offence charged against him.

The effect of the omission to make any express provision, in section 86 of the Penal Code, regarding the intention which is to be attributed to a voluntary drunkard committing an act, which is an offence when done with a particular or *specified* intent, is that the question of intention is left to be dealt with on the general principles of law, which are the same both in India and in England.

The drunkenness of an accused person at the time that he committed the act charged as an offence may

Penal Code—contd.

be and should be taken into consideration on the question whether he did the act with the intention necessary to constitute the offence charged. The law does not require that the intention, which would be ascribed to a sober man in connection with an act, must necessarily be ascribed to a drunken man who does the same act.

Section 86 of the Penal Code gives the drunken man the knowledge of the sober man when judging of his action but does not give him the same intention; it does not render him liable to be dealt with as if he had the same intent.

A. went up into *B.*'s house having a *dah* in one hand. He called out to *B.* that if *B.* did not give him money, he would cut *B.* and his wife. *B.* and his wife were in an inner room, the door of which was closed against *A.* *A* kicked at it and slashed it with his *dah* but the door did not give way. *A* then went to the door of another room; he kicked at it and slashed it but when the door opened, *A.* fell down. Meanwhile *B.* and his wife had fled through the back part of the house. *B.* assembled a number of villagers but when they approached the house, *A.* fled away. He was, subsequently, found in his father's house in a drowsy condition.

A. was charged with having attempted to commit robbery armed with a deadly weapon.

It was ascertained that *A.* had been drinking *toddy* before the commission of the offence.

His defence was that he was drunk and did not know what he did. He was convicted under section 398 of the Penal Code:

Held, (1) that *A.* was not so drunk as to be incapable of forming in his mind the dishonest intention necessary to constitute the offence of extortion in case his demands had been acceded to;

(2) that *A.* was guilty of an offence under section 387 of the Penal Code;

(3) that as at the time *A.* uttered his threat to *B.* and his wife, the latter were inside a room, the door of which was shut against *A.*, who could not get at them, it was doubtful whether the conditions necessary to constitute the offence of an attempt at robbery were fulfilled in the case, and that *A.* should have the benefit of this doubt.

Per *Hartnoll, J.*—To form an intention, a man must necessarily have the requisite knowledge to do so; but, if he has certain knowledge, he must, to form an intention, go a step further than having such knowledge.

Per *Young, J.*—In most cases, intention has to be inferred from the nature of the acts done and from all the circumstances of the case. If a drunkard by reason of his drunkenness does not know the nature of his act, he cannot be presumed to have intended the consequences of that act. Therefore, in cases where an act is not an offence at all unless it is done intentionally, drunkenness is an excuse.

A drunkard is often fully conscious of what he is doing and what are the natural consequences of his acts. If he fails to prove that owing to his intoxication, he had not the same knowledge in relation to the offence as he would have had if sober, then section 86 will not apply at all and an intention will be presumed or not just as it would be in the case of a sober man. NGA TUN BAW *v.* EMPEROR, 5 BUR. L. T. 175; 13 CR. L. J. 864; 6 L. B. R. 100 **800**

Penal Code—contd.

——— ——— **s. 86** **800**

——— ——— **s. 97** —*Private defence, right of—Defence of property and body—Reasonable force to defend possession.*

No person can take the law into his own hands and forcibly recover possession.

But the law allows every person to use reasonable force to defend his possessions from a trespasser.

Where *A.*, as owner of cattle, is in possession of the cattle and *B.* endeavours to dispossess him by trying to seize the cattle, the right of private defence exercised by *A.* in such a case is in reality a right of private defence of the body, though exercised with the object of defending property. EMPEROR *v.* GULSHAH, 6 S. L. R. 121; 13 CR. L. J. 765 **78**

——— ——— ——— **s. 99** **76, 1001**

——— ——— ——— **s. 100** **1001**

——— ——— ——— **s. 147** **565**

——— ——— ——— **s. 147**—Violence against inanimate object **565**

——— ——— ——— **s. 148** **54, 1001**

——— ——— ——— **s. 149** **54**

——— ——— ——— **s. 149** — *Unlawful assembly—Offence in pursuance of common object—Knowledge of individual members.*

The word "*knew*" in section 149 of the Penal Code indicates a state of mind at the time of the commission of the offence and not knowledge acquired in the light of subsequent events.

The offence, for which members of an unlawful assembly can be convicted as being in pursuance of the common object of the assembly, must so probably flow from the prosecution of the common object that each member might *antecedently* expect it to happen. IMPERATOR *v.* KHAMISO, 6 S. L. R. 101; 13 CR. L. J. 776 **408**

——— ——— ——— **ss. 182, 211** —*False information to Police.*

The offence of laying false information to the Police falls under the first paragraph of section 211 as well as under section 182 of the Penal Code. BARKATULLAH *v.* SADHO KALWAR, 10 A. L. J. 429; 13 CR. L. J. 855 **791**

——— ——— ——— **ss. 182, 211**—*False charge, bringing of, before Police—Recommendation by Police that informant should be prosecuted—Prosecution of informant and conviction—Irregularity—Criminal Procedure Code (Act V of 1898), ss* 195, 532, 537—"*Complaint*".

The appellant lodged information before a Sub-Inspector of Police that certain persons had beat him and set fire to a house. The Sub-Inspector on inquiry did not believe the story and recommended that the appellant might be prosecuted under sections 182 and 211 of the Penal Code.

The prosecution of the appellant was then directed by a Deputy Magistrate. A preliminary inquiry was made and the appellant was committed to the Court of Session and convicted under section 211:

Held, that even if there was any defect in the initiation of the proceedings in the original Court, still when the accused had been committed for trial

Penal Code—contd.

to the Court of Session, a conviction by that Court could not be set aside simply on the ground of some irregularity in the commitment proceedings, more specially when that point was not raised in the first Court, and that section 532 of the Criminal Procedure Code would cure such a defect.

Section 195 of the Criminal Procedure Code clearly contemplates prosecutions at the instance of Police Officers. In any case, when a Police Officer asks that a person should be prosecuted under section 211, Indian Penal Code, for information given to him, and gives evidence himself in support of that charge, no serious irregularity can arise in the conviction of the accused in proceedings initiated upon that report. DILAN SINGH *v.* EMPEROR, 13 CR. L. J. 826 **570**

——— ——— **s. 193**—Perjury during Police investigation **63**

——— ——— ——— **s. 193** - *Witness—Deliberate false statement - Prosecution for perjury.*

A witness, who deliberately gives false evidence but who, when confronted with incontestable proof of his falsehood, admits it to be false, is guilty of perjury. PUBLIC PROSECUTOR *v.* ARUMUGAM CHETTY, 13 CR. L. J. 752 **64**

——— ——— **s. 199**—*Declaration—False statement—Declaration not admissible in evidence, whether can be basis of prosecution.*

A declaration, before it can be made the foundation of a prosecution under section 199, Indian Penal Code, must be one which is admissible in evidence and which the Court before which it is filed is bound or authorized by law to receive in evidence. RAM PARSHAD *v.* EMPEROR, 13 CR. L. J. 769; 10 A. L. J. 462 35 A. 58 **401**

——— ——— ——— **s. 204** — Panchnama — *Rough draft destroyed—No offence—Fair copy regarded original document.*

In the course of an investigation, a Police Officer had a certain document drawn up and signed by a *Panch*, but finding it disfigured by interlineations and scratches, he had the document re-written in textually the same form by the same writer and the same *Panch*. The rough document was thereupon destroyed:

Held, that, on a true view of the facts, the fair document which the Officer preserved and ultimately presented to the Court must be regarded as the only document which he was lawfully compelled to produce as evidence, the former writing being nothing more than rough notes designed for the preparation of the fair original document, and hence a conviction of the Police Officer under section 204 of the Indian Penal Code could not be supported. EMPEROR *v.* GANGA RAM, 14 BOM. L. R. 1163; 13 CR. L. J. 912 **1008**

——— ——— ——— **s. 211** **570**

——— ——— **s. 211**—False information to Police **791**

——— ——— **s. 211**—Complaint to Magistrate —Investigation by Police **791**

——— ——— **s. 211**—Making false report to Police **1000**

——— ——— **s. 211**—Principles to be kept in view **993**

Penal Code—contd.

——— ——— ——— **s. 290**—*Public nuisance—Placing of charpoy temporarily on road.*

Placing a *charpoy* on the road in the *bazar* temporarily, does not amount to the offence of causing public nuisance. KAMLA PRASAD *v.* EMPEROR, 10 A. L. J. 362; 13 CR. L. J. 830 **574**

——— ——— ——— **s. 300, Exception 2**—*Culpable homicide—Firing at person mistaken for thief —Fatal injury—Offence.*

The accused fired at a person a gun loaded with a slug, one inch long, in the mistaken belief that he was a thief: the shot was fired in order to protect certain fruit from being stolen. The shot resulted in the death of the person fired at. It was found that the accused had no reason to apprehend anything more serious than the theft of certain fruit, and that he must have known that the shot was likely to cause death:

Held, that the accused was not entitled to the benefit of the second exception to section 300 of the Penal Code. THEKKUMTHATATHIL KELUKUTTI *v.* EMPEROR, 13 CR. L. J. 782 **414**

——— ——— **s. 302** **54**

——— ——— **s. 304** **1001**

——— ——— ——— **s. 304-A**—*Injuries inflicted intentionally—Section not applicable.*

Section 304A of the Penal Code deals with the causing of death by a rash or negligent act. It does not apply to a case where injuries are inflicted neither rashly nor negligently, but intentionally and designedly. EMPEROR *v.* ISTLINGAPA, 14 BOM. L. R. 887; 13 CR. L. J. 798 **542**

——— ——— ——— **s. 304 (part 2)** **54**

——— ——— ——— **ss. 304 (2), 320 (8)** **62**

——— ——— ——— **s. 325** **54**

——— ——— ——— **s. 326** **51, 54**

——— ——— ——— **ss. 352, 354**—Assault on six years' old girl **794**

——— ——— **s. 387** **800**

——— ——— **ss. 397, 326**—*Robbery—Robbery not proved—Conviction for grievous hurt under section* 326.

A Jury, in a Sessions case is competent, where a charge under section 397, Indian Penal Code, is not established, to convict the accused of an offence under section 326, Indian Penal Code, where the facts proved establish the commission of that offence. ADABALA MUTHIYALU, *In re*, 13 CR. L. J. 739 **51**

——— ——— **s. 398** **800**

——— ——— ——— **s. 401**—*Association for the purpose of habitual theft.*

The essential requisites for a conviction under section 401 of the Penal Code are:—(1) proof of association, and (2) proof that the association was for purposes of habitual theft.

The accused, in company with three others, whose whereabouts were unknown, came to a village. They were regarded with suspicion, and on being challenged ran away, but in the pursuit, the accused was caught. It was not shown who the others were

Penal Code—contd.

or whether they had before been seen together in the neighbourhood, or at some other place under suspicious circumstances, or that any one of them had ever been suspected or found guilty of theft or robbery :

Held, (1) that the conviction under section 401 of the Penal Code could not be sustained;

(2) that the fact that the accused had at one time been bound over under section 110 of the Criminal Procedure Code was immaterial. ISHAR DAS *v.* EMPEROR, 36 P. W. R. 1912 CR; 13 CR. L. J. 799; 258 P. L. R. 1912 **543**

——— ——— **s. 405**—*Breach of trust—Advance to brokers on pro-notes—Loan or trust—Debtor and creditor—Trust.*

A., a paddy dealer, entered into an agreement with *B.*, the object of which was that *A.* should supply *B.* with certain baskets of paddy to be bought at a particular place and to be delivered at *B.'s* mills. On the same day, *B.* advanced *A.* Rs. 10,000 to enable him to obtain this paddy and it was agreed that the account should be settled by *B.* taking over the paddy at the ruling market rate on the day of delivery. *A.* undertook to use this sum to no other purpose than the purchase of paddy for *B.* Simultaneously, *A.* executed five promissory-notes for Rs. 2,000 each in favour of *B.* bearing no interest. *A.* was to bear the loss, if any, and was to retain the profit if any:

Held, (*Hartnoll, J.*, dissenting), (1) that there was no entrustment of the money to *A.* within the meaning of section 405 of the Penal Code;

(2) that the effect of the transaction was to create the relationship of debtor and creditor between *A.* and *B.*

Per *Fox, C. J.*—The property in respect of which criminal breach of trust can be committed must be either the property of some person other than the person accused, or the beneficial interest in or ownership of it must be in some other person, and the offender must hold such property on trust for such other person or in some way for his benefit.

Mere breach of contract is not made synonymous with criminal breach of trust.

Per *Ormond, J.*—In a prosecution for criminal breach of trust, the fact of trust must be established beyond all reasonable doubt. NGA PO SEIK *v.* EMPEROR, 5 BUR. L. T. 143; 13 CR. L. J. 888; 6 L. B R. 62 **824**

——— ——— **s. 406** **792**

——— ——— **s. 414**—*Concealing stolen property—Owner of property not traced—Offence.*

Section 414 of the Penal Code does not impose on the prosecution the requirement to trace in all cases the owners of the property stolen. All that is needed is to show that the accused voluntarily assisted in concealing or disposing of property which he had reason to believe to be stolen property. The latter fact may be proved from the accused's own conduct and actions. EMPEROR *v.* BUDHANKHAN, 14 BOM. L. R. 893; 13 CR. L. J. 793 **537**

——— ——— **s. 441** — *Trespass — Civil and criminal trespass—Intention to annoy — Placing haystacks and manure on another man's land—Annoyance in law.*

The placing of haystacks and manure on another man's land need not necessarily amount to annoyance.

Penal Code—concld.

It is not annoyance in law. It may be annoyance in fact. To convict an accused of criminal trespass, it must be clearly found that he intended to cause annoyance.

The distinction between civil and criminal trespass should not be lost sight of. MEAJAN *v.* SHARAFATULLAH KHAN, 16 C. W. N. 1007; 13 CR. L. J. 783 **415**

——— ——— **ss. 467, 471** — *Alternative charge—Evidence recorded by Assistant Sessions Judge and judgment given by Sessions Judge—Jurisdiction—Sessions case—Adjournment—Practice.*

An Assistant Sessions Judge recorded the evidence in a Sessions case and the Sessions Judge pronounced judgment upon the evidence so recorded :

Held, that the Sessions Judge had no jurisdiction to do so.

An accused can be convicted at one and the same time of forging a document and using that document as forged under sections 467 and 471.

The intention of the Criminal Procedure Code is that a trial before a Court of Session should proceed and be dealt with continuously from its inception to its finish.

Adjournments should be granted only on the strongest possible ground and for the shortest possible period. BADRI PRASAD *v.* EMPEROR, 10 A. L. J. 473; 13 CR. L. J. 861; 35 A. 63 **797**

——— ——— **ss. 467, 471**—*Forgery of document—Forgerer of document charged under s. 467, whether can be charged under s. 471—Proof of forgery.*

The fact that a person charged with an offence under section 471, Indian Penal Code, is himself the forgerer of the document is no reason why he should not be charged under section 471, Penal Code, especially when he cannot be charged under section 467, Penal Code, owing to the latter offence having been committed beyond the jurisdiction of the Court.

The forgery must be proved in order to establish the offence under section 471, Penal Code, though it is not itself the subject of a charge. BHAGAVATTY PERUMAL PILLAY, *In re*, 13 CR. L. J. 862 **798**

——— ——— **s. 471** **797, 798**

Pensions Act (XXIII of 1871), s. 4—*Jurisdiction—Civil suit*—Deshpande Kulkarni Vatan—*Suit for declaration of share in cash allowance—Collector's certificate.*

A suit to obtain a declaration that the plaintiffs are owners of an eight-anna share in the *Deshpande Kulkarni Vatan*, consisting of a cash allowance paid annually from the treasury, whether coupled with a prayer to recover the actual cash received or not, falls within the class of suits defined by section 4 of the Pensions Act, and is, consequently, not maintainable in a Civil Court without a Collector's certificate. DWARKANATH AMRIT *v.* MAHADEV BALKRISHNA, 14 BOM. L. R. 938; 37 B. 91 **661**

Perils of the sea, meaning of **188**

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Personal decree against mortgagor—Essential elements—Second personal decree not to be made—Mortgage decree for sale and also personal decree—Not in conformity with Act, yet binding between parties **263**

Petroleum Act (VIII of 1899), ss. 11, 15—*Possession and transport of petroleum—Illegal possession by agent without principal's knowledge—Liability of principal.*

Even though the Petroleum Act provides a personal penalty, the only person that can be punished is the one who keeps petroleum or carries it about or puts more than 500 gallons at one place.

There is no provision in the Act, as there is in the Excise Act and in the Motor Car Act, which makes the principal responsible for the acts of his agents or servants.

Therefore, if an agent of several persons in the sale of petroleum keeps more than 500 gallons in contravention of section 11 of the Petroleum Act, his principal is not responsible for this unless the latter knew that more than 500 gallons of petroleum were illegally kept on his license and allowed this to take place with such knowledge. GANPAT RAI *v.* EMPEROR, 13 CR. L. J. 792; 17 C. L. J. 390; 17 C. W. N. 207 **536**

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Plaint—Amendment—Development of original cause of action **193**

———, amendment of—Rent, suit for, based on specific settlement—No alternative claim for rent—Plaintiff's title proved but settlement not proved—Whether decree for use and occupation should be given **646**

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Pleader engaging in trade—Carrying on family trade—Misconduct—Failure to report to High Court—Punishment **544**

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Pleader and client—*Compromise—Power of Vakil to compromise—Civil Procedure Code (Act V of 1908), s. 115—Revision not competent when there is an appeal—Position of Vakil.*

In a suit for maintenance, the Vakil of the plaintiff consented to the rate proposed by the defendant: the plaintiff sought to revise the order on the ground that the consent of her Vakil was not binding on her:

Held, that, as the order was appealable, an application for revision was not competent.

A Vakil, who has an engagement *vakalat*, empowering him to compromise an action, does not need to get a special and separate power in order to effect a compromise. KOLLIPARA VENKAMMA, *In re*, 12 M. L. T. 348 **391**

Pleader's fees — *Appeal — Land Acquisition award—Claim of objector absurdly exorbitant*—Ad valorem *fee.*

Where the claim of an objector to a Land Acquisition award is found to be exorbitant, speculative and absurdly extravagant, the Counsel's fees for the Secretary of State should be allowed *ad valorem* on the amount in appeal. FAIZ MUHAMMAD *v.* SECRETARY OF STATE, 107 P. R. 1912; 34 P. L. R. 1913 **901**

———————*Preliminary decree adjudicating a party as agriculturist—Appeal to High Court—Regulation II of 1827, s. 52—Pleaders Act (I of 1846), ss. 6, 7 (2)—Bombay High Court Appellate Side Rules, r. 65.*

For the purposes of assessing the Pleader's fees, an appeal to the High Court from a preliminary decree adjudicating the status of a party as an agriculturist, is governed, neither by section 52 of Regulation II of 1827 nor by section 6 of Act I of 1846, but by rule 65 of the Appellate Side Rules of the Bombay High Court, under which the fee to be allowed is the sum of Rs. 30. MANOHAR RAMCHANDRA HINGE *v.* COLLECTOR OF NASIK, 14 BOM. L. R. 1190 **964**

Pleadings—Appeal—Suit found time-barred **638**

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———Ground of attack in plaint but not pressed in appeal **247**

———No objection to jurisdiction in first Court **886**

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———Presumption of dishonesty—Suit for conversion of goods and marshalling securities **663**

———————*Appeal—Plea not raised before the first Court—Plea raised but not put in issue by first Court—Point not taken in grounds of appeal.*

Where the first Court has neither put in issue a plea of a defendant nor has given any finding thereon and the defendant has failed to raise the point in the grounds of his appeal, such plea cannot be allowed to be advanced in argument to attack the judgment under appeal.

A point not raised in the original Court cannot be allowed to be advanced for the first time in appeal. NATHU MAL *v.* MUL CHAND, 183 P. W. R. 1912; 197 P. L. R. 1912 **232**

———————, *effect of failure to prove facts alleged in.*

The failure of a party to prove the particular allegations of fact set up in pleadings does dot necessarily involve the failure of that party's case. GAYA KUNWAR *v.* DAL SINGH **296**

———————*New plea in further appeal not allowed.*

A party cannot be allowed to put forward a new case in appeal. RAM DITTA MAL *v.* KARAM DEVI, 167 P. W. R. 1912; 190 P. L. R. 1912 **243**

Pledge—*Bailment—Bailee working as warehouseman and merchant—Pledge of deposited goods—Pledgee having no knowledge of bailor's claim—Return of goods to pledgor—Notice—Presumption of dishonesty—Suit for conversion of goods and marshalling securities—Pleadings.*

A. entrusted certain bales of cotton to *B.* as a *muccadum* or warehouseman. Besides working as a

Pledge—concld.

muccadum or a warehouseman, *B.* carried on business as a cotton merchant on an extensive scale. *B.* was financed by *C.*, with whom *B.* used to pledge cotton to secure his account for cash advances and cash credits.

B. pledged *A.*'s bales to *C.*, who had no notice or reason to suspect that the cotton belonged to any one but *B.* or that any one but *B* had any right or title thereto or interest *therein*. As a matter of fact, the cotton was subsequently returned by *C.* to *B.* or parted with to *B.*'s order.

A. sued *C.* claiming recovery of cotton bales entrusted to *B.*; in the alternative, *A.* claimed payment of the value of the bales and finally claimed that his rights should be ascertained and declared on the basis that the securities deposited by *B.* with *C.* should be marshalled in his favour:

Held, (1) that, having regard to the claim to marshal securities, *C.* was entitled to prove the fact that the cotton was returned to *B.* or parted with to his order;

(2) that the fact that *C.* parted with the cotton deposited with him to or to the order of the depositor, *B.*, without notice of any claim by any other person, afforded a complete defence to the suit.

No one is bound to suspect dishonesty in a person of good credit and reputation with whom he is dealing, merely because that person occupies a position which would enable him to act dishonestly if he were a rogue. BANK OF BOMBAY *v.* NANDLAL THACKERSEYDAS, 12 M. L. T. 646; (1913) M. W. N. 29; 15 BOM. L. R. 1; 24 M. L. J. 177; 17 C. L. J. 146; 17 C. W. N. 358 **663 P. C.**

Police—Power to detain suspected person **571**

Possession—Mortgagor and mortgagee—Burden of proof **913**

——— ———, *suit for—Heir of person in possession can sue for possession as against person who shows no better title—Ejectment—Suit to eject trespasser by one of several persons jointly interested.*

The heir of a person in possession of property is entitled to bring a suit for possession against one who can show no better title.

One of several persons jointly interested in land may sue to eject a trespasser where the removal of the trespasser is necessary to give the plaintiff enjoyment of his rights. ROHAN SINGH *v.* AHSANI BEGAM, 10 A. L. J. 518 **469**

Possessory title—*Suit for recovery of land—Right of suit against person having no title.*

A person, who has merely a possessory title to land, is entitled to a decree for possession against a person who has no title. NEELAGARA LINGAMMA *v.* KINNAHAL HAMPIAH **167**

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——— ——— ———Reference to Full Bench **559**

——— ———Suit for possession of immoveable property—Power of Court to grant restitution—Unregistered document—Admissibility for collateral purpose—Restitution—Court's power to grant conditional decree **987**

——— ———*Jurisdiction—Magistrate seeking advice of District Magistrate—Magistrate bound to decide question himself.*

A Magistrate, before whom an accused was placed on trial, felt a doubt as to his jurisdiction to try the accused. He thereupon sought the advice of the District Magistrate and, on the receipt of the latter's opinion on the question of jurisdiction, proceeded to try the case:

Held, that the Magistrate was not justified in seeking the advice of the District Magistrate in the way he did. The Magistrate was bound to finish his inquiry, complete his record, by the reception of all evidence of relevant facts, including the facts which bore upon the question of accused's amenability to his jurisdiction, and then *as a Magistrate* pass such order as seemed to him to be legal and proper. EMPEROR *v.* ABDUL RAHIMAN MOMIN, 14 BOM. L. R. 891; 13 CR. L. J. 786 **530**

——— ———*Party waiting to be produced as witness by opposite party.*

A party knowing the facts of his case personally, should appear as his own witness and not wait to be produced as a witness by the opposite party. SURAT-SINGH *v.* BALDEO, 8 N. L. R. 150 **353**

——— ———*Suspicion, decision cannot be founded on—Evidence Act (I of 1872), s. 114—Presumption—Burden of proof—Production of document with endorsement of payment.*

Suspicion, though a ground for scrutiny, cannot be made the foundation of a decision.

In view of the presumption under section 114 of the Evidence Act, the production of a bond with an endorsement of payment, casts upon the plaintiff the burden of proving that the debt is still outstanding, *i.e.*, that the bond came into defendant's hands by dishonest means, and that the signatures to the endorsement are either forgeries or unauthorised. MOHAMMAD MEHDI HASAN KHAN *v.* MANDIR DAS, 12 M. L. T. 392; 15 O. C 278; (1912) M. W. N. 1052; 34 A. 511; 14 BOM L. R. 1073; 10 A. L J. 373; 17 C. W. N. 49; 16 C. L. J. 629; 23 M. L. J. 741; 39 I. A. 68 **396 P. C.**

Pre-emption—Decree for foreclosure against mortgagor's representative—Representative also co-occupant—Subsequent suit for pre-emption **616**

——— ———*Custom*—Wajib-ul-arz, *construction of.*

The provisions regarding pre-emption in a village were contained in paragraph 14, Chapter II of the *Wajib-ul-arz.* Chapter II was headed thus:—"Mutual rights of the co-sharers, based on custom or particular contracts." Paragraph 14 was headed "Custom relating to the right of pre-emption." The clause gave a right of pre-emption first to a near co-sharer, then to a co-sharer in the *patti*, after that to a co-sharer in the *thok* and lastly to a co-sharer in the *mahal*:

Held, that the terms of the *Wajib-ul-arz* clearly evidenced a *custom* of pre-emption in respect of the *mahals* to which it related. MATHURA PRASAD *v.* SHEIKH MUHAMMAD **844 P. C.**

——— ———*Deposit of 1/5th of purchase-money* plus *costs of improvements—Punjab Pre-emption Act (II of* 1905), *s.* 19—*Court-fee—Value of buildings.*

A pre-emptor, who has taken no steps to obtain an injunction against a vendee, who has been carrying on his building operations after the purchase of the pre-empted property and before the institution of the suit, is bound to pay Court-fee on the total value of the property as well as the improvements made thereon, and must deposit one-fifth of such total amount, under section 19 of the Punjab Pre-emption Act, II of 1905. KHIDMAT RAI *v.* ANANT RAM, 169 P. W. R. 1912; 184 P. L. R. 1912 **245**

——— ———*Muhammadan Law—Pre-emption—Assertion of right before completion of sale—Formalities for*—Talab-i-istishhad—*Reference to* talab-i-mowasibat, *when necessary—Co-owner's right to pre-empt* per capita.

The assertion of a right of pre-emption before the completion of a sale is premature and ineffectual.

Under Muhammadan Law, a pre-emptor must ordinarily comply with the following fomalities after the completion of a sale:

(1) *talab-i-mowasibat*, or assertion of right immediately on receiving information of sale;

(2) *talab-i-istishhad*, or demand in the presence of witnesses made either to the buyer or to the seller or on the premises in dispute;

(3) that *talab-i-istishhad* should refer expressly to the *talab-i mowasibat.*

Where, however, the occasion for performing the *talab-i-mowasibat* does not arise until all the conditions for a *talab-i-istishhad* had occurred, there is no scope for the operation of the rule that *talab-i-istishhad* should refer expressly to the *talab-i-mowasibat* and the maxim applies *cessante ratione legis, cessat et ipsa lex.*

All persons having an equal right of pre-emption are entitled under Muhammadan Law to divide the property equally *per capita.* PERUMAL *v.* MAHOMEDALI, 6 S. L. R. 107 **39**

——— ———*Provision in decree for payment of purchase-money within certain time—Payment not made—Appeal, maintainability of.*

In a pre-emption suit, the plaintiff got a decree on condition of his paying the purchase-money within a month. The plaintiff appealed to the District Judge simply in regard to the condition laid down by the first Court as to payment of the purchase-money.

Pre-emption—concld.

During the pendency of the appeal, the one month time expired and the money was not paid. The District Judge dismissed the plaintiff's suit on the ground that the money had not been paid within one month:

Held, that the suit should not have been dismissed on that ground as the condition of payment of money itself was the subject of appeal. KHURSHED-UN-NISSA *v.* ALIM-UN-NISSA, 10 A. L. J. 421 **858**

——— ———*Right of* othidar *in possession to claim pre-emption—Limitation—Knowledge of sale to third party—Limitation Act (XV of* 1877), *Sch. II, Art.* 120.

The right of an *othidar* in possession of property to claim pre-emption consists in a right to elect, when there has been an attempt on the part of the owner of the property to sell it to a third person, whether he will buy it for the same price as that offered by the third person or not.

Article 120 of the Limitation Act provides the period of limitation for a suit by an *othidar* for pre-emption, and time commences to run against the *othidar* from the date he has knowledge of the sale and of its terms and not from the date of the sale. MAMABI *v.* ACHARATH PARAKAT, 12 M. L. T. 535; 23 M. L. J. 607; (1912) M. W. N. 1217 **337**

——— ———Rishtadar karibi *not co-owner with the vendor—No right to pre-empt.*

The pre-emptive clause in the *zamima khewat* of a village ran as follows: "When any sharer wishes to transfer his rights, he can transfer first to a near relative (*rishtadar karibi*), after him to a distant relative (*rishtadar baidi*), and after him to sharers in the village (*shurkain deh*). In the event of those persons refusing, the transferor shall have power to sell or mortgage to whomsoever he pleases. Sharers (*hissadaran*) and sharers in the village (*shurkain deh*) shall be considered to have preference on condition that they are willing to pay the same price as a stranger is paying":

Held, that under the above clause, a near relative, who was not a co-sharer of the vendor in the same *mahal*, had no right to pre-empt. MAHABIR PERSHAD *v.* RAM LOCHAN TEWARI **521**

——— ———Wajib-ul-arz—*Evidentiary value of* wajib-ul-arz—*Custom or contract.*

In pre-emption cases, the *wajib-ul-arz* is, no doubt, evidence and, in some cases, evidence of great importance. But the existence or non-existence of a custom of pre-emption does not and cannot depend upon the construction of a *wajib-ul-arz.* The *wajib-ul-arz* is to be taken into consideration by the Court and carefully considered; but there is no class of evidence which varies so much in its importance as does a *wajib-ul-arz.* ZALIM SINGH *v.* RADHA BAI **594**

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——— ———**suit**—Property subject to mortgages—Covenant by vendor to discharge previous mortgages—Subsequent suit on mortgages **318**

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——— ———**inquiry.** *See* CRIMINAL PROCEDURE CODE, s. 202.

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Presentation. *See* REGISTRATION ACT, 1877, s. 32.

Presidency Small Cause Courts Act (XV of 1882), s. 69—*Reference to High Court when permissible—Reasonabl edoubt by the referring Court.*

Section 69 of the Presidency Small Cause Courts Act, permits a reference to the High Court only when the referring Court entertains a reasonable doubt on the point referred. KRISHNA DOSS PARAMANANDA *v.* FREDERICK WILLIAM EMERY 93

Presumption. *See* PUBLIC GAMBLING ACT.

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Principal and Agent—Possession and transport of petroleum—Illegal possession by agent without principal's knowledge—Liability of principal 536

————*Undisclosed principal — Right of suit by agent—Contract Act (IX of 1872), ss.* 230 (2), 236.

An agent is entitled to sue on a contract under section 230 (2) of the Contract Act, when he is able to establish that he has an undisclosed principal behind him.

Where a contract has been entered into with a person in the character of an agent, but in fact he is acting not as agent of any principal, but on his own account, he is not entitled to sue on the contract, under the provisions of section 236 of the Contract Act. RAMJI DAS *v.* JANKI DAS, 39 C. 802 973

Priority. *See* MORTGAGE—PRIORITY; REGISTRATION ACT, 1877, s. 50.

————Deposit of policy—Assignment by writing—Deposit by way of security 627

Prisons Act (IX of 1894), s. 33—*Supply of clothing to prisoner by arresting judgment-creditor—Subsistence allowance—Civil prisoner released owing to mistake of Jail authorities can be re-arrested—Civil Procedure Code (Act V of 1908), ss.* 57, 58 (2).

Prisons Act—concld.

Where *A.*, a civil prisoner, was released by the Jail authorities for non-supply of the clothing required to be supplied to him under section 33 of the Prisons Act, 1894, but where it was discovered that the requisition on the arresting creditor was despatched to a wrong address and did not reach him till four days after the petitioner's release:

Held, (1) that *A.* was released owing to a mistake of the Jail authorities and not owing to any default of the decree-holder under section 33, Prisons Act;

(2) that *A.* could be re arrested but in calculating the period of imprisonment under the new warrant, the time of imprisonment under the former warrant should be deducted.

The cost of clothing, etc., payable under section 33, Prisons Act, is not "subsistence allowance" as contemplated in section 58 of the Civil Procedure Code which includes only the monthly allowance fixed by scale under section 57. DURAI RAJAH MUDALIAR *v.* VADIVELU, 5 BUR. L. T. 159; 6 L. B. R. 61 911

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———— **defence,** right of. *See* PENAL CODE, s. 97.

————, *right of—Burden of proof—Assault by accused when deceased was violating woman—No proof that accused assaulted deceased afterwards—Penal Code (Act XLV of* 1860), *ss.* 34, 99, 100, 148, 304.

The right of private defence is a restricted right, and section 100 of the Penal Code has to be read subject to the provisions of section 99.

When one man takes away the life of another man the *onus* is on him to show the circumstances which justify his act in law. But where the deceased was assaulted, while he was in the very act of violating a woman, by her relations, no question of burden of proof arises, and the case falls within section 100 even as qualified by section 99.

The accused assaulted the deceased while the latter was in the very act of violating a woman related to the accused. The deceased escaped out of the room; in the corridor he was assaulted by persons other than the accused. The deceased finally got into the court-yard where he was beaten to death by a large body of persons. There was no common intention between the accused and the persons assembled outside the house.

The accused were not shown to have taken any part in the assault upon the deceased after he had escaped from the room and come to the corridor and finally to the court-yard:

Held, that the accused could not be convicted under sections 304 and 148, Penal Code. JHAKRI CHAMAR *v.* EMPEROR, 16 C. L. J. 440; 13 CR. L. J. 905 1001

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Privy Council Appeal—concld.

——————*High Court's decision in Land Acquisition case—Letters Patent (Bombay), cl. 39—Final judgment or order—Land Acquisition Act (I of 1894), s. 54.*

No appeal lies to the Privy Council from a decision of the High Court under section 54 of the Land Acquisition Act, although the value of the property involved in the case exceeds Rs. 10,000 and a substantial point of law is involved in the judgment.

The Land Acquisition Act is a special statute enacted to deal with a certain special class of cases and the orders made thereunder are outside the ordinary course of the Civil Court's jurisdiction.

Since the Act itself gives no right of appeal to the Privy Council, no such right exists.

An award made in a land acquisition case by the High Court is not a decree within the ordinary jurisdiction to which the Civil Procedure Code refers. Nor is it a final judgment or order within the meaning of section 39 of the Letters Patent. SPECIAL OFFICER, SALSETTE BUILDING SITES *v.* DOSABHAI, 14 BOM. L. R. 1194 **952**

——————, appeal to—Order refusing leave to appeal to Privy Council, if open to review—Value below Rs. 10,000 even if interest up to date fixed for redemption is added—Value above the sum if interest subsequent to that date is added—Redemption suit, when leave should be granted **221**

——————*Practice—Concurrent findings—Question of fact.*

The Privy Council, not sitting as a Court of first instance, cannot take into account even well-founded criticism and disturb the concurrent findings in effect of two lower Courts purely on a question of fact, unless it is satisfied that such findings are erroneous. SACHINDRA NATH ROY *v.* SECRETARY OF STATE **733 P. C.**

Probate. *See* PROBATE AND ADMINISTRATION ACT; WILL.

——————Will by a Muhammadan **868**

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——————s. 50 **763**

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Promissory-note—Unstamped promissory-note executed on settlement of accounts—Admissibility in evidence—Promissory-note for previous debt dishonoured—Revival of debt **721**

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——————, *suit on—Execution admitted—Undue influence of plaintiff and immorality of defendant pleaded—Burden of proof—Consideration—Contract Act (IX of 1872), s. 16—Interest up to date fixed for payment—Negotiable Instruments Act (XXVI of 1881), s. 79.*

Promissory-note—concld.

In a suit on a promissory-note, the defendant—a young man of 25 or 26—admitted the execution of the pro-note but contended that (1) the plaintiff had obtained the note by the exercise of undue influence, (2) a major portion of the consideration had not been paid by plaintiff, and (3) whatever consideration was paid by plaintiff was paid for an immoral purpose:

Held, that as there was nothing on the face of the pro-note or in the evidence to indicate that the bargain was an unconscionable one or to show that the plaintiff was in a position to dominate the will of the defendant, the *onus* lay upon the defendant to prove the pleas of undue influence and immorality.

Under section 79 of the Negotiable Instruments Act, a plaintiff is entitled to interest at the stipulated rate from the date of the institution of the suit till the date fixed for payment. GHAZAFFAR HUSSAIN *v.* MAHABIR PRASAD **309**

Property *subject to mortgages — Covenant by vendor to discharge previous mortgages—Pre-emption suit—Civil Procedure Code (Act V of 1908), s. 11—Res judicata.*

The first defendant owned a share of 1 *biswa*, 8 *biswansis* in a certain village and out of it he sold an unspecified 12 *biswansis* share to the plaintiffs. The sale-deed contained a recital that as the aforesaid share of 12 *biswansis* was being sold to the plaintiffs free of any charge, the vendor will pay off the debts due under the mortgages existing on the said share and if the plaintiffs were compelled to pay anything, they would be entitled to recover that sum from him. The other defendants pre-empted the share in suit and obtained the possession of it on payment of the purchase-money. Meanwhile, the plaintiffs purchased the previous mortgages existing on the property in dispute and put them into suit. It was contested by the defendants, who had pre-empted the property, that because the plaintiffs had not put forward the aforesaid mortgages in the pre-emption case, their present suit was barred:

Held, that the suit on the aforesaid mortgages was maintainable, inasmuch as a plea regarding the aforesaid mortgages could not be the subject of an issue in the pre-emption suit, nor could it affect the result of that suit. SHEO SAHAI *v.* SHIB SINGH **318**

Prostitute—Power to adopt **422**

Protection in statutory duties **673**

Provincial Insolvency Act (III of 1907), ss. 15 (1)—*Grounds for dismissing application for insolvency—Petitioner trying to show his property as belonging to another.*

A person, who petitions to be declared insolvent, not unfrequently at some stage or another of the proceedings, endeavours to keep back a portion of his property or pretends that property which belongs to him does not belong to him. An action of this kind on the part of a debtor or the suspicion or belief that such action is contemplated by a debtor is not a good ground for dismissing a debtor's petition in insolvency.

Such cases are distinguishable from cases in which the petitions are dismissed on the ground that they have been presented for inequitable or collateral purposes. MUHAMMAD HUSSAIN *v.* ILAHI BAKHSH, 10 A. L. J. 188 **92**

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Registration Act (III of 1877), ss. 17, 49—*Agreement between mortgagor and mortgagee as to disposal of rents and profits—Evidence Act (I of 1872), s. 92—Admissibility of previous negotiations to vary terms of document—Transfer of Property Act (IV of 1882), s. 65 (a), application of—Mortgage executed before Act.*

An agreement between a mortgagor and mortgagee as to the mode in which the rents and profits of the mortgaged property (exceeding Rs. 100 in value) are to be dealt with, requires compulsory registration and, if unregistered, is inadmissible in evidence.

It is no more permissible in India than in England to contradict or vary the express and unambiguous terms of a written instrument by reference to preliminary negotiations or previous conversations.

Section 65 (*a*) of the Transfer of Property Act can have no application to a case where the mortgage was executed before the date of the Act, though one of the further charges was subsequent to it. ABDULLAH KHAN *v.* BASHARAT HUSSAIN, 17 C. W. N. 233; 13 M. L. T. 182; (1913) M. W. N. 131; 35 A. 48; 17 C. L. J. 312 737 P. C.

——— ——— ——— s. 17 (b), (c) 176

——— ——— ——— ss. 32, 33—*Mortgage-deed executed by* parda nashin *lady—Presentation for registration by husband—Validity of presentation.*

A *parda nashin* lady executed a mortgage-deed. The deed was presented for registration to the Sub-Registrar by her husband who had no authority to make the presentation:

Held, that the presentation was a complete nullity. KHALIL-UD-DIN *v.* BANNI BIBI, 10 A. L. J. 440; 35 A. 34 274

——— ——— ——— s. 33 274

——— ——— ——— s. 44 176

Registration Act (1877)—*concld.*

——— ——— ——— s. 49 737

——— ——— ——— s. 49—*Suit for possession of immoveable property—Power of Court to grant restitution—Unregistered document—Admissibility for collateral purpose—Practice—Restitution — Court's power to grant conditional decree—Contract Act (IX of 1872), s. 65.*

A Court in India has power to pass a conditional decree as it is perfectly within its competence to impose a condition which will do complete justice to the parties and there is nothing in section 65 of the Contract Act which suggests that the Court has no such power.

Even in suits in which the relief sought is not an equitable relief, the Court has the power, in a proper case, to refuse to grant a relief to the plaintiff except on terms indicated by the obvious consideration of justice.

Per *Abdur Rahim, J.* (affirming the decree of the lower Court).—The main object of the Registration Act is to prevent documents of certain classes having any effect unless they are registered and not to deal with questions of evidence, pure and simple. That a document of sale was not intended to be a real transaction, can be proved by a contemporaneous document, which was intended to be a mortgage but failed to have that effect for want of registration, as the evidence is adduced not to enforce the mortgage, but to show that the so-called deed of sale was not intended to operate as a transaction affecting immoveable property.

An unregistered document is admissible to prove the circumstances in which the property came to be in defendant's possession.

Per *Miller, J.*—An unregistered document is inadmissible in evidence to prove the nature of the possession of the defendant or the circumstances in which defendant came into possession of the property so as to enable a plaintiff to disturb defendant's possession and re-place it by its own. MUTTA VENCATACHALAPATHY *v.* PYINDA VENCATACHALAPATHY GARU, 23 M. L. J. 652; 12 M. L. T. 579 987

——— ——— ——— s. 50—*Registered and unregistered deed—Priority—Same property covered by deeds by different persons.*

A. mortgaged certain property to *B.* on 21st August 1894. On 30th May 1896, *A.* mortgaged the same property to *C.* Both the mortgages were unregistered. *C.* brought a suit for sale on his mortgage and purchased the property himself in execution of the decree. *C.*'s heir sold the property to *D.*, whose heir sold it to *E.* The sale in favour of *E.* was an out and out sale of the full right of ownership in the property and was by a registered sale-deed:

Held, that *E.*'s deed had priority over *B.*'s unregistered mortgage-deed, as both deeds covered the same property and section 50 of the Registration Act applied. ISHRI PERSHAD *v.* GOPI NATH, 10 A. L. J. 222; 34 A. 631. 19

Registration Act (XVI of 1908), s. 32—*Presentation for registration—Executant present before Sub-Registrar when document handed over for registration by servant—Presentation, whether valid.*

Registration Act—(1908)—concld.

H. executed a mortgage-deed in favour of *K.* The document was handed over to the Sub-Registrar for registration by a servant of the mortgagee. The mortgagor was also present there assenting to the registration of the document :

Held, that the presentation was a valid presentation within the meaning of the Registration Act. KIRTA KISHEN *v.* HARNAM CHAND, 10 A. L. J. 510; 35 A. 72 **465**

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Release of property of one of mortgagors **931**

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Religious Endowment—Adverse possession by *Pujari*—Right of founder's representative to sue **589**

——— ———Waqf, *proof of—Question of law or fact—Appropriation of income, whether sufficient proof—Case to be made out by plaintiff—Question of law or fact.*

The mere appropriation of the rents and profits of a particular property to the up-keep of a religious foundation is not sufficient proof that such property is endowed property.

The question whether a specified property is or is not *waqf* property, is a question of law or, at any rate, a mixed question of law and fact.

A plaintiff, who sues in ejectment for recovery of property, alleged to have been appropriated by way of endowment for the up-keep of an endowed property, must make out just as strong a case as a plaintiff who seeks to set aside an alienation of endowed property. ABDUL GHAFUR *v.* SHIAM SUNDAR DAS **303**

Religious Endowments Act (XX of 1863), ss. 14, 18 **270**

Religious Institution—Mosque—Right to worship—Right to recite Qoran **386**

——— ———Dharmsala *of Sri Tilok Nath, Tahsil Nurpur, District Kangra—Public or private—Suit to remove Granthi—Leave to sue—Religious Endowments Act (XX of 1863), ss. 14, 18—Court-fee for such a suit.*

A plaint containing a claim to remove the manager of a religious institution, based on the allegation that the institution is a private one and is founded and maintained by plaintiff's ancestors, and that the plaintiff alone has the power of appointing and dismissing the manager who refuses to leave it, requires *ad valorem* Court-fee and is not maintainable on a stamp of rupees ten only.

Where the object of a *Dharamsala* is that the *Granth* should be read there daily and no member of the Sikh Community, who behaves with propriety can be excluded from participating in this service or forbidden from entering it where such recitation is being made, the *Dharamsala* is a Public Religious Institution, particularly where the *Granthi* is remunerated wholly or partly from a Government grant. It is immaterial whether the appointment or dismissal of the *Granthi* rests solely with the founder or his representative.

The *Dharmsala* of Sri Tilok Nath, Tahsil Nurpur, District Kangra, is a Public Religious Institution and the *Granthi* of such an institution cannot be removed even by its founder except for good reason.

The provisions of section 14 and other sections of Act XX of 1863 apply to an institution of the above description, and its founder or his representative or any other person interested in the institution suing to remove the *Granthi* or Manager cannot maintain a suit for the purpose without first obtaining leave, under section 18 of the said Act, of the principal Court of Original Civil Jurisdiction. BASAWA SINGH *v.* BHAGWAN KAUR, 181 P. W. R. 1912; 216 P. L. R. 1912 **270**

——— ——— ——— *Hindu temple—Scheme for future management—Practice—Exercise of discretion.*

The High Court has a large discretion in the matter of sanctioning a scheme for the management of a temple and of its funds, and unless it can be shown that that discretion has been improperly exercised, or that the High Court has not given due consideration to matters which they were directed by the Privy Council to take into consideration, its decision ought not to be interfered with. SEVAK KIRPA SHANKAR DAJI *v.* GOPAL RAO MANOHAR TAMBAKAR 12 M. L. T. 448; (1912) M. W. N. 1106; 16 C. L. J. 640; 15 BOM. L. R. 13; 24 M. L. J. 199 **441 P. C.**

Relinquishment. *See* PATTADAR.

Remand. *See* CIVIL PROCEDURE CODE, O. XLI, Rr. 23, 25.

——— ———Title suit—Finding of lower Appellate Court that plaintiff's suit is not barred—Sufficiency of finding—Remand by single Judge—Appeal coming on for hearing before Division Bench—Disposal of appeal by Division Bench **224**

Rent. *See* LANDLORD AND TENANT.

———, meaning of **120**

——— **suit**—Limitation **343**

——— ———*Res judicata* **445**

——— ———*Res judicata*—Presumption—Considerations for determination **111**

——— *suit for, based on specific settlement—No alternative claim for rent—Plaintiff's title proved but settlement not proved—Whether decree for use and occupation should be given—Amendment of plaint, whether should be allowed.*

In a suit for rent, where no alternative claim is made for use and occupation, no sum can be decreed on that footing.

Therefore, where rent was claimed under an alleged settlement with the defendant, which the plaintiff failed to prove, a decree for use and occupation ought not to have been given when there was no such claim and the defendant had no notice of such a claim.

A plaint may be allowed to be amended only when a claim has been omitted by mistake or inadvertence or for similar reasons, and not deliberately.

Rent suit—concld.

Therefore where the plaintiff has sued for rent upon a specific case of settlement with the defendant, which has been found to be false, it is not a case where he should be allowed to amend the plaint by claiming a relief for the defendant's use and occupation, not consistent with the claim originally laid. BHUKHI KOERI v. RAM KHELWAN PROSAD, 17 C. W. N. 311 **646**

Representative. *See* CIVIL PROCEDURE CODE, 1908, s. 146.

Repudiation of adoption **350**

Reputed ownership, doctrine of, inapplicable to secured creditor **31**

Res judicata. *See* CIVIL PROCEDURE CODE, 1908, s. 11.

———————, *constructive—Mortgage—Priority—Transfer of Property Act (IV of* 1882), *ss.* 79, 80—*Puisne mortgagee, whether personally responsible for re-payment of mortgage-debt.*

On the 28th September 1900, the mortgagors took a lease from the mortgagees of a certain property and on the same date executed a security bond, for the due payment of rent. The two documents were registered on the 11th October 1900. The lessees made default in payment of rent. The landlords, consequently, sued for rent and enforcement of the security given by the lessees. In this suit, several persons were joined as defendants including one *H.*, a mortgagee under a bond dated 12th October 1900, on the allegation that they had acquired an interest in the properties given by the lessees by way of security. A decree was made in favour of the landlords on the 13th March 1907, which declared the priority of the landlord's mortgage over that of *H.* On 20th April 1908, a mortgage bond was executed in favour of the mortgagees in lieu of the decree debt and other debts. In a suit to enforce this mortgage:

Held, that the security bond of the 28th September 1900, was not entitled to priority over the mortgage of the 12th October 1900, except to the extent that the matter was *res judicata* by virtue of the decree of the 13th March 1907, in respect of the sum then in controversy, for the Court would not extend the doctrine of constructive *res judicata* beyond the subject matter of the particular litigation.

A mortgagee, making a further advance, shall not, in respect of that advance, acquire any priority as against an intermediate mortgagee; but this general rule is subject to the exception that the intermediate mortgage is postponed in respect of advances subsequently made on the security of that mortgage, provided it expresses the maximum to be secured thereby and that maximum is not exceeded.

A puisne mortgagee, as holder of a fragment of the equity of redemption, cannot be held personally responsible for the re-payment of the mortgage-debt which is primarily payable by the mortgagors. DALIP NARAYAN SINGH *v.* CHAIT NARAIN SINGH, 16 C. L. J. 395 **927**

———————— *Joint decree—Rights* inter se *of plaintiffs not adjudicated upon their rights adjusted in subsequent suit—Recovery by one plaintiff of his share of first decree—Suit by other plaintiff entitled to that share under second decree—Recovery of money by person with knowledge of cessation of right, result of.*

Res judicata—contd.

In 1899, *A.*, claiming to be the sole proprietor of a trading firm, sued *C.* for the recovery of a debt due to the firm. *A.* joined his uncle *B.* as a *pro forma* co-defendant in the suit.

The Court found that *A.* & *B.* were co-partners and thus *B.* was joined as co-plaintiff and a joint decree was passed against *C.*

In 1900, *B.* sued *A.* for partition of the joint properties. It was found in this suit that *B.* was not entitled to any share in the partnership in respect of which the debt was claimed in the previous suit. Two years after the adjudication in the second suit, *B.* recovered his half share of the decretal debt due from *C. A.* sued to recover this money on the ground that *B.*'s interest in the first decree had ceased to exist by virtue of the second decree:

Held, per *Chandavarkar, Ag. C. J.*,

(1) that the finding in the first suit that *A.* & *B.* were jointly entitled to a decree was arrived at only for the purpose of the defendant sued in that litigation;

(2) that the Court was not called upon in the first suit to decide finally what the respective interests of *A.* & *B.* were in the decretal debt;

(3) that the finding in the second suit that *B.* was not entitled to any share in the partnership must be regarded as the final and decisive finding governing the jural relation of the parties;

(*a*) *first*, because it settled the interest between *A.* and *B.* which the judgment in the first suit had left undecided;

(*b*) *secondly*, even assuming that that judgment had settled what those interests were, *B.* having failed to plead that settlement as *res judicata* in the second suit, it was the adjudication in the second suit that must prevail as finally deciding the issue of title as between *A.* & *B.*;

(4) that *B.* having recovered the money while the decree in the second suit against him had come into existence, was liable to restore the money recovered by him knowing that he had no right to it.

Held, per *Batchelor, J.*—

(*i*) that there was no real inconsistency between the two decrees, because the later decree and that alone decided the question as to what interest, if any, *B.* had in the partnership;

(*ii*) that even supposing that the decision in the second suit could only be arrived at by overriding what was decided in the first suit, the later decision must prevail to govern the present rights of the parties.

The rule laid down in *Marriot* v. *Hampton*, 7 T. R. 269, that money recovered under a judgment or decree cannot be recovered back in a fresh suit or action whilst the decree or judgment under which it was recovered remains in force, rests on the ground that the original decree or judgment must be taken to be subsisting and valid until it has been reversed or superseded by some ulterior proceeding. If it has been so reversed or superseded, the money recovered under it ought certainly to be refunded.

In order to bring the principle of the rule mentioned above into force, there must be *bona fides* on the part of the party, who has got the benefit of his

Res judicata—concld.

opponent's payment. If a person enforcing a payment under legal process has therein taken an unfair advantage or acted unconscientiously, knowing that he had no right to the money, the principle cannot prevent the other party from recovering the money back. SHANKAR VISHNU GOKHALE v. RAGHUNATH HARI DHARAP, 14 BOM. L. R. 854 **205**

——— ——— ——— *Rent suit—Presumption—Considerations for determination—Bengal Tenancy Act (VIII of 1885), s. 51.*

A prior decision in a rent suit may be taken to determine the rent claimed in that suit, and to give rise, under section 51 of the Bengal Tenancy Act, to the presumption that the rents for subsequent years remained the same.

The weight to be attached to the presumption thus raised must depend first on the conditions under which that decision was arrived at, that is to say, whether it was after an adjudication of the question of the amount of rent or the rate of rent or not. If in the prior suit there had been such an adjudication it would be only open to the Judge in a subsequent suit for rent to look to subsequent circumstances and events to enable him to determine whether there had been any change in the relations between the parties since. If there was no adjudication of the question, it would be for him to consider the circumstances and events, both prior and subsequent to that former suit, in order to enable him to determine the relations existing between the parties and the rentals rightly due for the lands for the years in suit. BENI PERSHAD KOERI v. RAJ KUMAR CHOWBEY, 16 C. L. J. 124 **111**

——— ——— ——— *Suit by or against manager of joint Hindu family—Effect of decree in such suit on other members of family.*

The manager of a joint Hindu family can both sue and be sued in his representative capacity and a decision fairly obtained against him is binding on the other members of the family and operates as *res judicata* in a subsequent suit. BINDHACHAL RAI v. GAYA RAI **290**

Restitution—Assignment of decree during appeal—Assignee realising decree from judgment-debtor **420**

——— ——— Suit for possession of immoveable property—Power of Court to grant restitution **987**

——— ——— ——— *Suit for possession decreed in first Court—Forcible possession taken by plaintiff—Subsequent reversal of decree—Application by defendant for restitution and mesne profits, if may be entertained—Civil Procedure Code (Act V of 1908), s. 144.*

Section 144 of the Civil Procedure Code was enacted with a view to shorten litigation and afford speedy relief. A narrow construction of the section so as to restrict its application should not be adopted.

Where a successful plaintiff in a suit for possession took possession of the property in suit by force and not by execution of the decree, and the decree was set aside on appeal:

Held, that an application by the defendant for restitution of the property to him with the mesne profits enjoyed by the plaintiff in the

Restitution—concld.

interval by virtue of his possession was maintainable under section 144 of the Civil Procedure Code.

Section 144 is not limited to restitution of what may be technically described as mesne profits; if an appropriate order of restitution is made under the section no question of limitation arises.

The Court will not, in the interests of justice, be astute to force the parties to a separate suit, merely to allow the question of limitation to be raised. RAGHU SINGH v. SHEW PROSAD RAI, 16 C. L. J. 135 **121**

——— ——— **of conjugal rights,** suit for —Limitation **629**

——— ——— ——— *Hindu girl married during minority—Refusal to consummate marriage.*

A Hindu girl was married while under the age of puberty, but did not accompany her husband to his house and there was no cohabitation between the parties. On arriving at puberty, the girl refused to consummate the marriage;

Held, that the girl should be allowed freedom of choice and the husband was not entitled to a decree for restitution of conjugal rights. KALAWANTI v. BUKHAN, 187 P. W. R. 1912; 215 P. L. R. 1912 **254**

Resulting trust—Specific purpose **689**

Re-trial of appeal, power of High Court to direct **49**

Revenue Jurisdiction Act (X of 1876), s. 4 **148**

Revenue Sale Law (Act XI of 1859), s. 9—*Contract Act (IX of 1872), s. 69—Mortgage by co-sharer—Default in paying revenue by other co-sharers—Payment of their share by mortgagee—Suit by mortgagee for recovery of sums paid—Whether suit maintainable without specifying share of revenue payable by each co-sharer—Contribution suit, nature of—"Defaulting proprietor," meaning of—Person not proprietor paying revenue—Remedies.*

A co-sharer proprietor of an estate mortgaged his share to the plaintiff. Under the terms of the mortgage contract, the Government revenue was payable by the mortgagor. The other co-sharers of the estate made default in the payment of the revenue, and the plaintiff was obliged to deposit several sums to avert the sale of the properties and save his interest. He then brought this suit for the recovery of the sums against the defaulting co-sharers:

Held, that the suit was maintainable on the principle recognised in section 9 of the Revenue Sale Law Act of 1859, and also under section 69 of the Contract Act; that the plaintiff was not bound to claim against each co-sharer the specific amount of Government revenue payable by him proportionate to his share in the estate, as the present suit was not a contribution suit.

The nature of a contribution suit explained.

If the arrears of revenue due have been paid by a person who is not a proprietor he has a threefold remedy. If he is party to a suit pending before a Court of Justice for possession of the estate, it is competent to the Court to put him temporarily in possession. In the second place, he is entitled to have a personal decree against the defaulting proprietors for the amount paid by him

Revenue Sale Law—concld.

to save the estate from danger. In the third place, he is entitled to have a lien on the estate for the amount paid.

The expression "defaulting proprietor" in section 9 of the Revenue Sale Law Act of 1859 means, where there is more than one proprietor, the entire body of such proprietors.

The reasonable interpretation of section 69 of the Contract Act is that it applies only to cases in which the person who makes the payment is himself not liable to pay, but is interested in the payment of the money. MOTICHAND v. BAJRANG SAHI, 16 C. L. J. 148 **45**

Reversioner—*Declaratory suit—Offer to pay—Conditional decree—Charge for proved necessity.*

In suits by reversioners regarding the alienations of widows, the uncertainty, regarding the person who would be entitled to succeed the widow, is no ground for refusing a declaration regarding the character of the alienation. When the alienation is declared invalid there is no reason why a charge should not be declared in favour of the alienee on equitable grounds for the amount for which necessity has been proved. It is not necessary that there should be an offer in the plaint before a conditional decree can be passed and the alienee given a charge for the amount. GARIKIPATI PAPARAYUDU v. GARIKIPATI RATTAMMA, (1912) M. W. N. 1176; 24 M. L. J. 62; 13 M. L. T. 110 **508**

Review. *See* CIVIL PROCEDURE CODE, O. XLVII.

——Amendment of decree—Costs assessed on wrong principle—Proper remedy **418**

——*Privy Council, appeal to—Order refusing leave to appeal to Privy Council, if open to review—Civil Procedure Code (Act V of 1908), O. XLV—Value below Rs. 10,000 even if interest up to date fixed for redemption is added—Value above the sum if interest subsequent to that date is added—Redemption suit, when leave should be granted.*

An order of the High Court under Order XLV of the Civil Procedure Code, rejecting an application for leave to appeal to the Privy Council, may be reviewed by the Court which made the order.

In a redemption suit, even if the interest was calculated up to the six months allowed for redemption, the sum of Rs. 10,000 was not reached. The sum would be reached by the addition of interest subsequent to the date of redemption. The High Court, therefore, refused to grant leave to appeal to the Privy Council. On an application for a review of the order of the High Court:

Held, that there was no error apparent on the face of the record or any sufficient reason for granting a review. NAND KISHORE SINGH v. RAM GULAM SAHU, 16 C. W. N. 1089; 39 C. 1037 **221**

Revision. *See* PROVINCIAL SMALL CAUSE COURTS ACT, s. 25; PUNJAB COURTS ACT, s. 70.

——Chief Court—Compromise by joint succession by Government tenant **680**

——Costs assessed on wrong principle **418**

——Failure to exercise jurisdiction **991**

——*Civil Procedure Code (Act V of 1908), s. 73 (2)—Order of rateable distribution of judgment-debtor's assets among rival decree-holders in execution of decree.*

An order under section 73 (2) of the Civil Procedure Code, 1908, that a certain decree-holder is or is not entitled to share rateably in the assets realized from the judgment-debtor's property is not open to revision; it is immaterial whether the order has been actually carried out or not at the time of filing or hearing the revision.

The general policy of the law and the usual practice of the Superior Courts is not to interfere on the revision side except in cases where the petitioner has no other remedy or his only alternative remedy is so cumbrous or expensive that to refer him to it would be tantamount to denying him relief. RADHE KISHEN v. BHOLU MAL, 171 P. W. R. 1912; 176 P. L. R 1912 **254**

——*Criminal case—Findings of fact—Jurisdiction of High Court to interfere—Penal Code (Act XLV of 1860), s. 211—Principles to be kept in view in case under section 211.*

Applications for revision in criminal cases stand on a fundamentally different footing from appeals against appellate decrees in civil suits. In cases of the latter description, the High Court is bound by the rigid provisions of section 100 of the Code of Civil Procedure, 1908, to act on findings of fact embodied in the judgment of the lower Appellate Court. In criminal cases, on the other hand, there is no such statutory restriction to the exercise of the High Court's jurisdiction. As a matter of practice, the High Court does not ordinarily interfere with the conclusions of the lower Appellate Court on questions of fact, but there cannot be any question as to the competency of the High Court to interfere with a finding of fact when the occasion requires it, and the High Court will not hesitate to do so when satisfied that the finding is manifestly erroneous and a miscarriage of justice would result from it if left uncorrected.

In a case under section 211 of the Penal Code, two principles must be kept in view: (1) that failure on the part of a complainant to establish the truth of his allegation does not by any means justify the inference that the complaint was false, and (2) that to secure a conviction it must be established beyond reasonable doubt that the circumstances are not merely consistent with the guilt of the accused but entirely inconsistent with his innocence. RAM PROSAD v. EMPEROR, 16 C. L. J. 455; 13 CR. L. J. 897; 17 C. W. N. 379 **993**

——*Criminal cases—Concurrent findings of facts—Material error as to facts.*

Where a lower Appellate Court has fallen into a material error as to facts, the Chief Court will interfere in revision. PRABHU DIYAL v. EMPEROR, 24 P. L. R. 1912; 38 P. W. R. 1912; 13 CR. L. J. 774 **406**

——*High Court Power to interfere with Collector's order reversing mamlatdar's decision Collector a Subordinate Court—Civil Procedure Code (Act V of 1908), ss. 3, 115—Mamlatdars' Courts Act (II of 1906), s. 28.*

The Mamlatdars' Courts Act expressly constitutes the Collector, taking proceedings under that Act, a Court. Therefore, the Collector, when exercising judicial functions under the Act, is subject to the superintendence and control of the High Court.

Revision—concld.

Section 115 of the Civil Procedure Code authorizes the High Court to interfere on revision with the order of a Collector under section 28 of the Mamlatdars' Courts Act. The Collector has no authority under the latter section to reverse a decision come to by the *Mamlatdar* on evidence.

The enumeration of subordinate Courts in section 3, Civil Procedure Code, 1908, is not exhaustive and does not exclude all other Courts from the category of Courts subordinate to the High Court. PURSHOTTAM JANARDAN *v.* MAHADU PANDU TURMALKAR, 14 BOM. L. R. 947; 37 B. 114 **676**

——— ——*Material irregularity—Discretion of Judge.*

Where a Judge uses his discretion to grant or refuse leave to institute a suit, he does not act illegally or with material irregularity, nor is any question of jurisdiction involved. MANJESHWAR PADMANABHA BATTA, *In re*, 12 M. L. T. 359 **400**

——— ——— **(Civil)**—Civil proceeding in a Court of appeal **593**

——— ——— ———Leave to withdraw suit with liberty to bring fresh suit **647**

——— ——— ———Question of fact—Possession not permissive **508**

——— ——— ———Reference for minor to arbitration—Superseding arbitration **388**

——— ——— **(Criminal).** *See* CRIMINAL PROCEDURE CODE, ss. 435, 439.

——— ——— ———Sanction to prosecute granted by District Registrar **717**

Revival of debt—Promissory-note for previous debt dishonoured **721**

Right to sue—Adoption—Settlement by adoptive mother in favour of her daughter—Consent of natural father of adopted son—Repudiation of agreement by adopted son after majority—Right of daughter to enforce agreement **741**

——— ———Pro-note in name of deceased member of Hindu joint family—Right of survivor to sue **748**

——— ———Founder's representatives suing for preventing abuse of trust—Suit in ejectment against trespasser by worshipper **589**

Right of suit. *See* CAUSE OF ACTION.

——— ———Suit for declaration that decree was fraudulent **125, 126**

Riot case—Duty of Police to ascertain guilty party—Duty of Court **49**

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Sale. *See* VENDOR AND PURCHASER.

———Contract of sale—Registered deed **176**

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——— for Land Revenue—Fraudulent purchase **878**

——— or lease—Burden of proof **889**

———Liability of vendee to pay interest on consideration money **273**

——— of minor's property by guardian—Benefit—Necessity **609**

——— *of goods—Goods sold on credit and delivered to purchaser—Vesting of title—Goods taken away from custody of purchaser by third party—Liability of third party to vendor for purchase money.*

Where goods have been sold on credit and possession has been delivered to the purchaser, the title vests completely in him and the vendor has no lien on the goods sold. If thereafter the goods are unlawfully taken away from the custody of the purchaser by a third party, the vendor is not entitled to hold that party directly responsible for his claim. ERA APENA *v.* ERA SWAMI, 16 C. L. J. 575 **963**

——— *of interest in land in Rangoon—Verbal sale in 1890—Validity of sale—Transfer of Property Act (IV of 1882)—Law applicable prior to such extension—Burma Laws Act (XIII of 1898), s. 13.*

The Transfer of Property Act was first extended to the local limits of the ordinary Civil jurisdiction of the Recorder of Rangoon from the 1st January 1893.

Under sub-section 2, section 13 of the Burma Laws Act, all questions arising in Civil cases instituted in the Courts of Rangoon were to be dealt with and determined according to the law for the time being administered by the High Court of Judicature at Fort William in Bengal in the exercise of its ordinary Civil jurisdiction.

A verbal sale for Rs. 350 of a share in immoveable property at Rangoon in 1890, after the Transfer of Property Act was applied to the whole of Bengal from the first July 1882, though prior to the extension of the Act to Rangoon, is invalid inasmuch as it would have been invalid if it had taken place in Calcutta in that year. MG SAN U *v.* MA HMYIN, 5 BUR. L. T. 169; 6 L. B. R. 98 **954**

——— **in execution**—Application for delivery of possession 3 years after confirmation of sale **242**

——— ——— ———Application for setting aside sale—Deposit of amount specified in sale proclamation—Amounts due to decree-holders applying for rateable distribution **920**

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——— ——— ———Order allowing or rejecting application for setting aside sale—Appeal, second **884**

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Sales of Under Tenures Act (VIII of 1865 B. C.), ss. 4, 6, 16 **165**

Sanction to prosecute. *See* CRIMINAL PROCEDURE CODE, ss. 195, 196, 197.

Satisfaction, doctrine of **17**

Search—Failure to call witnesses **75**

Second Appeal. *See* APPEAL—SECOND.

Secretary of State—Party—Under-tenants—Suit under section 104 (*H*), Bengal Tenancy Act **921**

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——— without consideration—Other compensation **842**

——— for costs **739**

———*Good behaviour — Habitual offender—Notice to show cause—"By habit" a thief—Notice stating, "by general repute" a thief, whether bad—Person not misled or prejudiced by terms of order—Criminal Procedure Code (Act V of* 1898), *ss.* 110, 112, 117, 118.

In an order drawn up under section 112 of the Criminal Procedure Code, it was stated that as it appeared to the Magistrate that the opposite party was "by general repute" (instead of "by habit" as required by section 110) a thief, he was called upon to show cause why he should not give security. The evidence was directed mainly to show that he was a habitual thief and his cross-examination was directed to refute the evidence to that effect:

Held, that the inquiry provided for by sections 117 and 118 of the Criminal Procedure Code was not strictly limited by the precise terms of the order drawn up under section 112, and that as the opposite party was not misled or prejudiced by the terms of the order, no ground existed for granting him any relief. DEPUTY LEGAL REMEMBRANCER *v.* KADIR MIRZA, 13 CR. L. J. 784; 17 C. W. N. 331 **416**

Separation. *See* HINDU LAW—JOINT FAMILY; HINDU LAW—PRESUMPTION.

Service, contract of. *See* MASTER AND SERVANT.

——— **Inam.** *See* INAM.

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———. *See* SMALL CAUSE SUIT.

Small Cause Suit—Decree against recorded tenant—Sale of tenure of share of recorded tenant—Decretal amount paid by recorded tenant's co-sharer—Co-sharer's right to be re-imbursed by recorded tenant **90**

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——— ——— ———Suit against *inamdar* for *jodi* and *jasti jasti* **39**

——— ——— ——— ———Suit to recover money due on bond executed along with lease of occupancy-holding **522**

——— ——— ——— ———Suit for recovery of rent with incidental prayer for declaration of right **704**

Sovereign Prince or Ruling Chief, suit against—Consent of Governor-General in Council—Private International Law—Suit against Foreign State **444**

Specific performance. *See* SPECIFIC RELIEF ACT, s. 22.

——— ——— ——— of contract—Unfair advantage to plaintiff—Hardship to defendants—Discretion of Court **732**

——— ——— ——— *of contract of sale—Guardian or manager binding minor's share—Hindu Law—Enforceability of contract against minor's interest—Document, construction of—Evidence of surrounding circumstances—Award of damages — Specific Relief Act (I of* 1877), *s.* 19.

In determining what interest passes to a vendee under a sale-deed executed to him by the managing member of a joint Hindu family, it is competent to Courts to go beyond the language of the document, if necessary, and look to the surrounding circumstances to see whether the executant purported to convey only his personal interest or the family interest.

The managing member of a Hindu family has power, in proper circumstances, to bind the minor's interest, in a contract by him for the sale of the joint family property and specific performance can be given against that interest.

The Court can also, in such a case, award damages in the alternative, though not asked in the plaint. KRISHNA AIYAR *v.* SHAMANNA, 23 M. L. J. 610; (1912) M. W. N. 1188 **497**

Specific Relief Act (I of 1877), s. 9—*Suit in ejectment by licensee against trespasser, maintainability of.*

A licensee of land, if dispossessed by a trespasser, is entitled to maintain not merely a suit under section 9 of the Specific Relief Act, but also a regular suit on the basis of his title as lessee. SITA RAM *v.* JAGAN NATH, 15 O. C. 317 **469**

——— ——— ——— **s. 19** **497**

——— ——— ——— **s. 21** **389, 600**

——— ——— ——— **s. 22**—*Contract to sell—Suit for specific performance—When limitation commences to run—Delay in suit, when fatal to suit.*

Where, in a suit for specific performance of a contract to sell, no date is fixed for performance, limitation commences to run from the date when performance is demanded by one party to the contract and refused by the other.

Delay in instituting a suit for specific performance is not fatal to the suit, unless it can be shown that the delay has in any way prejudiced the defendant. ABDUR KHADIR *v.* NAGASARUPU, (1912) M. W. N. 1004 **399**

Specific Relief Act—concld.

——————— **s. 22**—*Specific performance of contract—Unfair advantage to plaintiff—Hardship to defendant—Discretion of Court.*

Where a contract conferred an undue advantage on the plaintiff and caused a hardship to the defendant, which was not anticipated at the time when the contract was entered into, the Court can, in its discretion, refuse specific performance of that contract. GULLA MAL *v.* CHUNNI LAL, 10 A. L. J. 498 **732**

——————— **s. 41** **370**

——————— **s. 42**—*"Legal character"—"Right to any property"—Declaratory suits, nature of—Such suits to be kept within legal limits—Discretion—Hindu Law — Adoption — Daughter's son—Nephews not competent to contest adopton.*

A., a Hindu, governed by the *Mitakshara*, died leaving two widows, a daughter and a daughter's son, *B.* *B.* set up a title to succeed to *A.*'s estate on the ground that he had been adopted by *A.* *A.*'s brother's son, *C.*, brought a suit to obtain a declaration that *B.* was not the adopted son of *A.* *A.*'s widows and daughters did not oppose *B.*'s title:

Held, (1) that the suit was not maintainable under section 22 of the Specific Relief Act;

(2) that *C.* could not be said to be entitled to a legal character or a right as to *A.*'s property;

(3) that *B.* was not a person entitled to deny *C.*'s title;

(4) that even if the suit were maintainable, it would be a proper exercise of the discretion, given by section 22, to refuse to grant a declaratory decree on account of the remoteness of *C.*'s interests being affected.

Per *Elsmie, J.*—*B.*'s heirs would be the same whether he succeeded to *A.*'s property as adopted son or as daughter's son.

Per *Rattigan, J.*—To entitle a plaintiff to maintain a declaratory suit under section 42 of Act I of 1877, it must be shown that his "legal character" or his "right to any property" has been denied by the defendant, or, if not denied, that the defendant is at least "interested to deny one or the other." As declaratory suits are an exceptional form of litigation, the power conferred by section 42 to institute such suits ought not to be extended beyond what the law absolutely requires. BARKAT RAM *v.* JAGAT RAM, 249 P. W. R. 1912 **379**

——————— **s. 42, proviso**—*Suit for declaration of right to collect dues.*

A suit by the proprietors of a *patti* for a declaration that they are entitled to collect village dues and that certain other persons, who have settled in the *patti*, have no such right is not barred by the proviso to section 42 of the Specific Relief Act. KAMIRA *v.* LALU, 110 P. R. 1912; 30 P. L. R. 1913 **907**

Standing Crops—Immoveable property **185**

Statement of person as to his rights in property—Not to be lightly set aside **216**

Statutory duties, protection in **673**

——— **Rule,** construction of **37**

Stay of Criminal proceedings—Pendency of Civil Appeal—Jurisdiction to order prosecution **720**

Stay—concld.

——— **of execution,** reasons for—Annoyance to feelings, whether a reason **219**

——————— *during pendency of appeal—Power of lower Court to stay execution—Jurisdiction—Decree for possession executed.*

A Court has no power to stay execution after an appeal has been filed to the High Court. The utmost that the lower Court can do is to stay its hands and go no further.

Where a decree for possession of the house has been executed, the decree can no longer be stayed, until the decree has been set aside in appeal; the Court below has no power to go backward to drive the decree-holder out of possession and re-place the judgment-debtors in possession. SATYA SHANKAR *v.* MAHARAJ NARAIN, 11 A. L. J. 83 **728**

——— **of proceedings**—Rule issued by High Court—Telegram sent by High Court Vakil to Court below—Disregard of telegram—Bias against accused—Transfer of case **78**

——— **of sale**—Court to which application should be made **763**

Step-in-aid of execution. *See* LIMITATION ACT, SCH. I, ARTS. 179, 182.

Streets and drains *in Municipal towns—Ownership in Government—Right of Municipality vesting in Municipality by statutory provisions—Construction by house owner of pial over drain—Adverse possession—Prescriptive right—Limitation—Extinguishment of title in Municipality after 12 years—Encroachment—Right of Municipality to remove pial—Madras District Municipalities Act (IV of 1884), s. 168 (1)—Injunction—Prayer for declaration, granting of—Subsidiary relief.*

The streets and the drains therein in Municipal towns are vested in the Municipalities by Government for purposes for which they were constituted. Their right is not a mere right of easement, but a special kind of property in the site previously unknown to the law, but created by statute.

Though the Municipalities cannot give up the rights of the public in the streets or affect their right of way by any act of their own, it would not affect the capacity of a person in hostile possession to acquire rights which would affect the public.

Although the soil may belong to one person, another person may be the owner of a building above the soil, and the right to occupy a portion of the space above the soil may be acquired by limitation.

The construction of a pial over a drain by a house owner in front of his house is a user by him adverse to the Municipality and 12 years' adverse enjoyment (before 1900) extinguishes the right of Municipality to the space of the pial, and 60 years' adverse enjoyment extinguishes the rights of the Government.

The Municipality, however, has the right under section 168 (1) of the District Municipalities Act, the statutory right to demolish the pial as 'an encroachment,' notwithstanding the existence of a prescriptive title as against it and Courts have no jurisdiction to restrain the demolition by an injunction.

Streets and drains—concld.

Where plaintiff sought to have it declared that he had acquired a prescriptive right to the site of a pial built by him over a drain and for an injunction restraining the Municipality from demolishing it:

Held, that the Court would not grant him the declaration, though he succeeded in establishing his prescriptive right to the site, as it was only subsidiary to the substantial relief asked for, *viz.*, injunction, which could not be granted. BASAVESWARASWAMI *v.* HAVALIGI HUSSAIN, 12 M. L. T. 405; 23 M. L. J. 479; (1912) M. W. N. 1080 **158**

Substitution. *See* CIVIL PROCEDURE CODE, O. XXII.

Succession Act (X of 1865), ss. 62, 164, 292 **17**

Succession Certificate Act (VII of 1889), ss. 4, 16—*Assignee of holder of certificate, whether can maintain suit.*

The assignee of a person, to whom a Succession Certificate has been granted, cannot sue for the recovery of the debt assigned to him. ALLAHDAD KHAN *v.* SANT RAM, 10 A. L. J. 506; 35 A. 74 **486**

——— **s. 16** **486**

Succession (Property Protection) Act (XIX of 1841), ss. 3, 4—*Malabar Law and Usage*—Tarwad *property*—*Self-acquisition of* karnavan—*Survivorship*—*Notice*—*Order to make inventory*—*Jurisdiction*—*Direction of deceased.*

The provisions of Act XIX of 1841 do not apply to cases where property lapses by survivorship, as in the case of the property held by the *karnavan* of a Malabar *tarwad*, whether the property is the *tarwad* property or the self-acquisition of the *karnavan.*

Before issuing any notice under the Act, the Judge must be satisfied that there are strong reasons for believing that the party in possession has no lawful title. The Judge cannot, without making an inquiry and without having such strong ground of belief, appoint an officer to make an inventory of the property.

Obiter dictum:—The Act pre-supposes a case of succession; if there are directions as to the disposal of the property, the Judge should give effect to them in this summary proceeding without considering their validity. ABDULLA *v.* MIRTHUR, 23 M. L. J. 537; 12 M. L. T. 497; (1912) M. W. N. 1164 **429**

——— **s. 4** **429**

Sufficient cause. *See* LIMITATION ACT, s. 5.

Suit for declaration that plaintiff not tenure-holder but *raiyat* **917, 919, 921**

——— **for land**—Suit to declare a mortgage of property outside Madras fraudulent—Suit to avoid incumbrance **342**

———, meaning of **198**

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Suits Valuation Act (VII of 1887), s. 8 **162**

Summary trial. *See* CRIMINAL PROCEDURE CODE, ss. 260, 263.

Sureties not to be rejected merely on Police report **72**

———, discharge of—Principal debtor sued but not proceeded with owing to want of address **893**

Surface water, test of **648**

Surrender of holder by tenant **682**

Survival of right to sue—Suit to contest alienation **101**

Suspected person—Power of Police to detain **571**

Suspicion, decision cannot be founded on **396**

Temple—Scheme for future management **441**

Temple Uralans **128**

Tenancy. *See* LANDLORD AND TENANT.

Tenant, *holding on after formal ejectment*—*Oudh Rent Act* (*XXII of* 1886), *s.* 127.

Where a tenant was ejected formally under the provisions of section 60 of the Oudh Rent Act, but nevertheless continued to cultivate the holding in question without any break for any period, however small:

Held, that the provisions of section 127 of the Oudh Rent Act could not apply to such a case. DEPUTY COMMISSIONER, FYZABAD *v.* GUR DAYAL SINGH, 15 O. C. 311 **464**

Tenant-in-common—Right to recover whole property **136**

Tender. *See* TRANSFER OF PROPERTY ACT, ss. 76 83, 84.

Testamentary Judge—Power to declare Will invalid **730**

Title—Treating near relation without title as co-sharer for many years **885**

Tort—Liability of servant for wrong done on behalf of master **378**

——— Suit for damages for wrongful distraint—Action commenced against wrong-doer—*Actio personalis moritur cum persona*—Scope of doctrine—How far applicable to India **226**

———*Trespass*—*Animal*—*Damage done to crops by cattle*—*Liability of owner*—*Negligence*—*Property adjoining highway*—*Fencing.*

The owner of an animal is liable for any injury or damage committed by it by trespassing on the land of another; it is immaterial whether the animal escapes by reason of the negligence of the owner or in spite of his most diligent care.

An exception from the general rule above stated exists when damage is done by cattle passing along a highway to property adjoining the highway.

In such cases, the sufferer cannot recover damages without proof of negligence or want of skill.

The rule is also inapplicable to a case where the sufferer is bound to fence but has failed to do so. In India, the complete fencing of fields with a view to exclusion of cattle is impracticable owing to the immense expense involved. MADHO *v.* AKAJI, 8 N. L. R. 190 **899**

Touts. *See* LEGAL PRACTITIONERS ACT, s. 36.

Transfer. *See* CIVIL PROCEDURE CODE, 1908, s. 24.

——— Sale—Contract of sale—Registered deed **176**

——— Void transfer—Collector leasing property for premium satisfying decree—Subsequent disposal of property by judgment-debtor **887**

——— **of case.** *See* CRIMINAL PROCEDURE CODE, s. 526

——— **of occupancy holding**—Illegal **522**

Transfer of Property Act (IV of 1882) 141, 577

——— Mortgage executed before enactment **467**

——— Verbal sale in 1890 in Rangoon **954**

——— **s. 3**—Fruit trees **910**

——— **s. 3** **544**

——— **s. 8** **129**

——— **s. 36** **933**

——— **s. 52** **1**

——— **s. 53** **342**

——— **s. 54** **176**

——— **s. 59**—*Equitable mortgage, essentials of—Deposit of title-deeds—Existence of debt—Intention to create security—Contract Act (IX of* 1872), *s.* 25—*Acknowledgment of time-barred debt without promise to pay—Equitable mortgage in lieu of time-barred debt—Right to enforce—Limitation Act (IX of* 1908), *s.* 19—*Evidence Act (I of* 1872), *ss.* 21, 32—*Entries by creditor in* samadaskat *book of debtor—Admission—Relevancy—Admissibility.*

The mere possession of title-deeds coupled with the contemporaneous existence of a debt is insufficient to raise the presumption that there was an equitable mortgage by deposit of title-deeds. In order to establish such a mortgage, it must also be proved that the title-deeds were deposited by the debtor as *security* for the debt, that is, the intention accompanying the deposit was to create a security for the debt.

A mere acknowledgment of indebtedness without any promise to pay is not such an agreement as is contemplated by section 25 of the Contract Act.

Where time-barred debts are accepted by the debtor and made the consideration for an equitable mortgage effected by the deposit of title-deeds, the consideration would be valid and good in law and the equitable mortgage would afford a sufficient ground for the action of the mortgagee to sue for the debt, even though the requirements of section 25 of the Contract Act are not complied with. By the deposit of title-deeds as security for debt, the equitable mortgagor virtually discharges the debt by assigning to the creditor an interest corresponding in money value with the debt due on the property mortgaged. A time-barred debt may be a good consideration if accepted by the obligor as such.

Transfer of Property Act—contd.

Entries, made by a creditor in the *samadaskat* book of his debtor, in which the creditor mentions the fact of the debt and the deposit of the title-deeds, fall within the language and intention of section 31 (2) of the Evidence Act.

Although such entries are admissions in favour of the creditor, they are not excluded by section 21 of the Act, as that section allows admissions of this kind to go in evidence if admissible also under section 32. JETHIBAI *v.* PUTLIBAI, 14 BOM. L. R. 1020 **722**

——— **s. 60** **837**

——— **s. 65**—*Purchase from mortgagor—Duty to pay revenue—Land Revenue Sale—Fraudulent purchase—Burma Land and Revenue Act (II of* 1876), *ss.* 37, 44, *r.* 80.

The implied covenant under section 65 of the Transfer of Property Act for the mortgagor to pay land revenue extends to the purchaser of property subject to a mortgage.

Where such purchaser has failed to pay revenue and the land has been sold for default and purchased by him free of mortgage, the property is not freed from the mortgage but continues to be subject to it, as the omission to pay revenue is in defraud of the mortgagee. VEERAPPA CHETTY *v.* KANAPPA CHETTY, 5 BUR. L. T. 268 **878**

——— **s. 65 (a),** application to mortgage executed before Act **737**

——— **ss. 76, 83**—*Tender of mortgage money—Mortgagor claiming to split up the mortgage—Dispute as to extent of mortgagor's right—Refusal of mortgagee to receive tendered amount—Mortgagor's claim for mesne profits—Interest.*

The provisions of the Transfer of Property Act relating to the tender of mortgage amount and the cessation of interest from the date of such tender, do not, in terms, refer to a case where the mortgagor claims to split up the mortgage in consequence of the mortgagee having become the owner of a portion of the equity of redemption, or to a case where there are disputes between the parties as to the extent of the subsisting interest of the mortgagor in the equity of redemption so as to compel the mortgagee to take upon himself the task of deciding such disputes rightly for himself at the risk of losing the interest on the money due to him and becoming accountable for mesne profits. VENCATARAMA AIYAR *v.* RANGASAWMI AIYANGAR, (1912) M. W. N. 1125 **368**

——— **ss. 79, 80** **927, 931**

——— **s. 83** **368**

——— **s. 85** **87**

——— **s. 85**—*Civil Procedure Code (Act V of* 1908), *O. XXXIV, r.* 1—*Mortgage suit—Joinder of parties—Person having right to redeem, whether necessary party under section* 85—*Creditor of mortgagor attaching mortgaged property in execution of money-decree, whether to be joined as party in mortgage suit.*

Order XXXIV, rule 1, of the new Civil Procedure Code, requires that not only a person having an interest in the mortgage security, but also a person having an interest in the right of redemption shall be

Transfer of Property Act—contd.

joined as a party to any suit relating to the mortgage. But section 85 of the Transfer of Property Act, which is repealed by Order XXXIV, rule 1, required that a person having an interest in the mortgage security only should be made a party to such a suit.

A creditor of the mortgagor who attaches the mortgaged property in execution of a money decree, does not obtain by his attachment any charge or lien upon the attached property; he only has the right to redeem. He is, therefore, not a necessary party in a suit upon the mortgage brought before the new Civil Procedure Code came into operation, although he would be a necessary party after the Code was passed. SHANANDA CHANDRA PAL *v.* SRI NATH ROY CHOWDHURY **432**

——————— **s. 90**—*Personal decree against mortgagor—Essential elements—Second personal decree not to be made—Mortgage decree for sale and also personal decree—Not in conformity with Act, yet binding between parties.*

Three essential elements must be established before a decree under section 90 of the Transfer of Property Act can be obtained; namely, *first*, that though there has been a decree for sale and the mortgaged property has been exhausted thereunder, the sale-proceeds have proved insufficient to pay the amount due to the plaintiff; *secondly*, that the balance is legally recoverable from the mortgagor otherwise than out of the property sold, and, *thirdly*, that a personal decree has not previously been made.

If the decree-holder has obtained a personal decree against the judgment-debtor, he cannot subsequently invite the Court to repeat the operation already performed and thus obtain a second personal decree against the mortgagor.

A mortgage-decree, which is not merely the usual decree for sale but also a personal decree against the defendant mortgagor in the event of non-satisfaction of the mortgage dues by sale of the mortgaged properties, is not in strict conformity with the provisions of the Transfer of Property Act.

But such a decree is a good and valid decree as between the parties thereto.

And the decree-holder, who has obtained that decree and has executed it, cannot be permitted to turn round and contend that the decree is inoperative and ask for a second personal decree against the mortgagor. DINABANDHU NANDI *v.* MASHUDA KHATUN, 16 C. L. J. 318 **263**

——————— **s. 91**—Right of owner of equity of redemption **837**

——————— **s. 108** **933**

——————— **s. 114** **991**

——————— **s. 130 (1)** **627**

——————— **s. 130**—*Pro-note executed by managing member of Hindu family—Endorsee of such pro-note, whether can sue members other than maker of pro-note—Endorsement whether assignment of actionable claim.*

The endorsee of a pro-note executed by the managing member of an undivided Hindu family, cannot sue the other members of the family: he can only sue the maker of the note or, his legal representatives, after his death, inasmuch as the mere endorsement is not an assignment of an actionable claim under section 130 of the Transfer of Property Act. SEETHARAMA CHETTY *v.* SESHIAH CHETTY, (1912) M. W. N. 1011 **417**

——————— **s. 136** **544**

Trespass. *See* PENAL CODE, ss. 441 TO 447.

——————— **by animal**—Damage done to crops **899**

——————, damages for—Limitation **605**

——————*Owner not in possession at time of trespass—Right to damages.*

An owner of immoveable property is entitled to damages against any one trespassing on it, whether he was or was not in possession at the time of trespass. CHILLAMUTHU *v.* MUTHUDAYAR SERVAI **740**

Trespasser—Suit to eject trespasser by one of several persons interested **469**

Trust. *See* WAKF.

——————*Investment—Unauthorised securities—Damages—Trusts Act (II of 1882), ss. 15, 20, 23—Liability for interest—Minor's monies.*

Trust monies payable to a minor are monies which cannot be applied for the purposes of the trust "at an early date" as the trustees cannot pay the money until the minor has attained majority. And even as regards money capable of being so applied at an early date, if the trustee takes the responsibility of keeping the money in investment for a long time, he is bound to make the investment in accordance with his obligation as trustee.

In the investment of trust money, a trustee is bound to comply with the provisions of section 20 of the Trusts Act, which regulates the mode in which a trustee is to make investments and such regulation is not controlled by the general provisions of section 15.

A trustee is guilty of breach of trust if he invests the money otherwise than in accordance with the provisions of the section, however well-intentioned and honest his act may have been.

The measure of prudence required of a trustee by section 15 must be regulated by any specific provisions applicable to special matters found in the other sections of the Act.

Clause 2 of section 15 must be read with other sections and does not apply where the trustee has committed a breach of trust as by acting contrary to section 20 of the Act. The broad terms of section 23, that a trustee is liable to make good the loss when he commits a breach of trust, are not controlled by section 15. The Indian Courts have not been given the powers conferred on English Courts by successive English Statutes of relieving honest trustees from their liability for breach of trust.

Where a trustee invests money in an unauthorised security, it must be treated as tantamount to failure to invest under clause (*e*) of section 23 and he is liable for interest on the money lost. NEELAM TIRUPATHIRAYUDU NAIDU GARU *v.* VINJAMURI LAKSHMINARASAMMA, (1912) M. W. N. 1237 **597**

——————*Trusteeship of Darga—Vesting of trusteeship in two persons—Succession to trusteeship, how*

Trust—concld.

to be determined—Per stirpes *or* per capita—*Muhammadan Law.*

Where the trusteeship of a Darga and the right of management thereof and the enjoyment of its emoluments vested in two persons:

Held, that the office of trustee with the right to emoluments devolved, on their death, to their heirs, according to the rules of Muhammadan Law, *per stirpes* and not *per capita*. GAFFUR SAHEB *v.* MOOSA SAHEB **124**

——— **or loan**—Advance to broker on pro-note —Breach of trust **824**

Trusts Act (II of 1882), ss. 1, 5—No written instrument necessary for a *wakf* under Muhammadan Law **857**

——— ——— **ss. 15, 20, 23** **597**

Unchastity. *See* HINDU LAW—WIDOW.

Under-proprietary rights in Oudh, meaning of—Oudh Rent Act (XXII of 1886), s. 3, cl 6—Proprietary rights, claim as to, does not affect under-proprietary rights—Pleas in defence which ought to be raised—Inconsistent pleas when barred **334**

Undue influence—Burden of proof **309**

U. P. Court of Wards Act (III of 1899), ss. 16, 17, 18, 20—*Notice, how to be published—Claims not notified to Collector within time—Loss of interest—Non-production of document before Collector upon notice—Objection taken at late stage of suit—Admissibility of document in evidence—Discretion of Court—Interpretation of Statutes imposing penalty.*

Provisions of law, which operate to impose a penalty or disability upon a person who fails to comply with them, require to be strictly interpreted.

Under the United Provinces Court of Wards Act, as soon as the notice required under section 16 is duly published by the Collector, a double obligation is laid upon the creditors; they must not only notify their claims against the ward or his property, giving full particulars of the same, but they must produce before the Collector with the statement of claim every document on which they rely in support thereof.

There being no general or special orders from the Board of Revenue directing the Collector to publish the notice under section 16 of the Court of Wards Act at any other place or in any other manner, no obligation lies on the Collector to do any thing more than get the notice published in English and Vernacular in the Provincial Gazette.

It would be contrary to all sound principles of nterpretation to apply the proviso to section 17 to the subsequent sections 18 and 20. The obligation to produce documents is laid upon all creditors of the ward and not only on those who notify their claims.

Where the admission of document of title was not challenged at the proper time, and, strictly speaking, was not challenged at all, and the Court below had no real opportunity, at the late stage when the objection was raised, to turn round on the plaintiffs and call upon them to explain the non-production of their mortgage deeds before the Collector:

U. P. Court of Wards Act—concld.

Held, that to exclude the documents altogether from the record would be to exact an extreme penalty for a piece of neglect due to mere ignorance.

The provisions of section 20 leave the Court a discretion to admit the plaintiff's document of title in evidence despite its non-production before the Collector but those of section 18, as regards interest, give no such discretion.

The provisions of section 16 of U. P. Court of Wards Act compared with the provisions of sections 10A and 10B of Bengal Court of Wards Act, COLLECTOR OF GHAZIPUR *v.* BALBHADDAR SINGH, 10 A. L. J. 234 **25**

——— ——— ——— ——— **ss. 17, 18, 20** **25**

U. P. Land Revenue Act (III of 1901)—*Partition—Guardian of minor not properly appointed — Hindu Law—Joint family — Partition against manager of family—Other members of family bound by it.*

Where a partition is fairly and honestly obtained against the managing member of a joint Hindu family, it is binding even on a minor member of that family, although no guardian had formally been appointed for such minor by the Revenue Court during the partition proceedings. BHAGWATI PRASAD *v.* BHAGWATI PRASAD, 11 A. L. J. 76 **846**

U. P. Municipalities Act (I of 1900), s. 128, cls. (h), (i)—*Municipal Rules*—"Dandidar," *meaning of—Seller.*

A *dandidar*, who only weighs things brought to a market to be sold, is not a seller of those things. JABBAR SINGH *v.* EMPEROR, 13 CR. L. J. 797; 11 A. L. J. 39 **541**

——— ——— ——— ——— **s. 147**—*Power of Municipal Board to have shop lawfully possessed vacated.*

A Municipal Board is not empowered to require a person to give up his shop situate on land, not belonging to Municipality, of which he is lawfully in possession. JIWA *v.* EMPEROR, 10 A. L. J. 286; 13 CR. L. J. 841 **713**

Unlawful assembly. *See* PENAL CODE, ss. 148, 149.

——— ——— ——— ——— Object—Death of one person by injuries caused—Murder—Death by rash act **54**

Valuation—Suit for declaration that plaintiff is sole *shebait* and for injunction **162**

——— ——— **of suit**—Declaratory suit—Suit against decree-holder and judgment-debtor that attached property is not liable to attachment—Judgment-debtor also made defendant but not appearing, disputing or admitting plaintiff's claim **196**

——— ——— ——— ——— Suit for rent and declaration of title with injunction **44**

——— ——— ——— ——— *Suit for foreclosure of mortgage—Presumption—Pleadings—No objection to jurisdiction in first Court—Objection in appeal—Central Provinces Courts Act (II of 1904), ss. 13, 15.*

In a suit for foreclosure of a mortgage, when the value of the mortgaged property is not less than the amount of the charge, the value of the suit for pur-

Valuation of suit—concld.

poses of jurisdiction is the total sum claimed as due for principal and interest under the mortgage.

In questions of jurisdiction, the presumption is in favour of giving jurisdiction to the highest Court.

A party cannot be heard to object, in appeal, to a valuation which he did not question at the trial of the suit and by virtue of which the suit had necessarily to be tried in a higher Court. KOTHIRAM *v.* GANPATI, 8 N. L. R. 179 **886**

Variation between pleading and proof—Claim for title over land in possession of another—Evidence of ownership—Right negatived by evidence—Right to easement—Whether can be declared on proof thereof **112**

Vatan—*Deshmukhi Vatan*—Alienation of *Vatan*—Power of Collector to set aside alienation and resume possession—Order granting alienor's heir permission to recover possession—Adverse possession of alienee for more than 12 years—Suit by alienee—Injunction—Jurisdiction of Civil Court—Decree, form of **148**

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——— ———Sale in execution—Collector levying full assessment—Character of land not changed—Right of auction-purchaser—Right of next holder after death of judgment-debtor—Limitation **170**

——— ——— **lands**—Widow's power to adopt **746**

Vatandar joshi—Suit to recover fees paid to usurper **138**

Vendor and Purchaser—Goods sold on credit and delivered to purchaser—Vesting of title—Goods taken away from custody of purchaser by third party—Liability of third party to vendor for purchase money **963**

——— ——— ——— Liability of vendee to pay interest on consideration money **273**

——— ——— ——— ———*Whole sale price not paid—Sale pre-empted—Vendor paid by pre-emptor—Vendor again suing vendee for unpaid purchase-money—Lien, discharge of, by payment made by third person—Contract Act (IX of* 1872), *ss.* 69, 70.

The plaintiff sold a certain village to the defendant. A portion of the sale price was paid by the defendant while the rest remained unpaid. The sale was the subject of two rival suits for pre-emption of which one suit was dismissed and the other was decreed. The pre-emptor whose suit was decreed paid the unpaid purchase-money to the plaintiff but that suit was ultimately dismissed on the ground that the purchase-money was not deposited in Court according to law. The plaintiff then brought a suit for the recovery of that very amount from the defendant who remained in possession of the property sold, the pre-emption suit having been dismissed:

Held, that the plaintiff was not entitled to bring a suit for the recovery of the same amount from the vendee when he had already received that sum from the pre-emptor. The plaintiff's cause of action, for

Vendor and Purchaser—concld.

the recovery of his unpaid portion of the purchase-money, was satisfied by the payment of the said money by the pre-emptor who had stepped into the shoes of the vendee. The mere fact that the decree for pre-emption had since been set aside did not revive the cause of action unless a claim was brought against the plaintiff for the refund of the said money and he was made to reimburse the same to one who had paid it. MUBARAK ALI SHAH *v.* ADITTYA PRASAD, 16 O. C. 1 **288**

Verdict. *See* JURY.

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Void Contract. *See* CONTRACT ACT, s. 23.

Wadhwan Civil Station is not a part of British India **534**

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Wakf. *See* MUHAMMADAN LAW—WAKF.

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——— ———*Trust - Perpetuity, rule against—Dedication to charity illusory—Perpetual family settlement—Muhammadan Law*—Shaffei—*Life-estate — Limitation Act (IX of* 1908), *s.* 10, *scope of—Resulting trust—Specific purpose—Estoppel—Possession of* mutwalli *—Life-tenant obtaining possession from trustee—Evidence Act (I of* 1872), *ss.* 115, 116.

It is doubtful whether the rule of the Muhammadan Law, that a life-estate is bad and would resolve itself into an absolute estate, can be sustained in the case of *shaffeis*.

A person, claiming under a resulting trust, may be barred by limitation unless the resulting trust is of such a kind as to fall within the scope of section 10 of the Limitation Act.

A trust for a specific purpose is a trust for a *specified* purpose.

A resulting trust in favour of the heirs of a testator, upon failure through invalidity of one of the trusts declared in the Will, is not a trust for a specific purpose within the meaning of section 10.

The opinion of Beaman, J., in *Casamally Jairajbhoy v. Sir Currimbhoy Ebrahim*, 12 Ind. Cas. 225; 36 B. 214; 13 Bom. L. R. 717, that for the purposes of limitation there is no distinction to be drawn between resulting trusts and trusts for specific purposes, and that the only case in which limitation can run in favour of a trustee, whether by express words or by operation of law, is where he is in as a trespasser and not as a valid transferee, dissented from.

A trust for the grand-daughter of the settlor for life and thereafter on her descendants from generation to generation, and in default thereof on the settlor's husband's relatives from generation to generation in perpetuity and in default with an ultimate trust for the education and instruction of Muhammadan youths, is void as being an attempt to create

Wakf—concld.

a perpetuity in the nature of a family settlement under the guise of a *wakf*.

Where there are passages in a *wakfnama*, justifying the trustee in handing over to the successive life-tenants, the possession of the trust properties, so long as he does not abdicate the position of the *mutwalli* assigned to him, and the life-tenants obtain possession of the properties with the consent of the *mutwalli* on the footing of their title as life-tenants under the *wakfnama*, the life-tenants cannot be permitted to deny that the person from whom the possession was claimed had a title to such possession when it was handed over to them.

The estoppel so created binds all those who claim under or through the life-tenants so obtaining possession. This is specially so where the person from whom possession is claimed is not a bare trustee but is also entitled to a contingent beneficial remainder on failure of certain limitations.

When a *wakfnama* must be treated as valid between certain parties owing to estoppel, the *mutwalli*, when his beneficial remainder has taken effect, is entitled to the possession of the property under the terms of the *wakfnama* both as trustee and as beneficiary.

When the claim of settlor's heirs under a resulting trust has long been barred by the law of limitation, the person who is in possession of the trust property, at the time of the institution of the suit, can successfully defend his possession against those heirs. MAHOMED IBRAHIM *v.* ABDUL LATIF, 14 BOM. L. R. 987 **689**

Wakf property—Simple mortgage **632**

Warrant for arrest of person who had left Court's jurisdiction—Proclamation—Attachment of property **540**

——— **Case.** *See* CRIMINAL PROCEDURE CODE, ss. 256, 257.

Water—*Right to water in running stream—Surface water—Nature and rights of water explained.*

Where water flowed through a definite channel across the lands of *A.*, up to *B.*'s lands and then spread itself all along the fields of *B.* and overflowed its *bunds* and joined another channel which irrigated *C.*'s land:

Held, that the water as it flowed from *B.*'s land could not be regarded as surface water and *C.* was entitled to the customary flow of the channel water along *B.*'s lands and *A.* and *B.* had no right to obstruct the same.

Although no claim can be made either as a natural right or as an easement by prescription except to water flowing in a definite course and no claim can be maintained with regard to surface water or surface drainage, yet it does not follow that the right to the water of a stream ceases when it ceases to flow in a confined water-course.

Water flowing into a field from a known channel and passing along the field onwards into another field, though not over a confined tract in the former field but along its whole area, is not surface water.

Water—concld.

In each case, the question, whether or not particular water is surface water, is one of fact to be determined by the circumstances, attending its origin and its continued existence. If the water is spread out and flows sluggishly over the surface, losing itself by percolation and evaporation, it is surface water although it has its source in springs.

But the mere fact that the water spreads out at some places and flows sluggishly without sufficient force to form a channel for itself, does not make it surface water if the flow has sufficient force to maintain itself and it is subsequently gathered together into a channel so as to form a water-course. The chief characteristic of surface water is its inability to maintain its identity and existence as a water body.

Well-defined existence arising from an ascertained course appears to be the real test in coming to a conclusion against any body of water being regarded as merely surface water. VILLURI ADINARAYANA *v.* POLIMERA RAMUDU, 12 M. L. T. 637; 24 M. L. J. 17 **648**

Water-tax when leviable **149**

Wet-nurse is not domestic nurse **658**

Widow. *See* HINDU LAW—WIDOW; MUHAMMADAN LAW—WIDOW.

Will. *See* HINDU LAW—WILL; MUHAMMADAN LAW—WILL.

——Construction—Right to give girl in marriage conferred by Will **95**

——Construction—Implied prohibition to adopt—Widow's power in face of such prohibition **746**

——Construction *Persona designata* — Practice—Hindu Law or Muhammadan Law **834**

——*Construction*—Shebaitship, *grant of.*

Where a Hindu made a Will appointing his minor son *shebait*, and his widow as guardian of the minor son, and, in the event of his death without obtaining majority, herself as *shebait*:

Held, that the gift of *shebaitship* to the son was absolute and the right of the widow to act as *shebait* was extinguished on the son attaining the majority and taking over the temple, and could not be revived on the subsequent death of the son. TRIPURARI PAL *v.* JAGAT TARINI DASI, 17 C. W. N. 145; 13 M. L. T. 1; (1913) M. W. N. 34; 17 C. L. J. 159; 15 BOM. L. R. 72 **696 P.C.**

——— *Construction—Satisfaction, doctrine of—Debt due from testator—Legacy of equal sum—Right to debt and legacy—Suit by legatee—Administration of whole estate—Succession Act (X of 1865), ss. 62, 164, 292—Probate and Administration Act (V of 1881), s. 112—Khoja Muhammadans—Hindu Law.*

Where the executors do not admit that they hold sufficient assets to meet all claims, the usual and proper course would be, whether a creditor or a legatee is suing, to have the whole estate administered.

Section 164 of the Succession Act expressly abolishes the doctrine of satisfaction. Although that

Will—contd.

Act does not apply to Hindus, Muhammadans or Buddhists, there is no doubt that the intention of the Legislature was to announce what they considered to be a generally correct principle of interpretation universally applicable unless overridden by some special provision of local law or usage.

Section 112 of the Probate and Administration Act criticised.

Quære:—Whether a Khoja Muhammadan should be treated for all testamentary purposes as a Hindu governed by Hindu Law?

A., a Khoja Muhammadan, had a deposit of Rs. 9,000 with his brother, *B.* *B.* made a Will bequeathing Rs. 9,000 as *bakshis* (*hiba*) to *A.*:

Held, that *A.* was entitled both to his deposit of Rs. 9,000 and also to the legacy of Rs. 9,000. HASANALLI *v.* POPATLAL PARBHUDAS, 14 BOM. L. R. 782 **17**

——*Construction—Legacy, vesting of—Possession—Decree, form of—Legatees suing for interest on money bequeathed.*

A Hindu lady made a Will in favour of her two minor great-grandsons. Under the Will, the interest on the two mortgages bequeathed, accruing subsequent to the death of the testatrix until both the legatees should attain majority, was to be taken by them, and their father was expressly disinherited; no intermediate estate was created in favour of any one else till the minor legatees attained age, nor was there any gift over in case of the minors dying without attaining majority:

Held, (1) that these facts were indications that the amount due on the mortgages was intended to vest in the legatees immediately on the death of the testatrix; that the expression in the Will that the legatee should take the principal and the interest accruing after the testatrix's death on the younger attaining majority referred only to the time when they were to take possession of the legacy;

(2) that in a suit for interest by the minor legatees, a decree for the money due should be passed but the amount, when realized from defendant, should be kept in Court deposit or invested by the Court in Government securities till the younger legatee attained majority. NARAYANA AIYAR *v.* ANAI AIYAR, 23 M. L. J. 649; (1913) M. W. N. 189 **754**

——*Natural father, executor—Alienation by executor—Son—Suit to recover alienated properties—Limitation Act (XV of 1877), Sch. II, Arts. 44, 91 not applicable—Alienation, valid, if made in due course of administration—Probate and Administration Act (V of 1881)—Probate—Letters of Administration—Title of executor not obtaining Probate.*

A., as legatee under a Will, sued in 1908 to recover certain properties sold by *B.*, his natural father and executor under the Will, to *C.* in 1897.

The suit was instituted more than three years after *A.* attained majority; *C.* contended that *B.* had authority to sell the land and the sale was for discharging certain debts due by the deceased testatrix:

Held, (1) that Article 44 of the Limitation Act did not apply, as the sale must be held to have been made by *B.* in his capacity as executor and not as guardian;

(2) that Article 91, too, did not govern the case, because *A.* could succeed without getting the alienation set aside. *B.*'s alienation would be binding on him if it was valid; if it was not, it would have no effect as against him.

There is no provision in the Probate and Administration Act which requires a person appointed as executor under a Will to take out Probate or Letters of Administration. There is nothing to prevent the executor from acting as executor and exercising the powers given to him under the Act without obtaining Probate.

An executor has the power to sell the estate for the purposes of administration and the alienee must be protected in the absence of any allegation that he was a *mala fide* purchaser, having knowledge that the sale was not made, in due course of administration. GANAPATHI AIYAR *v.* SIVAMALAI, 12 M. L. T. 207; 23 M. L. J. 306; (1912) M. W. N. 1112 **4**

——*Probate granted—Will admitted and acted upon—Subsequent application for revocation—Probate and Administration Act (V of 1881), s. 50.*

A., the sole heiress of a testator, applied through her attorney for Probate of the Will.

The Probate was granted and the Will was acted upon for some years.

Some years after the grant of Probate, *A.* applied for revocation of the Probate on the ground that the Will was forged:

Held, that having admitted the genuineness of the Will and taken advantage of it, *A.* could not get the Probate revoked. BABUI BACHA KUMAR *v.* BABUI SURAJ KALA KUMAR **763 P. C.**

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Workmen's Breach of Contract Act (XIII of 1859), *applicability of—Loan advanced to workman not for doing any specific work.*

The loans that can be recovered under Act XIII of 1859 are the loans which are advanced by employers to their workmen for doing specific work. Where a loan was advanced to a workman not for doing any particular work and the work which he was doing at the time that he took the loan had been finished and nothing of it remained to be done:

Held, that Act XIII of 1859 did not apply. GIGA *v.* MUHAMMAD AMIN, 10 A. L. J. 468; 13 CR. L. J. 863; 35 A. 61 799

——— ——— ———*Strict interpretation—Employer—Broker or middleman not entitled to proceed.*

The Workmen's Breach of Contract Act is a statute which calls for strict interpretation.

A person who is not an employer of labour or a master but is a mere broker or middleman for the purpose of supplying labour to the employer or master, is not entitled to take proceedings as an employer against a workman under the Act. EMPEROR *v.* NAGA TIMA, 14 BOM. L. R. 956; 13 CR. L. J. 853 789

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CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL NO. 2389 OF 1909.

August 22, 1912.

Present:—Sir Ashutosh Mookerjee, Kt., Judge, and Mr. Justice Beachcroft.

MADAN MOHAN SINGH—PLAINTIFF—APPELLANT

versus

RAJ KISHORI KUMARI—DEFENDANT—RESPONDENT.

Mortgage—Lease from mortgagor after mortgage suit—Lis pendens—Transfer of Property Act (IV of 1882), s. 52—Lease after mortgage but before mortgage suit—Lease valid if granted on usual terms in ordinary course of management—Burden of proof.

A person who obtains a settlement from a mortgagor after the commencement of a suit upon the mortgage, is affected by the doctrine of *lis pendens*, and may be ejected by the purchaser of the property in execution of the mortgage decree.

Binad Lal Pakrashi v. *Kalu Pramanik*, 20 C. 703, explained and distinguished.

A mortgagor in possession may make a lease conformable to usage in the ordinary course of management; for instance, he may create a tenancy from year to year in the case of agricultural lands, or from month to month in the case of houses. But he is not competent to grant a lease on unusual terms, or to alter the character of the land, or to authorize its use in a manner or for a purpose different from the mode in which he himself had used it before he granted the mortgage.

A person, who has obtained a settlement from a mortgagor after the mortgage but before the mortgage suit, can resist a claim for ejectment made by the purchaser in execution of the mortgage decree, only if he can establish that the lease in his favour was granted on the usual terms in the ordinary course of management.

Such a person acquires an interest in the equity of redemption and can claim to redeem on that footing.

Appeal from the decree of the District Judge of Bhagalpur, dated June 11th, 1909, affirming that of the Sub-Judge of Monghyr, dated June 8th, 1908.

Babu *Mohini Mohan Chatterjee*, for the Appellant.

Babus *Jogendra Nath Mukherjee* and *Biraj Mohan Majumdar*, for the Respondent.

JUDGMENT.—This is an appeal on behalf of the plaintiff in an action for declaration of title to land, for declaration that certain entries in the Record of Rights are erroneous, for recovery of possession and for incidental reliefs. The property originally belonged to the husband of the first defendant who executed a mortgage in favour of the plaintiff on the 27th January 1836. The mortgagee sued to enforce his security on the 16th November 1893. The usual mortgage-decree was made on the 20th February 1899. The property was sold in execution and was purchased by the decree-holder on the 19th September 904. The sale was confirmed on the 22nd June 1905. The case for the plaintiff is that, during the pendency of the mortgage suit, the mortgagor settled a number of persons, who are now defendants in this action, on different portions of the land, and these persons later on had their names entered in the Record of Rights as tenants in occupation of the land. The plaintiff, therefore, prays for declaration of his title as purchaser at the mortgage sale and for ejectment of the defendants on declaration that they have acquired no valid interest in the disputed property. The Courts below have concurrently dismissed the suit. On behalf of the plaintiff, this decree of dismissal has been assailed on three grounds, namely, *first*, that such of the defendants as took settlement after the commencement of the mortgage suit and before its termination were affected by the doctrine of *lis pendens*; *secondly*, that such of the defendants, if any, as took settlement before

the commencement of the mortgage suit but after the grant of the mortgage, have acquired no valid title as against the mortgagee, and *thirdly*, that the Courts below have come to a conclusion, erroneous in law, upon the question of the true nature of the land, namely, whether it is *kamat* land as alleged by the plaintiff or *ryati* land as alleged by the defendants.

In so far as the first ground is concerned, it is clear that such of the defendants as may be proved to have obtained settlement from the mortgagor after the commencement of the mortgage suit, are affected by the doctrine of *lis pendens*. Section 52 of the Transfer of Property Act provides in very comprehensive language that during the active prosecution in any Court having authority in British India of a contentious suit in which any right to immoveable property is directly and specifically in question, the property cannot be transferred or otherwise dealt with by any party to the suit or proceeding so as to affect the rights of any other party thereto under any decree or order which may be made therein, except under the authority of the Court and on such terms as it may impose. It cannot be disputed that the grant of a lease by the mortgagor is a transfer of an interest in immoveable property. It cannot also be disputed that when a mortgagor grants such a lease, after the institution of the mortgage suit, he, in any view, deals with the property in suit. If any authority is needed for an elementary proposition of this character, reference may be made to the cases of *Devi Prasad* v. *Baldeo* (1); *Thakur Prasad* v. *Gaya Sahu* (2) and *Gaskell* v. *Durdin* (3). It has been contended, however, on behalf of the defendants-respondents that they are *ryots* in occupation of the land and cannot, consequently, be ejected in view of the decision of a Full Bench of this Court in the case of *Binad Lal Pakrashi* v. *Kalu Pramanik* (4). In this case, it was ruled that a *ryot*, who has been inducted into the land by a trespasser in possession and who has accepted settlement *bona fide*, acquires a right to hold the land, within the meaning of section 5 of the Bengal Tenancy Act. This principle has been applied to cases of agricultural tenants who have been settled on land by a middle-man who holds for a limited term, and it has been ruled in *Atal Rishi* v. *Lakshmi Narain Ghose* (5) that an agricultural tenancy so created continues in operation even after the expiry of the lease of the grantor. It was pointed out, however, in the case of *Upendra Narain Bhattacharya* v. *Protab Chandra Pardhan* (6) that the principle enunciated in *Binad Lal Pakrashi* v. *Kalu Pramanik* (4) is a great encroachment upon the ordinary rules of law and, consequently, should be applied with caution. Instances of cases where the Court has declined to extend the application of the doctrine in question will be found in *Jonab Ali* v. *Rakibuddin Mallik* (7); *Peary Mohun Mandal* v. *Radhika Mohun Hazra* (8) and *Kazi Nawaz Khoda* v. *Surendra Nath Dey* (9). We are clearly of opinion that the principle should not be extended so as to affect the application of the doctrine of *lis pendens*; and section 52 of the Transfer of Property Act cannot be frittered away by the application of the doctrine recognised in *Binod Lal Pakrashi* v. *Kalu Pramanik* (4). The defendants, who obtained leases from the mortgagor after the institution of the mortgage suit are, consequently, not entitled to resist the claim of the plaintiff.

In so far as the second ground is concerned, we have to consider the position of such of the defendants, if any, as obtained settlements from the mortgagor before the mortgage suit was instituted but after the execution of the mortgage. It has been broadly contended on behalf of the appellant that a lease, granted by a mortgagor after the execution of the mortgage in no way binds the mortgagee, and in support of this view, reliance has been placed upon the case of *Wazir Ali* v. *Moti Chand* (10). It may be conceded, as was said by Lord Selborne in *Corbett* v. *Plowden* (11), that if a mortgagor left in possession grants a lease without the concurrence of the mortgagee, (and for this purpose, it makes

(1) 18 A. 123; (1896) A. W. N. 13.
(2) 20 A. 349.
(3) 2 Ball & Beaty 167.
(4) 20 C. 706.
(5) 10 C. L. J. 55; 2 Ind. Cas. 417.
(6) 8 C. W. N. 320; 31 C. 703.
(7) 1 C. L. J. 303; 9 C. W. E. 571.
(8) 5 C. L. J. 9; 8 C. W. N. 315.
(9) 5 C. L. J. 33; 11 C. W. N. 201; 34 C. 109.
(10) 2 A. L. J. 294.
(11) 25 Ch. D. 678 at p. 681; 54 L. J. Ch. 109; 56 L. T. 740; 32 W. R. 667.

MADAN MOHAN SINGH *v.* RAJ KISHORI KUMARI.

no difference whether it is an equitable lease by an agreement under which possession is taken or a legal lease by actual demise), the lessee has a precarious title, inasmuch as although the lease is good as between himself and the mortgagor who granted it, the paramount title of the mortgagee may be asserted against both of them. This doctrine appears to have been recognised in the cases of *Wazir Ali* v. *Moti Chand* (10); *Chunni* v. *Thakur Das* (12) and *Macleod* v. *Kissan Vithal Singh* (13). In our opinion, it cannot be disputed that a person, taking a lease from a mortgagor after the mortgage, acquires an interest in the equity of redemption and can claim to redeem on that footing. But this principle, which was recognised in *Radha Pershad Misser* v. *Monohur Dass* (14), *Kasimunnissa* v. *Nilratana Bose* (15); *Radha Bai* v. *Shamrav* (16), *Paya Matathil Appu* v. *Kovamel Amina* (17) and *Raghunandan Prosad* v. *Ambika Singh* (18), does not support the extreme contention of either of the parties. The doctrine does not assist the appellant, because it does not justify the inference that a lessee from the mortgagor acquires no interest whatever in the property demised to him, nor does it assist the respondent in his contention that a lease of this character is always operative against the mortgagee. The true point of view was indicated in the observation of Sir James Parke in *Pope* v. *Biggs* (19), that the mortgagor may be considered as acting in the nature of a bailiff or agent for the mortgagee. Consequently, if the moatgagor, after he has granted the mortgage, deals with the property in the usual course of management, the interest created by him may be rightly deemed operative against the mortgagee. An illustration of this view will be found in the case of *Moreland* v. *Richardson* (20), where a person took a mortgage of a chapel and burial ground. It was held that as the object of the burial ground is to grant rights of burial, this being the mode in which such property is dealt with, the mortgagee was not entitled to disturb the graves of those who had been buried on the land, while the mortgagor continued to hold it. The same principle was recognised in *Bani Pershad* v. *Reet Bhuniun Singh* (21). As the case is very imperfectly reported, we have examined the record and ascertained the question in controversy. The proprietor of an estate mortgaged it on the 12th March 1861. On the 7th July 1862, the mortgagor granted an *ijara pattah* of the property for a term of ten years. The mortgagee subsequently sued the mortgagor alone, and got a decree. At the execution sale which followed, the property was sold on the 24th December 1863. The purchaser sued on the 12th March 1867 to eject the lessee, on the ground that as he had acquired the property in the condition in which it was when mortgaged, the lease, which would otherwise run till the 7th July 1872, did not bind him. The Court of first instance overruled this contention as too broadly formulated, and held that as the mortgagor had in good faith granted the lease for a limited term on a fair and reasonable rent, the mortgagee or the purchaser in execution of his decree could not repudiate it, specially as the mortgage-deed did not prohibit the grant of temporary leases to middle-men or cultivators. On appeal, the District Judge affirmed this view and declined to accept the broad contention that leases of all descriptions granted by a mortgagor were void as against the mortgagee. On second appeal to this Court, Jackson and Mitter, JJ., took substantially the same view. It cannot, however, be maintained, as was pointed out by Lord Justice Romer in *Reynolds* v. *Ashby* (22), that the mortgagor has anything like a general authority to deal with or affect the mortgaged property during his possession thereof. The true position thus is that the mortgagor in possession may make a lease conformable to usage in the ordinary course of management; for instance, he may create a tenancy from year to year in the case of agricultural lands or from month to month in the case of houses. But it is not competent to the mortgagor to grant a lease on unusual terms, or to alter the character of the

(12) 1 A. 126.
(13) 30 B. 250 at 269; 6 Bom. L. R. 996.
(14) 6 C. 317; 7 C. L. R. 293.
(15) 8 C. 79; 9 C. L. R. 173; 10 C. L. R. 11.
(16) 8 B. 168.
(17) 19 M. 151.
(18) 29 A. 679; A. W. N. (1907) 227; 4 A. L. J. 703.
(19) 9 B. & C. 245 at 258; 4 Man. & Ry. 193; 7 L. J. (o. s.) K. B. 246; 32 R. R. 665.
(20) 24 Beav. 33; 26 L. J. Ch. 690; 3 Jur. (N. s.) 1189; 5 W. R. 672; 116 R. R. 18.
(21) 10 W. R. 325.
(22) (1903) 1 K. B. 87 at p. 102; 72 L. J. K. B. 51; 51 W. R. 405; 87 L. T. 640; 19 T. L. R. 70.

land or to authorise its use in a manner or for a purpose different from the mode in which he himself had used it before he granted the mortgage. In the case before us, therefore, if there are any defendants, who have obtained settlement from the mortgagor after the mortgage, but before the commencement of the mortgage suit, they can resist the claim of the plaintiff, only if they establish that the leases in their favour were granted on the usual terms in the ordinary course of management: such a plea, if established—and it must not be overlooked that the burden of proof in this matter is upon them—will furnish a complete answer to the claim of the plaintiff. We may observe in this connection that the plaintiff alleged that the land was *kamat*, that it had never before been let out to tenants but had always been cultivated by the proprietor by hired labourers or by his servants, and that the mortgagor designedly settled *ryots* on the land with a view to prejudice, if possible, the position of the mortgagee. These allegations must be kept in view in the determination of the question whether the settlements with the defendants were made in the ordinary course of management of the estate. The second ground urged on behalf of the appellant must, therefore, prevail.

In so far as the third ground is concerned, it must be conceded that the judgment of the District Judge is open to criticism upon the question of the character of the disputed land. Section 120 of the Bengal Tenancy Act lays down rules for determination of private lands of proprietors. The first sub-section formulates two tests to which a detailed reference is for our present purposes not necessary, because as the District Judge has found the case has not been brought within either of the two clauses. The appellant contends, however, that the provisions of the second sub-section of section 120 have been overlooked. That sub-section provides that in determining whether any land ought to be recorded as the proprietor's private land, the Revenue Officer (or the Civil Court, as the case may be) shall have regard to local custom and to the question whether the land was, before the 2nd day of March 1883, specifically let as proprietor's private land, and to any other evidence that may be produced; but shall presume that land is not a proprietor's private land until the contrary is shown. The District Judge has referred to the absence of evidence of local custom, but he does not specifically consider whether there is "any other evidence" as mentioned in sub-section 2 of section 120. The question of the true character of the land must, therefore, be re-considered, with reference to the terms of sub-section (2) of section 120 upon the evidence on the record. The third ground, consequently, prevails.

We may add that upon the question of the point of time when each of the tenants-defendants was settled on the land, the parties will be at liberty to adduce fresh evidence. Such evidence may be taken by the District Judge or taken by the Court of first instance under his direction and submitted to him with its finding thereon.

The result is that this appeal is allowed, the decree of the District Judge set aside and the case remanded to him for re-consideration.

The costs of this appeal will abide the result.

Appeal allowed;
Case remanded.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 523 OF 1911.

August 1, 1912.

Present:—Mr. Justice Sundara Aiyar and Mr. Justice Sadasiva Aiyar.

GANAPATHI AIYAR—PLAINTIFF—APPELLANT

versus

SIVAMALAI AND OTHERS—2ND DEFENDANT'S LEGAL REPRESENTATIVES AND 1ST DEFENDANT—RESPONDENT.

Will—Natural father, executor—Alienation by legatee—Son—Suit to recover alienated properties—Limitation Act (XV of 1877), Sch. II, Arts. 44, 91 not applicable—Alienation, valid, if made in due course of administration—Probate and Administration Act (V of 1881)—Probate—Letters of Administration—Title of executor not obtaining Probate.

A., as legatee under a Will, sued in 1908 to recover certain properties sold by *B.*, his natural father and executor under the Will, to *C.* in 1897.

The suit was instituted more than three years after *A.* attained majority; *C.* contended that *B.* had authority to sell the land and the sale was for discharging certain debts due by the deceased testatrix:

Held, (1) that Article 44 of the Limitation Act did not apply, as the sale must be held to have been made by *B.* in his capacity as executor and not as guardian;

GANAPATHI AIYAR v. SIVAMALAI.

(2) that Article 91, too, did not govern the case, because *A.* could succeed without getting the alienation set aside. *B*'s alienation would be binding on him if it was valid; if it was not, it would have no effect as against him.

There is no provision in the Probate and Administration Act which requires a person appointed as executor under a Will to take out Probate or Letters of Administration. There is nothing to prevent the executor from acting as executor and exercising the powers given to him under the Act without obtaining Probate.

Sheik Moosa v. *Sheik Essa*, 8 B. 241, *Mathuradas Lavji* v. *Madhanji*, 10 B. 468, followed.

Sarat Chandra Banerjee v. *Bupendra Nath Basu*, 25 C. 103, explained, discussed and distinguished.

An executor has the power to sell the estate for the purposes of administration and the alienee must be protected in the absence of any allegation that he was a *mala fide* purchaser, having knowledge that the sale was not made, in due course of administration.

Second appeal against the decree of the District Court of Coimbatore, in A. S. No. 106 of 1910, preferred against that of the District Munsif of Erode, in O. S. No. 480 of 1908.

Mr. *T. M. Krishnaswami Aiyar*, for the Appellant.

Mr. *L. A. Govindaraghava Aiyar*, for the Repondent.

JUDGMENT.—The plaintiff, as legatee under a Will, sues to recover certain properties which were sold by the 1st defendant, his natural father and executor under the Will, to the 2nd defendant in 1897. The suit was instituted in 1908. The plaint alleged that the sale was not binding on the plaintiff. The second defendant contended that the 1st defendant had authority to sell and that the sale was made for discharging certain debts due by the deceased testatrix. The District Munsif held that the sale was not binding on the plaintiff and gave a decree in his favour. On appeal, the District Judge disposed of the case on the question of limitation. He held the suit barred as it was instituted by the plaintiff more than three years after the date of his attaining majority; he regarded the suit as one to set aside an alienation made by a guardian and applied Article 44 of the Limitation Act. The 2nd defendant has not contended that the sale was made by the 1st defendant in his capacity as guardian. We are of opinion that the finding on the question of limitation cannot be upheld. The 1st defendant was executor and he had the powers of an executor. His right to deal with the estate must be regulated by rules relating to the powers and duties of an executor subject to any express provisions that may be contained in the Will. There are in the Will in this case no provisions either restricting or extending the scope of the executor's powers. The act cannot be regarded as having been done by the executor as a guardian when his powers were regulated by the rules relating to an executor.

Article 44 of the Limitation Act must, therefore, be held to be inapplicable. Mr. Govindaraghava Iyer contends that Article 91 must govern the case. We cannot agree with him. We do not think that the plaintiff could not succeed in recovering the property without setting aside the alienation. The alienation was not one made by him or by any one from whom he claims the property as heir. The executor's alienation would be binding on the plaintiff if it was valid; if it was not, it would have no effect as against him. It cannot be held to be a transaction binding on him until he set it aside, although, no doubt, he could ratify the act done by the executor. No authority has been cited in support of the application of Article 91 in such a case. We hold it is not applicable.

The District Judge has not recorded any finding on the merits of the case, that is, on the question whether the alienation is binding on the plaintiff. We propose to decide the question ourselves instead of remanding the case for decision by the Appellate Court. The plaint does not contain any allegation that the 2nd defendant was aware that the sale was not a proper act of administration and was not required for the purpose of discharging debts of the deceased. Undoubtedly, the plaintiff was bound to allege it and the *onus* would be on him to show that the 2nd defendant's conduct disentitled him to the protection which alienees from executors are entitled under the law. If, therefore, the 1st defendant was, at the date of the sale, entitled to exercise the powers of executor, the sale must be upheld. But it was argued by Mr. T. M. Krishnasami Iyer for the appellant that as Probate had not been obtained of the Will or Letters of

Administration taken out with the Will annexed, the 1st defendant could not exercise the powers of an executor. He urges that the property of the deceased testator would vest in the 1st defendant only if and when he took out Probate or Letters of Administration and as he never did so, he never became possessed of the status and powers of an executor. We are unable to uphold this contention. There is no provision in the Probate and the Administration Act, which requires a person appointed as executor under a Will to take out Probate or Letters of Administration. Section 187 of the Indian Succession Act which provides that no right as legatee or executor under a Will can be enforced unless Probate or Letters of Administration have been taken out, has not been enacted in the Probate and Administration Act. It was imported into the Hindu Wills Act but it was, apparently for very good reason, considered undesirable to embody it in the Probate and Administration Act. Under section 4 of the Act, all the property of the deceased vests in the executor as such Probate is not necessary to make a person an executor. His title is derived under the Will. If section 187 of the Succession Act had been imported into the Probate and Administration Act, then neither the executor nor any persons claiming as alienees under him would be entitled to enforce any right as executor or alienee. But we can see nothing in the Act as it stands to prevent the executor from acting as executor and exercising the powers given to him under the Act without obtaining Probate. This was the view taken in *Sheik Moosa* v. *Sheik Essa* (1) and *Mathuradas Lavji* v. *Goculdas Madhowji* (2). In the former case, Sarjeant, C. J., states that the law is the same in this country as in England as to the title of an executor to the property devised by a Will, that Probate is regarded as the authentic evidence of the Will itself, from which the executor derives his title and by virtue of which the property vests in him from the death of the testator, from which time the executor would be entitled to collect the debts due to the deceased. Mr. Krishnasamy Iyer has referred us to a case, *Sarat Chandra Banerjee* v. *Bupendra Nath Basu* (3), but the question in that case was as to the validity of a sale made by an executor under a Hindu Will in the year 1864, long before the Probate and Aministration Act was passed. It was contended on behalf of the alienee that the acts of the executor were as valid as if they had been done after Act V of 1881 had come into force. Reliance was placed on section 2 of Act V of 1881, which lays down that, "Chapters II to XIII, both inclusive, of this Act, shall apply in the case of every Hindu, Mahomedan, Buddhist and of every person exempted under section 337 of the Indian Succession Act of 1865, dying before or after the said 1st day of April 1881." The argument was that as the provisions of the Act are applicable to the case of a Hindu dying before April 1881, executors under the Will in question had the powers given by the Act. It would probably have been quite enough to observe in answer to such an argument that no person could in 1864 have powers which were given to an executor only in 1881, though some other provisions of the Act of 1881 might be applicable to Wills made before that date, for instance, Probate of a Will made before 1881 could be obtained under the provisions of that Act. Before the Probate and Administration Act was passed, when there was no provision for granting Probate or Letters of Administration with respect to Hindu Wills, the position of a Hindu executor was taken to be that of a mere manager and not of one in whom the legal estate in the properties of the deceased vested. Whether by virtue of section 4 of Act V of 1881, the property of the deceased could be taken to have vested, immediately on the death of the deceased, in a person appointed as executor by a Will made before 1881, it is unnecessary to consider. But apparently the learned Judges who decided the case, regarded the executor's powers as depending on the question whether title vested in him on the death of the deceased. There are, no doubt, observations to be found in the judgment of these learned Judges which would show that in the case of a Hindu dying before 1881, if the executor or administrator should wish to get the benefit

(1) 8 B. 241.
(2) 10 B. 468.
(3) 25 C. 103.

of section 4 of the Act, he should come in and prove the Will and take out Probate or Letters of Administration and references are made to the preamble of the Act and the heading II, in which section 4 is to be found, the preamble stating that it is desirable to provide for the grant of the Probate of Wills and Letters of Administration to the estate of certain persons and the heading of Chapter II being 'Grant of Probate and Letters of Administration.' The inference is apparently drawn that a party could obtain the benefits of the provisions of the Act only by obtaining Probate or Letters of Administration, but this inference, so far as this decision is concerned, is expressly limited to the case of a Hindu dying before April 1881. We cannot assume that the learned Judges would have taken the same view with respect to Wills made by a person who died after 1881. If the learned Judges had taken the view which we do, that no executor could before 1881 claim powers which were for the first time given by that Act, they would probably not have considered it necessary to rest their decision on the ground that a person who did not take out Probate of the Will of a testator who died before 1881, could not claim the benefit of any of the provisions to the Act. We do not think that either the preamble or the heading of Chapter II requires such a construction to be put on the words of section 4. That section certainly does not relate to the grant of Probate and would be beyond the scope of the heading and the preamble. The fact is that the Act contains many provisions which would not strictly come within either. The 1st defendant in this case, in our opinion, had, as an executor, the power to sell the estate for the purposes of administration, and the 2nd defendant must be protected in the absence of any allegation that he was a *mala fide* purchaser having knowledge that the sale was not made in due course of administration. In the result, therefore, the decree of the Appellate Court must be affirmed but, in the circumstances of the case, we shall make no order as to the costs of the second appeal.

Decree confirmed.

CALCUTTA HIGH COURT.

REGULAR CIVIL APPEAL No. 20 OF 1910.

July 30, 1912.

Present:—Sir Ashutosh Mookerjee, Kt., Judge, and Mr. Justice Holmwood.

SURYA NARAIN JHA—PLAINTIFF—APPELLANT

versus

BANWARI JHA AND OTHERS—DEFENDANTS—RESPONDENTS.

Arbitration—Award—Decree based on award if appeable on ground that there was no valid award—Application to set aside award—Period of limitation, if Court can extend—"If an application has been made to set aside award", meaning of—Civil Procedure Code (Act XIV of 1882), s. 522—Limitation Act (IX of 1908), s. 5, Sch. I, Art. 158.

A decree based upon an award is not open to appeal on the ground that there was no award valid in law.

Ghulam Jilani v. *Muhammad Hassan*, 29 C. 167; 12 M. L. J. 77; 29 I. A. 51; 4 Bom. L. R. 161; 6 C. W. N. 226; 25 P. R. 1902, relied upon.

Raja Har Narain Singh v. *Chowdhrani Bhagwant Kuar* 13 A. 300; 18 I. A. 55, distinguished.

Indur Subbaramani Reddy v. *Kandadai Rajmanner Ayyangar*, 26 M. 47 and *Muhammad Abid* v. *Muhammad Asghar*, 8 A. 64; (1886) A. W. N. 2, not followed.

Under section 5 of the Limitation Act, the Court has no authority to receive an application to set aside an award after the time prescribed by Article 158 of the Act. It is not competent to the Court to extend the time prescribed by that Article.

The expression "if no application has been made to set aside the award" in section 522 of the Civil Procedure Code is comprehensive enough to cover the case of an application to set aside the award on the ground that there was no award valid in law, and refers to a contingency other than the remission of an award.

Appeal from the decree of the Sub-Judge of Deoghur, dated July 28th, 1909.

Babus *Dwarka Nath Chakravarti* and *Romesh Chandra Sen*, for the Appellant.

Babus *Mohendra Nath Roy*, *Ambika Pada Chowdhury* and *Peary Mohan Chatterjee*, for the Respondents.

JUDGMENT.—This appeal is directed against a decree made under section 522 of the Code of Civil Procedure of 1882, in confirmation of an award of arbitration. A preliminary objection has been taken to the competency of the appeal, because under that section, an appeal does not lie from such decree except in so far as the decree is in excess of or not in accordance with the award. As the decree is not assailed on behalf of the appellants on the ground that it is in excess of or not in accordance with the award, the appeal is *prima facie* incompetent.

SURYA NARAIN JHA *v.* BANWARI JHA.

It has been argued, however, on behalf of the appellant, upon the authority of the decisions in *Indur Subbaramani Reddy* v. *Kandadai Rajamanner Ayyangar* (1) and *Muhammad Abid* v. *Muhammad Asghar* (2), that inasmuch as the decree is assailed on the ground that there was no award valid in law, the appeal is competent. But this contention cannot possibly prevail, in view of the plain language of section 522, and of the exposition of the law by the Judicial Committee in *Ghulam Jilani* v. *Muhammad Hassan* (3). Our attention, however, has been invited to another decision of the Judicial Committee in *Raja Harnarain Singh* v. *Choudhrani Bhagwant Kuar* (4), where an appeal, under somewhat similar circumstance, was allowed to be heard without any question as to its competency. In that case, the award had been filed after the expiry of the time prescribed by the Court, and it was held by the Judicial Committee that there was no legal award which could be made the foundation of a decree. It is clear, however, from the judgment of the Judicial Committee that no question as to the competency of the appeal was raised either before their Lordships or in the High Court. Consequently, that decision cannot be treated as in any way in conflict with the later decision of the Judicial Committee in the case of *Ghulam Jilani* v. *Muhammad Hassan* (3).

It is, further, worthy of note that even if the appellants were allowed to invite this Court to interfere in the exercise of its revisional jurisdiction, he would still find himself in inextricable difficulty, as no application was made on his behalf to the Court below to set aside the award. The matter was referred to the arbitrators on the 14th March 1907. The award was filed on the 8th July 1909. The Court thereupon adjourned the case till the 18th July and directed the parties to file objections, if any, on or before that date. This was in strict conformity with Article 158 of the second Schedule of the Limitation Act. On the 17th July, it was discovered that the date to which the case had been adjourned was a Sunday; the Court thereupon adjourned the case to the 28th July. We cannot interpret this order in the sense that the time within which objection could be filed was also thereby extended to the 28th July. In fact, it was not competent to the Court to extend the period of ten days prescribed by Article 158, because, under section 5 of the Limitation Act, the Court has no authority to receive an application to set aside the award after the expiry of the time prescribed by that Article. The appellant suggests, however, that he was misled by the order of the 17th July 1909 and alleges that he could not appear before the Judge on the date fixed, as the Court was held on that date in a place different from the locality wherein the Court was ordinarily held. It is not necessary for us to determine whether this latter allegation is or is not well founded on fact. The position is unassailable that no exception was taken within the time prescribed by Article 158 and it was not competent to the Court to extend the time prescribed by that Article. It thus became obligatory on the Court to confirm the award. But it has been ingenuously argued that an application to set aside the award was unnecessary, because the award had, in the eye of law, no existence, as the reference to arbitration was made with the concurrence of a person who had no authority to act on behalf of the guardian of the appellant, an infant at that time. This contention is clearly fallacious. Section 522 of the Code of 1882 provides that if the Court sees no cause to remit the award or any of the matters referred to arbitration for re-consideration in the manner aforesaid, that is, under sections 520 and 521, and if no application has been made to set aside the award or if the Court has refused such application, the Court shall proceed to give judgment according to the award. The expression 'if no application has been made to set aside the award' is clearly comprehensive enough to cover a case of the present description, and refers to a contingency other than the remission of an award. The award here, if not successfully challenged, would be *prima facie* binding upon the appellant; if there was good reason to assail the award, it was competent to his guardian *ad litem* to apply to the Court to set it aside within the time prescribed by Article 158. This was not done; and the Court had thus no other course open than to record an order of confirmation.

(1) 26 M. 47.
(2) 8 A. 64; (1886) A. W. N. 2.
(4) 13 A. 300; 18 I. A. 45.
(3) 29 C. 167; 12 M. L. J. 77; 29 I. A. 51; 4 Bom. L. R. 161; 6 C. W. N. 226; 25 P. R. 1902.

It has finally been represented to us that the appellant, at the time of the proceeding in the Court below, was an infant, and that, although he has since then attained majority, he is now insane. This may be a matter for regret, but plainly cannot affect our decision. We do not, however, express any opinion upon another aspect of the matter suggested in the course of argument, namely, whether it is possible for the plaintiff to obtain relief in a separate declaratory suit, on the ground of negligence of his guardian *ad litem*. We only hold that the present appeal is incompetent and that, even if we had been invited to interfere in the exercise of our revisional jurisdiction, we could not afford any relief to the petitioner in the events which have happened.

The result is that this appeal is dismissed with costs. We assess the hearing fee at five gold *mohurs*.

Appeal dismissed.

CALCUTTA HIGH COURT.

REGULAR CIVIL APPEAL No. 5 OF 1910.

May 16, 1912.

Present:—Mr. Justice Stephen and Mr. Justice Richardson.

INDRO DEB DAS AND OTHERS—DEFENDANTS—APPELLANTS

versus

AZIZUR RAHAMAN SARKAR AND OTHERS—PLAINTIFFS—RESPONDENTS.

Bond—Construction—Interest to be paid at certain sum per month—Compound interest at end of every six months to be added to principal—Whether interest to be paid on whole sum per month or per cent. per month.

In a bond the debtor agreed to pay, on the principal amount of Rs. 2,000, interest at the rate of Re. 1·9 per month. There was a further provision to this effect: "We shall pay the interest every six months. If we fail to do so, the interest and compound interest shall at the end of every six months be added to the principal and we shall go on paying interest thereon at the aforesaid rate:"

Held, that the interest was to be payable at the rate of Re. 1-9 per cent. per month.

Appeal from the decree of the Sub-Judge of Jalpaiguri, dated September 21st, 1909.

Babu *Karunamoy Bose*, for the Appellants.

Babu *Brojo Lal Chakravarti*, for the Respondents.

JUDGMENT.

STEPHEN, J.—This case arises out of a mortgage-bond executed by the defendants in favour of the plaintiffs. The bond recites that the defendants on the day of execution of the bond borrowed Rs. 2,000 from the plaintiffs. It then goes on to say:—"We shall pay interest on this sum at the rate of Re. 1·9 per month." Further on, there is a provision which is as follows:—"We shall pay the interest every six months from this date. If we fail to do so, the interest and compound interest shall, at the end of every six months, be added to the principal and we shall go on paying interest thereon at the aforesaid rate until the time of re-payment."

Before the lower Court it was argued on behalf of the plaintiffs that the first of these passages meant that interest was to be payable at the rate of Re. 1-9 per cent. per month and that the words "per cent." had been left out by mistake. Under the circumstances, the lower Court allowed evidence to be adduced to show that such a mistake had in fact been made, and eventually held that the proper construction of the document in question was to read the words as though "per cent." had been added.

In appeal, it is argued before us that the lower Court had no authority to admit the evidence that was tendered as regards the making of the mistake and that the construction of the document, is wrong. We cannot take this view. For myself, I must admit that had I to construe only the words "we shall pay interest on this sum at the rate of Re. 1-9 per month," I should hold that the words are intelligible in themselves and mean that Re. 1-9 would be due on the whole sum of Rs. 2,000. This is an intelligible construction. It creates a provision which it was open to the parties to make. Looking, however, at the subsequent words relating to compound interest, it seems to me that the document becomes absolutely unintelligible unless the words "per cent." are included in the earlier sentence. It is not to be supposed that compound interest was to be reckoned at the rate of Re. 1·9 on the sum of Rs. 2,000. Some other rate was in contemplation and I have no doubt that that was intended to be indicated by the words "per cent." which have been omitted by mistake. Taking the document as a whole, I consider that the Judge is

correct in reading it as he did. I would, therefore, dismiss the appeal with costs, the hearing-fee being assessed at two gold *mohurs*.

RICHARDSON, J.—I agree in the conclusion arrived at by my learned brother. The question, as I understand it, is one of construction and for my part, bearing in mind the universality of the practice of fixing the rate of interest at a rate per cent., I think that the words to be construed can only mean as they stand that interest was to be chargeable at the rate of Re. 1-9 per cent. per month. If the document be read as a whole, there can be no room for doubt on the subject.

Appeal dismissed.

BOMBAY HIGH COURT.
FIRST CIVIL APPEAL NO. 110 OF 1911.
July 2, 1912.
Present:—Sir N. G. Chandavarkar, KT., Ag. Chief Justice, and Mr. Justice Batchelor.

VITHAPPA DEVAPPA PATIL—APPELLANT
versus
BASAGOWDA DEVAPPA PATIL—RESPONDENT.

Limitation Act (IX of 1908), s. 18, Sch. I, Art. 127—Fraud—Knowledge of fraud—Burden of proof—Nature of evidence—Partition—Private partition found to be fraudulent—Suit for fresh partition—Exclusion of plaintiff—Limitation.

Where a Court finds that a partition, effected between the co-parceners of a joint family, was unfair and inequitable, as one of the co-parceners had been imposed upon, the case is reduced to one of a fraudulent partition, and the cause of action for a suit for partition is, then, in substance to set aside that partition on the ground of fraud and to treat the family as joint and seek for a fresh partition of the family estate.

For the purpose of limitation, such a case is taken out of Article 127 of the Limitation Act.

Where fraud is found and the Court has to apply the Limitation Act in order to see whether the suit is within time, the Court ought to have evidence of a definite character to show the point of time at which the plaintiff had not merely suspicion but definite knowledge of fraud. In order to make limitation operate when a fraud has been committed by one who has obtained property thereby, it is for him to show that the injured plaintiff has had clear and definite knowledge of the facts constituting the fraud, at a time which is too remote for the suit to be brought.

Rahimbhoy Habibbhoy v. *Charles Agnew Turner*, 17 B. 341; 20 I. A. 1, followed.

First appeal from the decision of the first class Subordinate Judge at Bijapur, in Civil Suit No. 175 of 1909.

Mr. *Nadkarni*, (with him Mr. *S. V. Palekar*), for the Appellant.

Mr. *K. H. Kelkar*, for the Respondent.

JUDGMENT.—The present suit was one for partition brought by the appellant. His allegation was that he, defendant No. 1 and defendants Nos. 2 and 3, the sons of defendant No. 1, and two brothers of his, Rama and Laxmana, were members of a joint family, and that in 1886 defendant No. 1, the eldest member and manager, effected a partition with Rama and Laxmana, so that these two brothers having become separated in estate left the rest of the members of the family including the plaintiff joint, and that in 1907 defendant No. 1 turned the plaintiff out of the family house, in which he was living with the said defendant. Hence the suit for partition.

Defendant No. 1 in his written statement pleaded that the plaintiff was not entitled to a share in the property, because there had been already a partition among the members of the family in the year 1886. In support of that allegation, he produced a *farkhat* executed by Rama and Laxmana and by Laxmana as the guardian of the plaintiff who was then a minor.

The defendants' case was that since 1886 the plaintiff had been living separately, enjoying the share of the property which had been allotted to him at the partition in 1886, and that, therefore, the plaintiff had been excluded from the general family property since that year, so that the claim was barred under Article 127 of the Limitation Act.

The Subordinate Judge found the partition of 1886 proved but he held that that partition was unfair and inequitable and was also the result of fraud. The finding on the question of fraud is as follows:—"Both Rama and Laxmana thus seem to have been hoodwinked and deceived by defendant No. 1 in the matter of the partition of the family property. Rama admits his having been imposed upon and says that he has been content with what was given to him. When two of the three brothers, deceived and imposed upon as noted above, have taken no steps to obtain redress for the wrong

done to them and have submitted to it quietly, is it probable that the third (the plaintiff) who, though a minor, was made to throw in his lot with the two others would act differently?" This is a substantial finding that defendant No. 1 acted fraudulently in the matter of the partition especially with reference to the plaintiff who was then a minor and whose interests all the three brothers, defendant No. 1, Rama and Laxmana, were bound to protect. After this finding, the case became reduced to one of a fraudulent partition and the plaintiff's cause of action then is in substance to set aside that partition on the ground of fraud and to treat the family as joint and seek for a fresh partition of the family estate. In other words, for the purpose of limitation, the case was taken out of Article 127 of the Limitation Act. Notwithstanding his finding on the question of fraud, the Subordinate Judge held that, because in virtue of the partition of 1886 Rama, Laxmana and the plaintiff had been living apart from defendant No. 1 and dealing with the estate which had been allotted to them at the partition, it must be held that they knew they had been excluded from the joint family property by defendant No. 1, and that the claim was barred under Article 127.

Where fraud is found and the Court has to apply the Limitation Act in order to see whether the suit is within time, the Court ought to have evidence of a definite character to show the point of time at which the plaintiff had not merely suspicion but definite knowledge of fraud: see *Rahimbhoy Habibbhoy* v. *Charles Agnew Turner* (1), in which their Lordships of the Privy Council say that "in order to make limitation operate when a fraud has been committed by one who has obtained property thereby, it is for him to show that the injured complainant has had clear and definite knowledge of the facts, constituting the fraud, at a time which is too remote for the suit to be brought. Suggestion of his having been defrauded does not amount to such knowledge as is required by section 18 of the Indian Limitation Act XV of 1877."

Under these circumstances, the lower Court having failed to pursue the question of fraud from the point of view of the Limitation Act by the light of the authority just cited, it becomes necessary for this Court sitting in appeal to direct that there ought to be a fresh trial. The plaint will have to be amended. The plaintiff, no doubt, sues for partition but it now turning out that there had been a partition in the year 1836, the suit must be treated as one brought to set aside that partition on the ground of fraud, and the suit seeking a general partition of the family estate, all those who were co-parceners in 1886 or their legal representatives as the case may be, must be brought upon the record as defendants. The plaintiff must amend his plaint seeking relief on the ground of fraud alleging what that fraud is and when he came to have knowledge of it.

We reverse the decree of the Subordinate Judge and send back the case for a fresh hearing with due regard to the observations in this judgment. The plaintiff must amend his plaint in the manner directed by this Court within two months.

The Subordinate Judge will raise proper issues having regard to the law which has been pointed out by this Court's judgment.

All the family property will have to be brought into hotchpot as it existed in 1886 and though the plaintiff has abandoned his claim to the moveable property in appeal, yet, it will be open to the other parties who are brought upon the record to claim that it should be also brought into hotchpot and treated as part of the subject-matter of the suit. Whether the plaintiff, by reason of his having abandoned in appeal the claim for moveable property, has any right to claim it again, is a question on which this Court expresses no opinion at present. It will be open to the Subordinate Judge to deal with that question on its own merits at the hearing.

All costs hitherto incurred will be costs in the cause.

Decree reversed; Case remanded.

(1) 17 B. 341; 20 I. A. 1.

MCINTOSH *v.* BIDHU BHUSAN SEN.

CALCUTTA HIGH COURT.
CIVIL RULE No. 5032 OF 1911.
April 18, 1912.
Present:—Mr. Justice Stephen and Mr. Justice Chatterjee.

W. C. McINTOSH—CLAIMANT—PETITIONER
versus
BIDHU BHUSAN SEN—DECREEE-HOLDER—OPPOSITE PARTY.

Claim—Collusive sale by judgment-debtor to claimant to defraud creditors—Possession of claimant to be deemed as in trust for judgment-debtor—Trust need not be shown to be capable of enforcement—Civil Procedure Code (Act V of 1908), O. XXI, rr. 58, 61.

S., a judgment-debtor, for the purpose of defrauding his creditors, conveyed certain property to *P.*, who again collusively conveyed it to the claimant who took possession. This property being attached by the creditor of *S.*, the claimant put forward a claim:

Held, (1) that the claimant was in possession for the benefit of the judgment-debtor as his trustee and that the claim should be rejected under rule 61, O. XXI of the Civil Procedure Code;

(2) that it was not necessary in order to defeat the claim to show that the trust was one capable of enforcement by law.

Rule against the judgment of the Sub-Judge of Mymensingh, dated August 7th, 1911.

Babu *Harendra Narayan Mitra* (for Babu *D N. Chuckerbutty*) and Babu *Kali Kinkar Chuckerbutty*, for the Petitioner.

Babus *Tara Kishore Chowdhury* and *Hem Chundra Sen*, for the Opposite Party.

JUDGMENT.—This is a claim case under Order XXI, rule 58, in which the lower Court has dismissed the petition of claim. A Rule has been granted calling on the opposite party to show cause why the Subordinate Judge should not be directed to allow the claim of the petitioner on the facts found; to this Rule a clause has been added calling on the opposite party to show cause why the attachment obtained by him should not be set aside as being made without jurisdiction owing to a previous adjudication in insolvency made on the 19th September 1910. The facts of the case as found are as follows: On the 11th September 1909, a husband and wife, Mr. and Mrs. Sophianopulous, sold certain property to Mr. Philipopulous. This sale was not a *bona fide* one, which we understand to mean that it was entered into by Sophianopulous and Philipopulous for the purpose of shielding the property from the creditors of the former. On the 25th June 1910, Philipopulous sold the property to the claimant, who took possession and retained it till the attachment. This sale was a collusive one, being apparently a similar transaction to the first. Philipopulous was adjudicated insolvent on the 19th September 1910, a fact which curiously enough is not mentioned in the judgment of the Court below, though from the terms of the Judge's order we think he must have had it in his mind. The property was attached on the 7th May 1911; and it is against this attachment that the present claim is made. Under Order XXI, rule 60, the Court was bound to make an order releasing the property if it was satisfied that the property, when attached, was not in the possession of Sophianopulous or of some person in trust for him. Under rule 61 if the Court was satisfied that the property was in possession of Sophianopulous or of some other person in trust for him, it was bound to disallow the claim. There is no question of possession by Sophianopulous, and the only question arising under these two rules is whether the property was in the possession of the claimant in trust for Sophianopulous. The findings show that the claimant was in possession of the property under a title which neither he nor Sophianopulous intended should be acted on as between themselves, and that he was in possession for the benefit of Sophianopulous and to defraud his creditors. We are of opinion that, looking at the scope and purpose of the rules in question, it is not necessary in order to defeat the claim to show that the trust is one capable of enforcement by law. Accordingly, we hold that the claimant was in possession in trust for Sophianopulous: and the claim was, therefore, rightly dismissed. As to the second part of the Rule, it may be that the adjudication vested the property in dispute in the Official Assignee: but he has not so far made any objection to the attachment, though he has done nothing that can be taken as admitting its validity as against him We see no reason why on revision we should allow the claimant to take advantage of a right in another which has not yet been asserted.

The Rule is, therefore, discharged with costs, the hearing-fee being assessed at three gold *mohurs*.

Rule discharged.

VELCHAND v. BOURCHIER.

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL No. 783 OF 1911.

July 5, 1912.

Present:—Sir N. G Chandavarkar, Kt., Ag. Chief Justice, and Mr. Justice Batchelor.

VELCHAND CHHAGANLAL—APPELLANT

versus

LIEUT. E. BOURCHIER—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 60—Attachment—Salary of officer of Regular Forces—Army Act (44-45 Vic. Ch. 58), s. 136.

The salary of an Officer of the British Regular Army is not liable to attachment in execution of a decree, under section 60 of the Civil Procedure Code.

Colonel Lecky v. *Bank of Upper India Limited*, 33 A. 529; 8 A. L. J. 487; 9 Ind. Cas. 1023, followed.

Section 60 does not encroach upon the provisions of the Army Act.

Second appeal from the decision of the District Judge of Ahmedabad, in Appeal No. 215 of 1911, confirming that passed by the Joint Subordinate Judge of Ahmedabad, in *Darkhast* No. 188 of 1911.

Mr. *T. R. Desai*, for the Appellant.

Mr. *L. A. Shah*, *amicus curiæ*, for the Respondent.

JUDGMENT.

CHANDAVARKAR, AG. C. J—We are indebted to Mr. Shah for having undertaken to argue this case as *amicus curiæ* for the respondent, but we do not wish to call upon him to reply to Mr. Desai, who has put the case before us very clearly and there is no doubt upon the law that the lower Courts have taken the correct view.

The whole question depends upon the construction of the words of clause 2 (*b*) of section 60, Civil Procedure Code, *viz.*, "Nothing in this section shall be deemed to affect the provisions of the Army Act or of any similar law for the time being in force."

Section 136 of the Statute 44 and 45 Vic., c. 58, amended in 1895, provides that the salary of an Officer in the British Army serving in India shall be paid to him without deduction unless the Legislature in India has directed to the contrary in that behalf.

The question, therefore, is whether there is any such direction in any Act of the Indian Legislature. The only law bearing upon that is clause 2 (*b*) of section 60 to which I have referred.

What is the meaning of the words "to affect the provisions of the Army Act" in that clause? They mean that section 60 shall not have any effect, it shall not encroach upon the provisions of the Army Act. What the Army Act directs is that the salary of the officer in question should be paid to him without any deduction unless the law in India has said expressly or by necessary implication that there shall be such deduction. What the Indian enactment says is that it will not "affect the provisions of the Army Act," that is to say, it leaves the provisions of the Army Act untouched.

Mr. Desai for the creditor argues that an officer of the kind we have in this case is a public officer within the meaning of the Army Act as defined in section 2, clause (17), of the Civil Procedure Code, but we cannot reach that stage unless we first find that clause 2 (*b*) of section 60 paves the way for it. It is that which is the bar to our considering the further question whether the officer falls within the definition of "public officer". The decision of the Allahabad High Court in *Colonel Lecky* v. *Bank of Upper India, Limited* (1) is to the same effect.

For these reasons, the decree must be confirmed.

BATCHELOR, J.—I am of the same opinion. The respondent in this case is an officer of the Second Battalion of the North Staffordshire Regiment, that is to say, he is an Officer of the Regular Forces.

Now, under the Army Act, section 136, the salary of such an officer is not liable to attachment except by virtue of some law made by the Governor-General in Council in that behalf. But the only law made by the Governor-General in Council in that behalf is admittedly section 60 of the Civil Procedure Code, and that section in its explanation, clause 2 (*b*), expressly declares that it does not affect the provisions of the Army Act.

That being so, it seems to me that there is no law of the Governor-General in Council whereby this officer's salary is liable to attachment.

Decree confirmed.

(1). 33 A. 529; 8 A. L. J. 487; 9 Ind. Cas. 1023.

BALAKRISHNA PILLAY *v.* NARAYANASAWMY NAIDU.

MADRAS HIGH COURT.
CIVIL SUIT No. 41 OF 1906.
March 29, 1912.
Present:—Mr. Justice Bakewell.

P. BALAKRISHNA PILLAY AND OTHERS —PLAINTIFFS

versus

M. P. NARAYANASAWMY NAIDU AND ANOTHER—DEFENDANTS

AND

THE OFFICIAL ASSIGNEE—CLAIMANT.

Insolvent Debtor's Act (11—12 *Vict. Ch.* 21), *s.* 7—*Possession of after-acquired immoveable property by insolvent--Adverse to Official Assignee—Limitation Act* (*XV of* 1877), *s.* 28, *Sch. II Art.* 144.

Where an undischarged insolvent acquires immoveable property subsequent to the insolvency and is in possession of the same for over twelve years, his possession is adverse to the Official Assignee and the right of the Official Assignee to the property is extinguished under section 28 of the Limitation Act, 1877.

Kristocomul Mitter v. *Suresh Chunder Deb*, 8 C. 556; 12 C. L. R. 253, followed.

In re New Land Development Association and Gray, (1892) 2 Ch. 138; 61 L. J. Ch. 323; 65 L. T. 404; 40 W. R. 295, *Rowlandson* v. *Champion*, 17 M. 21, *Abdul Kareem Sahib* v. *The Official Assignee of Madras*, 28 M. 168 at p. 171, referred to.

FACTS.—In this case, one Narayanasawmy Naidu became an insolvent in 1880. The joint family, of which he was a member, got considerable properties under a bequest of his paternal aunt, Ammai Ammal, and at a partition in 1896, he got separate possession of his share as representing his branch of the family. He mortgaged certain properties, which fell to his share, in 1902 to the father of the plaintiff and on the said mortgage, a decree was passed on 17th July 1906. On 12th October 1907, the Official Assignee intervened and he was given leave to sell three items of the mortgaged property and to bring the legal representative of the said Narayanasamy Naidu on record, who died in the meanwhile. On 14th September 1909, the 2nd defendant was added as his legal representative. The said mortgaged properties were sold and the sale-proceeds were deposited in Court and the Official Assignee took out this notice of motion for payment to him of the sale-proceeds. It was contended, relying on *Kristocomul Mitter* v. *Suresh Chunder Deb* (1) and *Suja Hossein* v. *Manohur Das* (2) and other authorities on behalf of the plaintiff and 2nd defendant, that the right of the Official Assignee to the property was barred by limitation and he had no right to the sale-proceeds.

Mr. *Nugent Grant*, instructed by Messrs. *King & Partridge*, for the Official Assignee.

Mr. *T. Ethiraja Mudaliar*, for the Plaintiffs.

Mr. *P. Venkataramana Rao*, for the 2nd Defendant.

JUDGMENT.—By an order of the Insolvent Court, dated the 25th October 1880, the property of one Narayanasawmy Naidu, an insolvent, became vested in the Official Assignee of Madras. On the 11th of July 1881, the insolvent obtained his personal discharge but he obtained no order for his discharge in the nature of a certificate, so that by virtue of the vesting order of 1880 and section 7 of the Insolvency Act of 1848, all the estate and interest of the insolvent in any real or personal estate which the insolvent might purchase or which might revert, descend, be devised or bequeathed or come to him, vested in the Official Assignee.

On the 19th August 1902, the insolvent mortgaged to the plaintiffs in this suit certain immoveable property, which he had acquired under the Will of one Ammai Ammal, who died in 1894 as a member of his joint family. The plaintiff brought this suit upon the mortgage and, on 17th July 1906, obtained a decree for sale of the mortgaged property and the payment of Rs. 5,910-13-2 and costs.

On the 12th October 1907, the Official Assignee applied by Judge's summons that the sale-proceeds of the mortgaged property might be paid to him and a consent order was passed directing that the property should be sold and the proceeds paid into Court. On the 15th November 1909, it was ordered that the Official Assignee should have the further conduct of the suit and that the legal representatives of the insolvent defendant, then deceased, should be brought in as parties.

The property has been sold and the Official Assignee now applies that the sale-proceeds now in Court may be paid to him. Under section 7 of the Insolvency Act, the order of 1880 vested the insolvent's after-acquired property in the Official Assignee, without any conveyance or assignment, so

(1) 8 C. 556; 12 C. L. R. 253.
(2) 24 C. 244.

that the bequest contained in the Will of Ammai Ammal conveyed the interest to the insolvent but the property bequeathed passed at once to the Official Assignee [see *In re New Land Development Association and Gray* (3) per Chitty, J., page 145, cited in *Rowlandson* v. *Champion* (4)].

It has been held by the English Courts that when a bankrupt has been having and dealing with present estate, alienations of such property by him, before the trustee in Bankruptcy intervenes, will not be disturbed, but that this rule does not apply to real property which passes by conveyance; and this distinction has been approved by this Court in *Rowlandson* v *Champion* (4).

It follows that the mortgaged property never passed to the insolvent and he never had any lawful power to dispose of it and that his possession was that of a trespasser. It was the duty of the insolvent to account to the Official Assignee for all the property acquired by him and he might possibly have been made criminally liable for mortgaging it to the plaintiff (see Insolvency Act, sections 50, 70) but it does not appear that he was guilty of deceit or committed any fraud upon the Official Assignee [see *Abdul Kareem Sahib* v. *The Official Assignee of Madras* (5).]

I am of opinion that the possession of the insolvent was adverse to the Official Assignee since it did not originate from any lawful title; and it appears from the affidavit of the 2nd defendant that possession commenced in 1894. The right of the Official Assignee to the property was, therefore, extinguished in 1907. [Limitation Act, section 28, Schedule II, Article 144; *Kistocomul Mitter* v. *Suresh Chunder Deb* (1)].

It is unnecessary, therefore, to consider the argument on his behalf that his application of the 12th October 1907 was under section 26 of the Insolvent Act and is not within the Limitation Act or to deal with the procedure adopted by him to which no objection was, moreover, raised by the plaintiffs.

The motion is dismissed with costs, two sets.

(3) (1892) 2 Ch. 138; 61 L. J. Ch. 323; 66 L. T. 404; 40 W. R. 295.

(4) 17 M. 21 at p. 33.

(5) 28 M. 168 at p. 171.

CALCUTTA HIGH COURT.

MISCELLANEOUS CIVIL APPEAL No. 357 OF 1911.

July 29, 1912.

Present:—Mr. Justice Sharfuddin and Mr. Justice Coxe.

BHOGIRATH CHANDRA MANDAL AND OTHERS—JUDGMENT-DEBTORS—APPELLANTS

versus

SITAL CHANDRA SARKAR—DECREE-HOLDER—OPPOSITE PARTY.

Landlord and tenant—Occupancy holding—Transferability—Custom, proof of—Registration of transferee's name on payment of nazar—*Consent of landlord.*

Where there was evidence that *nazars* were as a rule paid to the landlord by the transferees of occupancy-holdings, and on payment of the *nazar*, the purchaser was usually recognised by the landlord as his tenant:

Held, that it was not evidence of any custom by which an unwilling landlord was bound, or evidence that the landlord was compelled, to recognise the purchaser on payment of *nazar*, whether he wished to do so or not.

Appeal from the order of the District Judge of Rungpur, dated April 25, 1911, affirming that of the Sub-Judge of that District, dated September 20th, 1910.

Babu *Surendra Chandra Sen*, for the Appellants.

JUDGMENT.—This appeal arises out of an objection of the judgment-debtors, who are the appellants before us, under section 47 of the Code of Civil Procedure that their *raiyati* holdings, which had been attached, were not saleable by local custom or usage without the consent of the landlord. Both the Courts below dismissed the objection of the judgment-debtors and they have now appealed to this Court.

The proof that these holdings are saleable without the landlord's consent, depends entirely upon a passage in the evidence which has been quoted in the judgment of the first Court. The view of that portion of the evidence taken by the first Court is accepted by the lower Appellate Court. The quotation of the evidence given in the first Court's judgment is this: "There is a custom of the sale of *raiyati jotes* (meaning occupancy holdings) in the *pergunnah*. Without the permission of the *zemindar*, the *jotes* are being sold. If the purchaser pays rent, we take it and give receipt in the name of the old tenants. We do not give *marfat* of the purchaser. Without taking *nazar*, we do not make *kharij-dakhil*. We take order of

the *zemindar* and take *nazar* from the purchaser and then make *kharij-dakhil* . . . . without *nazar* never *kharij-dakhil* is made . . . In these villages, *nazar* is taken at the rate of Rs. 2 per *bigha*. We do not forbid the purchase of *jote* at auction-sale. We make *kharij-dakhil* of the name of purchasers if *nazar* is paid. No objection is taken to it." What this amounts to is that *nazars* are as a rule paid to the *zemindar* and on payment of the *nazars* the purchaser is usually recognised by the landlord. But the passage is not evidence of any custom or usage by which an unwilling landlord is bound, or evidence that the landlord is compelled, to recognise the purchaser on payment of *nazar* whether he wishes to do so or not. There is no other evidence in support of the finding of the Court below, which must, therefore, be regarded as based on no evidence and unsustainable.

We, therefore, set aside the judgments and decrees of the lower Courts and decree this appeal with half costs in this Court, the hearing-fee being assessed at half a gold *mohur*. The appellants before us are entitled to their costs in both the Courts below.

Appeal allowed.

MADRAS HIGH COURT.

LETTERS PATENT APPEAL No. 86 OF 1912.

October 3, 1912.

Present:—Mr. Justice Sundara Aiyar and Mr. Justice Sadasiva Aiyar.

SRIMAT UJJANI SADHARMA SIMHASANANDISWARA CHARAPPATTADHYASKSHA MARULASIDDA RAJA DESIKENDRA MAHASWARMULU—APPELLANT

versus

SRIMAT UJJANI SADHARMA SIMHASANANDESWARA CHARAPATTADHYASKSHA SIDDALINGA RAJA DESIKENDRA MAHASWARMULU, BY HIS AGENT CHENNABASAPPA—RESPONDENT.

Civil Procedure Code (Act V of 1908), *O. XL, r.* 1 —*Appointment of Receiver—Properties not comprised in suit.*

Rule 1, Order XL, of the Civil Procedure Code, 1908, does not empower the Court to appoint a Receiver of properties which cannot be dealt with by the Court in the suit.

Appeal, under section 15 of the Letters Patent, against the order of the Hon'ble Mr. Justice Sankaran Nair, dated 15th August 1912, in Civil Miscellaneous Petition No. 625 of 1912 in Civil Miscellaneous Appeal No. 63 of 1912, presented against the order dated 21st February 1912 in F. A. No. 356 of 1911 in O. S. No. 19 of 1911 on the file of the District Court of Bellary.

Mr. *C. P. Ramaswamy Aiyar*, for the Appellant.

Dr. *M. S. Swaminadhan*, for the Respondent.

JUDGMENT.—The plaintiff in his plaint sued to recover the properties in Schedule A appended to it. When he put in his application for the appointment of a Receiver, he appended another schedule to it, which he called B. The affidavit also stated that the suit was for the recovery of the properties in schedule A. It seems to be fairly clear that the properties in schedule B were not part of those included in schedule A to the plaint. There is nothing in the plaint which can be taken to make the properties in schedule B. appended to the Receiver petition the subject-matter of the suit. We cannot agree with the learned Counsel for the respondent that rule 1, Order XL, of the Code of Civil Procedure, empowers the Court to appoint a Receiver of properties which cannot, in any way, be dealt with by the Court in the suit. A Receiver, therefore, cannot be appointed in this case to take charge of the properties in schedule B appended to the plaintiff's petition. It is suggested that, probably, the Judge did not intend to make the order include these properties, but the order is vague and at least liable to misconstruction. It must be restricted in terms to the properties included in the plaint. We modify the order of the lower Court accordingly. There will be no order as to costs in this Court either in this appeal or in the petition before Mr. Justice Sankaran Nair.

Order modified.

HASANALLI v. POPATLAL PARBHUDAS.

BOMBAY HIGH COURT.

ORIGINAL CIVIL SUIT No. 944 OF 1911.

June 25, 1912.

Present:—Mr. Justice Beaman.

HASANALLI MOLEDINA—APPELLANT

versus

POPATLAL PARBHUDAS—RESPONDENT.

Will—Construction—Satisfaction, doctrine of—Debt due from testator—Legacy of equal sum—Right to debt and legacy—Suit by legatee—Administration of whole estate—Succession Act (X of 1865), ss. 62, 164, 292—Probate and Administration Act (V of 1881), s. 112—Khoja Muhammadans—Hindu Law.

Where the executors do not admit that they hold sufficient assets to meet all claims, the usual and proper course would be, whether either a creditor or a legatee is suing, to have the whole estate administered.

Section 164 of the Succession Act expressly abolishes the doctrine of satisfaction. Although that Act does not apply to Hindus, Muhammadans or Buddhists, there is no doubt that the intention of the Legislature was to announce what they considered to be a generally correct principle of interpretation universally applicable unless overridden by some special provision of local law or usage.

Section 112 of the Probate and Administration Act criticised.

Quære:—Whether a Khoja Muhammadan should be treated for all testamentary purposes as a Hindu governed by Hindu Law?

Advocate General v. *Karamali*, 6 Bom. L. R. 601; 29 B. 133, referred to.

A., a Khoja Muhammadan, had a deposit of Rs. 9,000 with his brother, *B.* *B.* made a Will bequeathing Rs. 9,000 as *bakshis (hiba)* to *A.*:

Held, that *A.* was entitled both to his deposit of Rs. 9,000 and also to the legacy of Rs. 9,000.

Pestonji v. *Framji*, 12 Bom. L. R. 863; 8 Ind. Cas. 180, relied upon.

Mr. *Talyarkhan* (with him Mr. *Kanga*), for the Plaintiff.

Mr. *Shortt* (with him Mr. *Davar*), for the Defendants.

JUDGMENT.—This suit was brought by the plaintiff to recover a deposit of Rs. 9,000 from the estate of the deceased Karmali Moledina and a legacy of equal amount given to him by clause 8 of the Will. The suit was brought against the executors, who resisted the plaintiff's claim on two main grounds: (1) availing themselves of the old and, as far as this country is concerned, exploded doctrine of satisfaction that the legacy in the Will was no more than a payment of the deposit or debt and, therefore, the plaintiff could not have both the debt and the legacy; (2) that inasmuch as the executors had not given their assent to the legacy, the plaintiff could not sue them directly as upon a complete title for that amount, nor as a creditor of the estate could he sue the executors without asking for an administration of the whole estate.

In order to avoid as much as possible unnecessary difficulties arising out of technical defences of that kind, the plaintiff was allowed to amend his plaint so as to ask in the first instance for a declaration that he was entitled to his debt and his legacy; in the next, if necessary, for an administration of the estate. To the plaint so amended, the executors have put in a supplemental written statement, reiterating their defence based upon the doctrine of satisfaction, and further claiming that all parties interested in the estate ought to be joined in this suit. As to that, they will be able to come in in the administration suit if they desire to do so. The executors were asked whether they admitted that they held sufficient assets of the deceased to meet all claims upon the estate, for, if they did, it would probably be unnecessary to make the usual administration decree. They do not admit that they hold sufficient assets to meet all claims; and where that is so, the usual and proper course, no doubt, would be, whether either a legatee or a creditor is suing, to have the whole estate administered.

Before dealing with the substantial objection taken by the executors, I should like to observe in passing, upon their defence under section 112 of the Probate and Administration Act, that that section appears to me to be unfortunately worded. If it really means what it says, the practical consequences of applying it strictly logically would be absurd, for, however just a legatee's claim may be, no Court could decree it upon an incomplete title. Therefore, as long as the executors chose to withhold their assent, it is difficult to find any remedy of which the legatee might effectually avail himself. The executors appear to have thought that while this objection would be fatal to a suit brought directly against them, it would be obviated as soon as the form of the suit was changed and administration of the estate granted. Merely as a matter of academical logic, I do not see how that in any way affects the position. I cannot bring myself, however, to believe that the law really meant to leave legatees thus completely at the mercy

of perverse or capricious executors; and it certainly does appear to me that the Legislature might with advantage alter or add to the words of this section and the section which corresponds with it in the Indian Succession Act.

I now pass to a consideration of the executors' main defence. I have already said that, as far as this country is concerned, the doctrine of satisfaction is exploded. Section 164 of the Indian Succession Act expressly abolishes it, and although that Act does not apply to Hindus, Mahomedans or Buddhists, it cannot be doubted that it was the intention of the Legislature to announce what they considered to be a generally correct principle of interpetation universally applicable unless overridden by some special provision of local law or usage. I may further add that if Khojas are really to be treated as Hindus for the purposes of making Will as well as in all matters of succession and inheritance, then the Will at present in dispute being regarded as that of a Hindu would be governed by the provisions of section 164 of the Indian Succession Act. This point has frequently come before me during the five years I have been sitting on the original side of this Court. I have repeatedly expressed my own opinion that it has never yet been authoritatively and finally decided that for all testamentary purposes a Khoja Mahomedan is to be treated as though he were a Hindu governed by the Hindu Law. There are observations in a judgment of Sir Lawrence Jenkins in the case of *Advocate-General* v. *Karmali* (1), which indicate that that eminent and learned Chief Justice thought that in this Presidency, Khoja Mahomedans were governed in all testamentary matters by the Hindu Law. As, however, that opinion appears to have rested chiefly upon the assent of Counsel of long standing and experience who were arguing the particular case before him, I have never been able to regard it as an authoritative and final decision of the question, for a question so important and so vitally affecting the interests of a large, wealthy and influential community could hardly be properly decided upon the admissions of Counsel made probably for their own convenience in the argument of a particular case. However that may be, if Khoja Mahomedans are not governed by the Hindu Law and section 164 of the Indian Succession Act is, therefore, not applicable to their Wills, then the interpretation of those Wills would seemingly have to be made in accordance with the provisions of the general law of evidence. Section 92 of the Evidence Act would then create even a more formidable bar to the defence upon which these executors rely than any section to be found in the Succession Act. It is true that section 92 is not to be applied in contravention or supersession of any of the special provisions of the Indian Succession Act relating to the interpretation of Wills. But the executors, as far as I can see, are not entitled in one breath to deny the applicability of the principles enunciated in section 164 of the Indian Succession Act and also the applicability of the general rule of evidence, which, as soon as the provisions of that Act are got out of the way, governs the interpretation of all documentary evidence.

In the present case, it is enough for me to say that I adhere to every word of my former decision in the case of *Pestonji* v. *Framji* (2), particularly where I have endeavoured in that judgment to ground my decision upon general principles. That was a far stronger case than this; for here even were any Court not precluded by the provisions of section 164 read with those of section 62 of the Succession Act, or, leaving that Act entirely out of consideration, by section 92 of the Evidence Act, from going behind the plain language of the Will in search of imaginary motives and conjectured circumstances, still reading the Will as a whole, I do not think that any Court even in the early days in England would have been disposed, where the language is as plain as it is here, to go very far in that direction although, no doubt, the doctrine of ademption has been applied very peremptorily and carried very far. In clause 8 of the Will, the testator says in as plain language as possible that he gives Rs. 9,000 to the plaintiff as *baskshis*. I do not see how any bequest could have been expressed in plainer language. Upon the principle, therefore, of *Pestonji* v.

(1) 6 Bom. L. R. 601; 29 B. 133.

(2) 12 Bom. L. R. 863; 8 Ind. Cas. 180.

Framji (2), and without covering the same ground again, I have no hesitation whatever in coming to the conclusion that the plaintiff is entitled to this legacy.

The debt to the extent of Rs. 9,000 is admitted. The plaintiff is, therefore, clearly entitled to the declaration he has asked for in prayer (*a*) to the plaint; and thereupon to have the usual administration decree prayed for in prayer (*c*) to the plaint.

Costs of the parties up to the present out of the estate, those of the executors as between attorney and client.

Costs and further directions reserved.

Liberty to apply.

Suit decreed.

Attorneys for the Plaintiff: Messrs. *Shamrao Minocheher & Hiralal.*

Attorneys for the Defendant: Messrs. *Raghavayya, Bhimji & Nagindas.*

ALLAHABAD HIGH COURT.

LETTERS PATENT APPEAL No. 34 OF 1912.

July 19, 1912.

Present:—Sir Henry Richards, KT., Chief Justice, and Mr. Justice Tudball.

ISHRI PERSHAD—DEFENDANT—APPELLANT

versus

GOPI NATH AND OTHERS—PLAINTIFFS—RESPONDENTS.

Registration Act (III of 1877), *s.* 50—*Registered and unregistered deed—Priority—Same property covered by deeds by different persons.*

A. mortgaged certain property to *B.* on 21st August 1894. On 30th May 1896, *A.* mortgaged the same property to *C.* Both the mortgages were unregistered. *C.* brought a suit for sale on his mortgage and purchased the property himself in execution of the decree. *C.*'s heir sold the property to *D.*, whose heir sold it to *E.* The sale in favour of *E.* was an out and out sale of the full right of ownership in the property and was by a registered sale-deed:

Held, that *E.*'s deed had priority over *B.*'s unregistered mortgage-deed, as both deeds covered the same property and section 50 of the Registration Act applied.

Ram Lal v. *Thakur Bachha Singh*, 10 A. L. J. 114; 16 Ind. Cas. 625, followed.

Sobhagchand Gulabchand v. *Bhaichand*, 6 B. 193 at p. 208, and *Baldeo Parshad* v. *Baldeo*, (1901) A. W. N. 112, relied upon.

Letters Patent Appeal from the following decision of

BANERJI, J.—In my judgment, there is no force in this appeal. The suit which has given rise to it was brought by the respondents for sale upon a mortgage, dated the 21st of August 1894, for Rs. 99, executed by Ram Bakhsh and others. On the 30th of May 1896, the same mortgagors mortgaged the same property to one Bindraban. Both the mortgage-deeds were unregistered. Bindraban brought a suit for sale upon his own mortgage, and, in execution of the decree obtained by him, sold the mortgaged property and bought it himself. His son sold it to one Bal Kishen, whose heir sold it to Ishri Prasad, defendant, on the 7th of April 1910. This sale-deed was registered. Ishri Prasad claims that by reason of his sale-deed being registered, he has priority over the plainitiff by virtue of the provisions of section 50 of the Registration Act. In my opinion, the lower Appellate Court has rightly overruled his plea. The mortgage in favour of Bindraban was a mortgage of such rights as existed in the mortgagor after the execution of the prior mortgage in favour of the plaintiffs. It is these rights which Bindraban brought to sale in execution of his decree, and it is these rights only which passed to him under his auction-purchase. Ishri Prasad under his purchase has acquired only such rights as Bindraban and his successors-in-title possessed. Therefore, Ishri Prasad has only acquired the rights of the mortgagors which existed in them after the execution of the mortgage-deed in favour of the plaintiffs; that is to say, the equity of redemption of the mortgagors. That being so, Ishri Prasad cannot claim that he has acquired the property mortgaged to the plaintiffs; that is to say, the entire property, and that he can ignore the mortgage in the plaintiff's favour. His sale-deed and the mortgage of the plaintiffs do not in reality cover the same property, and, therefore, section 50 cannot apply to a case like this. The principle of the decision of the Bombay High Court in *Sobhagchand Gulabchand* v *Bhaichand* (1), does not apply to the present case. I dismiss the appeal with costs.

Mr. *Sital Pershad Ghosh*, for the Appellant.

Mr. *P. L. Banerji* (for Mr. *D. C. Banerji*), for the Respondents.

(1) 6 B. 193 at p. 208.

ISHRI PERSHAD *v.* GOPI NATH.

JUDGMENT.—The facts of this case are as follows:—

Ram Baksh and others mortgaged certain property to the present respondents on 21st August 1894. On 30th May 1896, they mortgaged the same property to Bindraban. Both mortgage-deeds were unregistered. Bindraban brought a suit for sale on his mortgage and purchased the property himself in execution of his decree.

His son sold the property to Bal Kishen. The latter's heir sold it to Ishri Prasad, the present appellant.

It must be clearly noted here, that though Bindraban purchased at the auction sale the right, title and interest of his mortgagors, what was sold to Ishri Prasad by the heir of Bal Kishen was the full right of ownership and not the mere right, title and interest of the transferor. An examination of Ishri Prasad's sale-deed makes this clear. That sale-deed was registered. Ishri Prasad's vendor was the full owner of the mortgage of 21st August 1894, was out of the way, but we may assume for the purposes of this appeal that the vendor legally owned only the property subject to that mortgage; what he purported to sell, was the full right of ownership. In this, he may or may not have acted dishonestly, but there is nothing to show that Ishri Prasad had any notice whatever of the pre-existing unregistered mortgage. The prior mortgagee brought the present suit for sale out of which this appeal has arisen.

In defence, Ishri Prasad pleaded section 50 of the Registration Act and urged that his registered sale-deed took effect as regards the property comprised therein against the unregistered mortgage-deed of the plaintiff which related to the same property. The Court of first instance upheld this plea and dismissed the suit. The lower Appellate Court reversed that decision and decreed the suit. On second appeal to this Court, the learned Judge, who heard the appeal, confirmed the decree of the Court below, hence this appeal under the Letters Patent.

It is urged before us, and with great force, that our learned brother has taken a wrong view of the facts of the case. The argument in his judgment is that, what was mortgaged to Bindraban, was the equity of redemption; and this is what Bindraban purchased, and what his son sold to Bal Kishen, and what Bal Kishen's heir transferred to Ishri Prasad; and as the latter only purchased the equity of redemption, the two deeds do not cover the same property and, therefore, section 50 of the Act does not apply. Reliance was placed on the decision in *Sobhagchand Gulabchand* v. *Bhaichand* (1). The error in the above is patent on an examination of the sale-deed in favour of Ishri Prasad. That deed does not purport to transfer only the right, title and interest of the transferor, but is, in plain terms, a sale, out and out, of the full right of ownership in the property. The mortgage in the present suit is a mortgage of the same property.

The two deeds, therefore, *do* cover the same property and section 50 of the Act does apply.

There can be no question that if the original mortgagors had executed the two deeds now in conflict, the sale-deed being registered would take effect against the unregistered mortgage-deed, even though *after the execution of the latter*, the mortgagors would have been the owners of only the equity of redemption.

The rights of the mortgagors were acquired by the appellant's vendor, but he sold to the appellant not the equity of redemption but the property itself. In principle, there is no difference.

We would call attention to the remarks of Melville, J, in *Sobhagchand Gulabchand Bhaichand* (1), which were quoted with approval by Aikman, J., in *Baldeo Parshad* v. *Baldeo* (2).

In the present case, the "estate" was covered by both the deeds in suit. The case is also covered by the decision in *Ram Lal* v. *Thakur Bachha Singh* (3).

We allow the appeal, set aside the decree of this Court and restore that of the Court of first instance, with costs in all Courts.

Appeal allowed.

(2) A. W. N. (1901) 112.
(3) 10 A. L. J. 114; 16 Ind. Cas. 625.

J. Kashmir University Library

NIAMAT ULLAH v. AISHA BIBI.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 606 OF 1911.

February 26, 1912.

Present:—Mr. Justice Shah Din and Mr. Justice Chevis.

NIAMAT ULLAH AND OTHERS—DEFENDANTS—APPELLANTS

versus

Musammat AISHA BIBI—PLAINTIFF AND *Musammat* AIMNA BIBI—DEFENDANT—RESPONDENTS.

Custom—Alienation—Inheritance—Right of daughter of uncle of last male owner to contest alienation by his widow—Muhammadan Law—Gujars *of Kharian, District Gujrat.*

Among *Gujars* of Kharian, in the Gujrat District, a daughter of the uncle of the last male owner is not entitled by custom, in the absence of a proof to the contrary, to inherit property left by him, nor is she regarded as a reversionary heir possessing a right of control in respect of alienations made by his widow. She has also no such right under the Muhammadan Law.

Chiragh Bibi v. *Hassan*, 19 P. R. 1906; 70 P. L. R. 1906; *Maqsud-ul-Nisa* v. *Kaniz Zohra*, 135 P. R. 1908; *Sher Muhammad Khan* v. *Muhammad Khan*, 5 P. R. 1895; *Nur-ul-nissa* v. *Gauhar-ul-nissa*, 61 P. R. 1906; *Lahori* v. *Radho*, 72 P. R. 1906; 108 P. L. R. 1907, and Musammat *Kokan* v. Musammat *Lakhoo*, 60 P. R. 1910; 92 P. W. R. 1910; 7 Ind. Cas. 470; 109 P. L. R. 1910, cited.

Hamira v. *Ram Sigh*, 134 P. R. 1907, (F. B.); 85 P. W. R. 1907, relied upon.

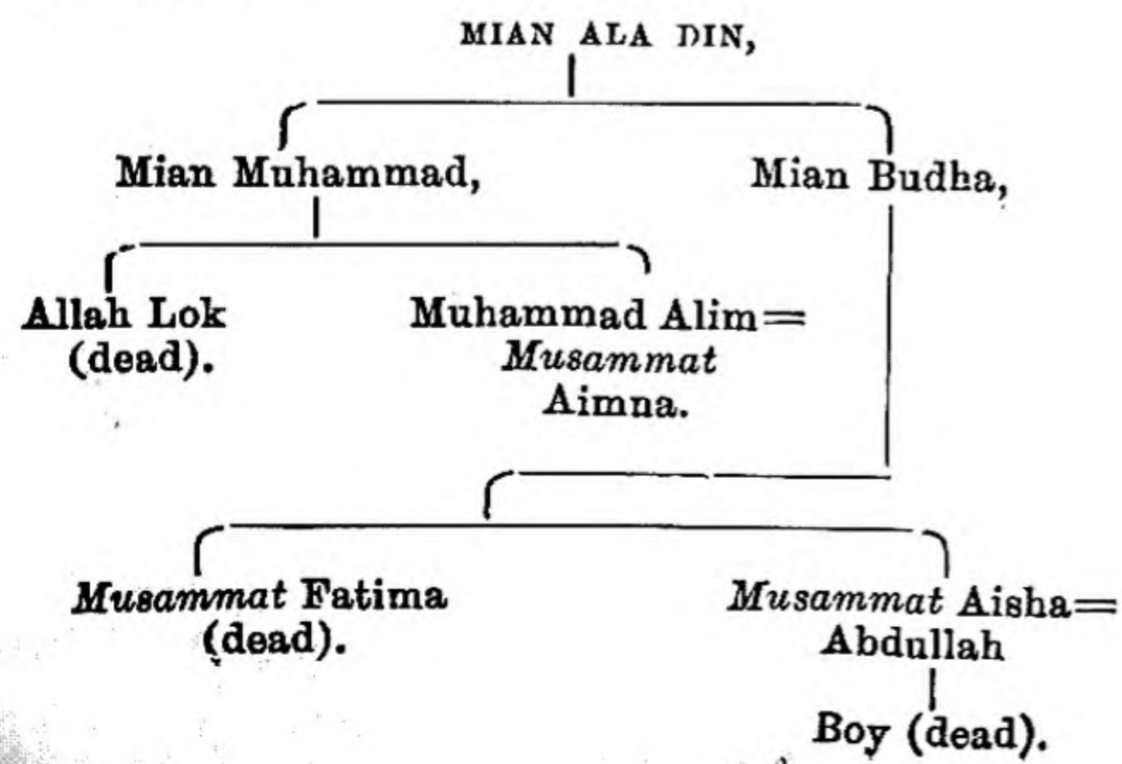
If such a right of inheritance by custom, and consequently a right of control in respect of alienations by widows, is claimed, it must be proved by the party asserting it.

Second appeal from the decree of the Divisional Judge of Rawalpindi Division, dated the 30th November 1910.

Mr. *Fazal-i-Hussain*, for the Appellants.

Mr. *Ganga Ram*, for the Respondents.

JUDGMENT.—The parties are Gujars of Tahsil Kharian of Gujrat District, and their relationship appears from the following pedigree:—



The property in suit is a house situate in Dingah which admittedly came down from Mian Ala Din to Muhammad Alim, the deceased husband of *Musammat* Aimna, respondent No. 2. By a registered deed dated the 6th May 1909, this lady made a gift of the house, by way of charity, to the *Imam* of a mosque in Dingah known as the Barnianwali mosque. In June following, the present suit was brought by *Musammat* Aisha, daughter of Mian Budha, to obtain a declaration to the effect that the gift in question shall not affect her rights of reversion in the house gifted by *Musammat* Aimna. The donors and the donees pleaded, *inter alia*, that the plaintiff was not an heir to Muhammad Alim, deceased, or to *Musammat* Aimna, and that she had no *locus standi* to sue for the declaration prayed for. The first Court held that the plaintiff had no right of inheritance in the house in dispute, and on that ground it dismissed her suit. On appeal, the Divisional Judge held that since, in the absence of all other heirs, *Musammat* Aisha would succeed to the house in question on the death of *Musammat* Aimna, therefore, she was an heir to her in respect of this house, and that as such heir she had a right to contest the gift in dispute which is one made by a widow with a limited estate. The learned Judge has cited *Chiragh Bibi* v. *Hassan* (1) and *Maqsud-ul-nisa* v. *Kaniz Zohra* (2) in support of the latter view, and has decreed the plaintiff's claim. The donees have preferred a further appeal to this Court, and before us, two questions have been discussed in argument,—

(1) Whether *Musammat* Aisha is an heir to Muhammad Alim, deceased, as regards the succession to the house in dispute, and

(2) Whether, if she is an heir, she, being a female heir entitled to reversionary rights on the death of *Musammat* Aimna, is empowered by custom to contest the validity of the gift of 1909 ?

With reference to the second question, a number of authorities have been cited on both sides, reliance being placed by the appellant's Counsel chiefly on *Sher Muhammad Khan* v. *Muhammad Khan* (3) and *Nur-ul-nissa* v.

(1) 19 P. R. 1906; 70 P. L. R. 1906.
(2) 135 P. R. 1908.
(3) 5 P. R. 1895.

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Gauhar-ul-nissa (4) and by the respondent's Pleader on *Chiragh Bibi* v. *Hassan* (1), *Lahori* v. *Radho*(5), *Maqsud ul-nisa* v. *Kaniz Zohra*(2) and *Musammat Kokan* v. *Musammat Lakho*(6). We do not, however, think it necessary to consider and decide this question as, in our opinion, the first question must be answered in the negative. It is not disputed that among the parties' tribe, a daughter has no right of inheritance in her father's property as against his collaterals; and it is also admitted that plaintiff, *Musammat* Aisha, has married outside the family. It was for the plaintiff, *Musammat* Aisha, to prove that as the daughter of Muhammad Alim's uncle, she had by custom a right to succeed to the house in dispute on the death of his widow, *Musammat* Aimna, and she has adduced no evidence whatever in support of such right of succession. On the principle enunciated in *Hamira* v. *Ram Singh* (7), the plaintiff cannot, for purposes of succession to the house in dispute, be regarded as the granddaughter of the common ancestor, Mian Ala Din; she must prove affirmatively that she is entitled to succeed as the first cousin of Muhammad Alim to the property left by him, and that his widow *Musammat* Aimna is in possession of that property only on a life-estate. Unless and until she establishes such a right of inheritance by custom, she cannot claim to possess a right of control in respect of alienations made by *Musammat* Aimna in respect of the property in her possession as a widow of Muhammad Alim. Furthermore, for the purposes of the present litigation, we cannot assume that *Musammat* Aimna succeeded to the house in suit on the usual life-estate as a widow, for that presupposes that there is in existence a reversionary heir who is entitled to succeed under custom to Muhammad Alim's property on the death or remarriage of *Musammat* Aimna. The plaintiff, *Musammat* Aisha, has not shown that custom assigns to her the position of such reversionary heir. It follows, therefore, that, on the one hand, *Musammat* Aisha is not proved to be a reversionary heir of Muhammad Alim; nor, on the other hand, is *Musammat* Aimna shown to have succeeded to a mere life-estate in the house in dispute. It is, undoubtedly, true that in the absence of a definite rule of custom applying to the case in hand, *Musammat* Aisha would, under her personal law, have succeeded to the house in suit on the death of *Musammat* Aimna without heirs if the gift in dispute had not been made; but such right of succession under the Muhammadan Law does not confer on *Musammat* Aisha the power to control an alienation by way of gift made by *Musammat* Aimna in respect of the property in dispute. In order to possess such a power of control, she must show that she has a right of succession to Muhammad Alim's property under custom, and, in our opinion, she has entirely failed to prove such right.

We accordingly accept the appeal and, reversing the decree of the lower Appellate Court, we restore that of the first Court with costs throughout.

Appeal accepted.

(4) 61 P. R. 1906.
(5) 72 P. R. 1906; 108 P. L. R. 1907.
(6) 60 P. R. 1910; 92 P. W. R. 1910; 7 Ind. Cas. 470; 109 P. L. R. 1910.
(7) 134 P. R. 1907 (F. B.); 85 P. W. R. 1907; 74 P. L. R. 1908.

ALLAHABAD HIGH COURT.
SECOND CIVIL APPEAL No. 870 OF 1911.
June 18, 1912.
Present:—Mr. Justice Chamier.
SULTAN AHMAD AND ANOTHER—PLAINTIFFS —APPELLANTS
versus
WALLIULLAH AND OTHERS—DEFENDANTS —RESPONDENTS.

Easements Act (V of 1882), *s.* 15—*Easement—Prescriptive right, acquisition of—Right of way—Old way used for* 20 *years and then abandoned—New way not used for* 20 *years.*

The fifth paragraph of section 15 of the Easements Act, which applies both to continuous and discontinuous easements, seems to render it impossible to acquire a statutory prescriptive title to an easement unless and until the claim thereto has been contested in a suit.

A. enjoyed for more than 20 years a right of way over *B.*'s land through a particular passage. About 16 or 17 years ago, *A.* abandoned the old passage and began to use a new passage. The deviation was not due to any building erected by *B.* but was made by *A.* of his own accord.

B. sued *A.* for a perpetual injunction restraining *A.* from passing along *B.*'s land and from obstructing *B.* in the building of a wall across the land.

A. pleaded that he had acquired a prescriptive right of way:

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Held, that *A.* had no right of way,—

(*a*) across the old passage as it was not used within two years next before the institution of the suit;

(*b*) across the new passage as it had not been used for 20 years.

Second appeal from a decision of the District Judge of Azamgarh.

When the appeal first came on for hearing, Chamier, J., by his order, dated 11th April 1912, called for further findings. The order was as follows:—

ORDER.—This was a suit by the appellants to obtain a perpetual injunction restraining the respondents from passing across plot No. 1640, which is the property of the plaintiffs, and also restraining them from obstructing the appellants in the building of a wall across the same plot. The respondents' case was that they had originally two distinct rights of way across No. 1640 from north to south. Both the Courts below have decided that although it is proved that the respondents have been using the eastern way for many years, they have not used it for the period required for the establishment of an easement. Nothing more need be said about the eastern way. With regard to the western way, the Munsif held that it was proved that the defendants for many years used that way in passing from their houses to their factory and that they gave it up in favour of a new and more direct way when they built their new *zanana* house. The Munsif was of opinion that the evidence was strong to show that the western way was used by the plaintiffs up to within 16 or 17 years of the present suit, and that about that time, the defendants of their own accord abandoned the old way and began to use a different way. He rejected the contention of the defendants that the deviation was due to a construction of a wall caused by the plaintiffs and he declined to hold that the deviation took place ten years before the suit. He held that the defendants had not used the old way for 16 or 17 years before giving it up, and that the new way had been enjoyed for a sufficiently long period

On appeal, the District Judge, after agreeing with the Munsif regarding the eastern way, said that it was satisfactorily proved that the defendants had enjoyed the western way over plot No. 1640 for many years. He agreed with the Munsif that the defendants had built a new house 16 or 17 years before the suit, but he found it proved that about 10 years before the suit the plaintiffs had built an enclosure, and that it was then that they had begun to use a somewhat different way over the plaintiffs' property. He held that it was not proved that the defendants had abandoned the old way, but that it was a case of a deviation due to the erection of the plaintiff's enclosure. He allowed the appeal in part and dismissed the plaintiffs' suit as regards a way which he marked on the plan as A B C D.

In second appeal, it is contended that there is no definite finding by the lower Appellate Court, and that in fact there is no evidence on which there could have been a definite finding that the defendants had enjoyed the old western right of way over plot No. 1640 as an easement and as of right without interruption for twenty years before the deviation took place. It seems probable that the District Judge intended to find on this point in favour of the defendants, but I am bound to hold that there is no definite finding. The case must, therefore, go back for a definite finding, and as the attention of the parties was not drawn in the Court of first instance to the importance of proving or disproving the existence of an easement previous to the deviation, I do not think that I should prevent the parties from giving any further evidence that may be available. I direct that the record may be returned to the lower Appellate Court for definite findings on the following issues:—

(1) Whether the defendants acquired an easement in respect of what is called the old western way over No. 1640?

(2) Whether there was a deviation from that way?

(3) Whether the deviation was caused by the buildings erected by the plaintiffs, and, if so, when those buildings were erected?

Further evidence may be admitted. On return of the findings, ten days will be allowed for objections.

FINDINGS.

The facts of the case have been explained with clearness in the order of the Hon'ble High Court, so they need not be repeated here. The issues remitted to this Court for decision are:—

(1) Whether the defendants acquired an

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easement in respect of what is called the old western way over plot No. 1640?

(2) Whether there was a deviation from that way? and

(3) Whether the deviation was caused by the buildings erected by the plaintiffs, and if so, when these buildings were erected?

I hold that the defendants did acquire an easement in respect of the old western way. Their *zanana* house is to the south of plot No. 1640, which was formerly *parti land* and their *baithka*, where the men congregate, is to the north of that land. In the very nature of things, an Indian could never resist the temptation of a short cut over an open space of land belonging to another person. The plan prepared in the year 1875 (paper 30 C), indicates that a pathway did exist in plot No. 1640.

Undoubtedly, the witnesses of the defendants are prejudiced in their favour, but they testify to a natural course of events, and I am prepared to believe them so far as they speak of the defendants making use of a pathway over the *parti* land to the west from the defendant's western door to their *baithka*.

(2) It is admitted by both parties that there was a deviation from that way, and I hold accordingly.

(3) I do not believe that the deviation was caused by the plaintiff's building over the path to the west. The defendants had left that old path some years before the building was constructed and adopted the path to the east going directly to the *baithka* from the northern door. Sixteen or seventeen years ago, the defendants opened the door to the north of their house after building the northern portion of brick. Since that time, the door for ingress and egress to the house has been the northern door and not the old western door. The dispute between the parties is whether the opening to the west continued to be a door or turned into a window sixteen or seventeen years ago. The matter is of no importance because it is clear that the western door ceased from that time to be the principal door of the house and was not made use of for the purposes of ingress and egress by the inhabitants. This is clearly indicated by a copy of an award, dated 23rd December 1903, filed to-day, on behalf of the plaintiffs. The arbitrator has stated therein that this western opening was no longer used at the time by the defendants as a means of communication with the public road. There is another point: the parties are at such enmity and are so keen on litigation that if the western path had existed six or seven years ago, when the plaintiffs constructed their enclosure, the defendants would never have allowed such an opportunity for a suit to pass by without taking advantage of it. The only reason why the defendants did not rush to Court at the time was that they had given up the western road and had started using a different road to the east over the *parti* land. The defendants' witnesses are very confused about the exact situation of this old western path. Some put it as far as the south-western extremity of the new building and some as near as the south-eastern extremity. Some give it as their opinion that the path was situated between those two points. It is clear to me that the path existed at a time of which the witnesses have no clear recollection. This would not have happened if the path had ceased to exist only six or seven years ago when the plaintiffs constructed the new enclosure. The want of recollection is due to the path having been given up over fifteen years ago when the defendants changed the situation of the front door of their house. The parties to the suit form two factions in the village whose only amusement in life is to have some litigation on in Civil Courts. The witnesses they bring to Court are well tutored partisans who help the parties as whole-heartedly with false testimony as they themselves hope to be helped by these parties in other litigations in which the witnesses are concerned. In such a state of affiairs, a Court is more likely to arrive at the truth by the guide of circumstances and probabilities than by reliance on the uttered word. I hold that the deviation was not caused by the plaintiff's buildings; that the defendants gave up the western path voluntarily some years prior to the construction of the buildings, and that only the eastern path has been in use for the last fifteen years.

Mr. *Ahmed Kareem*, for the Appellants.

Mr. *P. L. Banerji*, for the Respondents.

JUDGMENT.—The finding on the first and second issues remitted by my order of April 11th is in the affirmative, and the finding on the third issue is in the negative.

The meaning of the findings on the first and third issues is that the defendants enjoyed the old western right of way over

plot No. 1640 as an easement and as of right for more than twenty years up to within 16 or 17 years of this suit and then abandoned it, or at all events the southern part of it in order to go direct to a new door opened by them.

It seems to me that the result of these findings is that the defence fails. The fifth paragraph of section 15 of the Easements Act seems to render it impossible to acquire a statutory prescriptive title to an easement unless and until the claim thereto has been contested in a suit. The same has been held with reference to sections 3 and 4 of the Presciption Act, 1832 [see the judgment of Lord Macnaghten in *Colls* v. *Home and Colonial Stores* (1) and *Hyman* v. *Van den Bergh* (2).] The circumstance that section 3 of the Prescription Act relates to continuous easements only does not appear to affect the matter. The fifth paragraph of section 15 of the Indian Easements Act applies to both continuous and discontinuous easements.

There is no ground for presuming a lost *grant* of the right of way. Nothing of the kind has been suggested. The defendants have not claimed to be entitled to an easement except under the Easements Act.

The result is that the appeal is allowed, the decree of the lower Appellate Court is set aside and the decree of the Munsif is restored with costs throughout.

Appeal allowed.

(1) (1904) A. C. 179 at p. 189; 73 L. J. Ch. 484; 90 L. T. 687; 53 W. R. 30; 20 T. L. R. 475.

(2) (1908) 1 Ch. 167; 77 L. J. Ch. 154; 98 L. T. 487.

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL NO. 256 OF 1910.

May 23, 1912.

Present:—Mr. Justice Chamier and Mr. Justice Piggott.

COLLECTOR OF GHAZIPUR—DEFENDANT—APPELLANT

versus

BALBHADDAR SINGH AND OTHERS—PLAINTIFFS—RESPONDENTS.

U. P. Court of Wards Act (III of 1899) ss. 16, 17, 18, 20—Notice, how to be published—Claims not notified to Collector within time—Loss of interest—Non-production of document before Collector upon notice—Objection taken at late stage of suit—Admissibility of document in evidence—Discretion of Court—Interpretation of Statutes imposing penalty.

Provisions of law, which operate to impose a penalty or disability upon a person who fails to comply with them, require to be strictly interpreted.

Under the United Provinces Court of Wards Act, as soon as the notice required under section 16 is duly published by the Collector, a double obligation is laid upon the creditors; they must not only notify their claims against the ward or his property, giving full particulars of the same, but they must produce before the Collector with the statement of claim every document on which they rely in support thereof.

There being no general or special orders from the Board of Revenue directing the Collector to publish the notice under section 16 of the Court of Wards Act at any other place or in any other manner, no obligation lies on the Collector to do anything more than get the notice published in English and Vernacular in the Provincial Gazette.

It would be contrary to all sound principles of interpretation to apply the proviso to section 17 to the subsequent sections, 18 and 20. The obligation to produce documents is laid upon all creditors of the ward and not only on those who notify their claims.

Where the admission of documents of title was not challenged at the proper time, and strictly speaking, was not challenged at all, and the Court below had no real opportunity, at the late stage when the objection was raised, to turn round on the plaintiffs and call upon them to explain the non-production of their mortgage-deeds before the Collector:

Held, that to exclude the documents altogether from the record would be to exact an extreme penalty for a piece of neglect due to mere ignorance.

The provisions of section 20 leave the Court a discretion to admit the plaintiff's document of title in evidence despite its non-production before the Collector but those of section 18 as regards interest give no such discretion.

The provisions of section 16 of U. P. Court of Wards Act compared with the provisions of sections 10A and 10B of Bengal Court of Wards Act.

W. Barrow v. *Gaya Prasad*, 9 A. L. J. 558; 15 Ind. Cas. 729, explained and discussed.

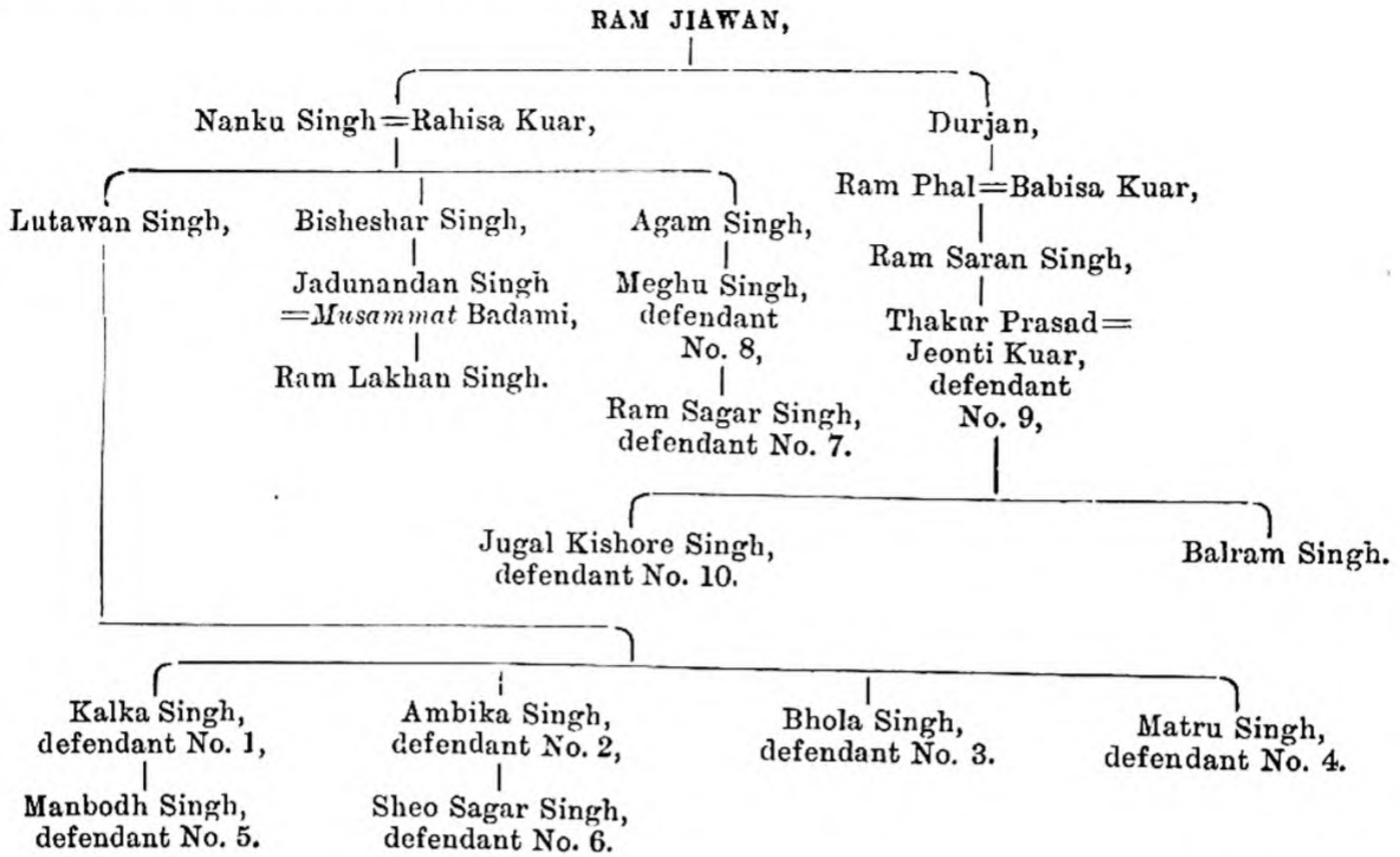
First appeal from a decree of the Subordinate Judge of Ghazipur.

Mr. *A. E. Ryves* (with him Mr. *W. Wallach*), for the Appellant.

The Hon'ble Dr. *Sunder Lal* (with him Mr. *Gobind Prasad*), for the Respondents.

JUDGMENT.—This appeal arises out of a suit by respondents Nos 1 and 2 upon three mortgage-deeds executed in their favour, or in favour of their father, in March 1888, and August 1892, by Ram Saran Singh, Lutawan Singh, Bisheshar Singh and Meghu Singh. The following pedigree shows the relationship between the mortgagors and other persons who will be referred to in this judgment:—

COLLECTOR OF GHAZIPUR *v.* BALBHADDAR SINGH.



The defendants, described as defendant first party in the Court below, are the living descendants of Nanku Singh and Ram Saran Singh. The defendants, second party, are lessees whose exact position need not be explained. The defendant, third party, is the Collector of Ghazipur, representing the estate of Dulhin Ram Kuar, who purchased the mortgaged property in December 1902, from Ram Saran Singh and his descendants and from the descendants of Nanku Singh. The defence of the Collector of Ghazipur was that the property belonged to Nanku Singh and Ram Phal Singh; that Nanku's widow, as guardian of her children, sold their share in the property in December 1850, to Ram Phal Singh; that Ram Phal Singh died without issue, leaving his widow, Babisa Kuar, who died in September 1901; that the Ram Saran Singh shown in the pedigree was not the son of Ram Phal, nephew of Nanku, but was the son of a Ram Phal whose father's name was Ghore Patari Rai; that during the life-time of Babisa Kuar, the descendants of Nanku, who were her husband's reversionary heirs, had no rights in the property, therefore, the mortgages in suit were invalid; and lastly, that Dulhin Ram Kuar purchased the property from the persons who became entitled to the property on the death of Babisa Kuar, whether under a Will said to have been executed by her or as the reversionary heirs of her husband.

It appears that Babisa Kuar obtained mutation of names in her favour upon the death of her husband. But in 1884, Ram Saran and the sons of Nanku got their names entered in the record. Babisa Kuar, in May 1894, obtained a decree against them declaring that they had no title. The plaintiffs alleged that the proceedings of 1894 were collusive. The Subordinate Judge has found that those proceedings were collusive; that Ram Saran was the son of Ram Phal, nephew of Nanku, and that the mortgages in suit are binding on the property in the hands of the Collector.

At a late stage of the suit, under circumstances which will be detailed below, it was contended on behalf of the Collector that the suit was not maintainable inasmuch as the plaintiffs had failed to notify their claim to the Collector when the Court of Wards took charge of the estate of Dulhin Ram Kuar in 1903, and had failed at that time to produce before the Collector the deeds on which this suit is based. The Subordinate Judge rejected this plea.

In appeal, it is contended that the decision of the Court below is erroneous on both points.

We think that the decision of the Court below on the question of fact is clearly right.

It may be that there was in the village a Ram Phal, who was the son of Ghore Patare Rai. But there can be no doubt that Ram Saran, father of defendant No. 9 and grandfather of defendant No. 10, was the son of Ram Phal, nephew of Nanku Singh. Mutation of names was, no doubt, made in favour of Babisa Kuar upon the death of Ram Phal. But that would not unnaturally have been done if Ram Saran was then a minor. Ram Saran and the descendants of Nanku managed to get their names on the records in 1884. Ram Saran joined with the descendants of Nanku in mortgaging the property in 1878 to Raja Shambhu Narain Singh, and Babisa Kuar made a Will in November 1894, whereby she purported to leave half the property to Balram Singh, grandson of Ram Saran. If Ram Saran, who was admittedly the father of defendant No. 9 and grandfather of defendant No. 10 and of Balram Singh, was, as the defendants suggest, merely a dishonest servant of Babisa Kuar, it is inconceivable that she would have left half her property to Ram Saran's grandson very soon after she had litigation with Ram Saran. The association of Ram Saran with the descendants of Nanku on several occasions when the property was being dealt with, is inexplicable except on the ground that he was related to them. It came out in the cross-examination of some of the defendants' witnesses that Ram Saran's house was actually next door to that of Lutawan Singh, the eldest son of Nanku; whereas the house of Ghore Patare Rai was some distance away. It seems probable that Ram Saran's house is part of the old family house. After a full consideration of the documentary evidence, we have no doubt that the evidence of the plaintiff's witnesses is true. These witnesses say that Ram Saran, father of defendant No. 9, was the son of Ram Phal by his wife Babisa Kuar. Much stress was laid by the defendants upon a suit brought by Babisa Kuar in 1898 against a Receiver, who had been appointed in execution of a decree, obtained by Raja Shambhu Narain Singh upon a mortgage made in his favour in August 1878, by Ram Saran and the descendants of Nanku. In that suit, Babisa Kuar obtained a declaration that the mortgage of August 24th, 1878, was not binding upon her. The defendants have also relied strongly upon a statement made by Babisa Kuar in a Will made by her in November, 1894, to the effect that she had no son. We regard that statement as being of a piece with the allegations made by Babisa Kuar in her suit against Ram Saran and others earlier in the year in which she obtained a declaration of her title. The suit was brought and the Will was made long after the mortgages now in suit and are parts of a scheme which was designed to enable the family to get rid of the mortgages in suit. The failure of the Receiver to successfully resist the suit brought against him by Babisa Kuar may be explained on the ground that he was an outsider, who had no knowledge of the facts, and was, therefore, severely handicapped in defending the suit. We have no doubt that the suit brought by Babisa Kuar against Ram Saran and others in 1894 was a collusive proceeding taken for the purpose of evading the mortgages, which are now in suit. We agree with the Court below that Ram Saran, grandfather of defendant No. 5, was the son of Ram Phal and Babisa Kuar. It follows that the mortgages in suit are binding upon the property purchased by Dulhin Ram Kuar and now in charge of the Court of Wards.

The question of law was raised in the Court below in a somewhat peculiar manner. The suit was instituted on May 7th, 1909, the written statement of the Collector of Ghazipur, as Manager of the estate of Dulhin Ram Kuar under the Court of Wards, was filed on September 1st, 1909. In this written statement, no plea is taken as to the suit being open to any sort of objection by reason of the failure on the part of the plaintiffs to comply with the provisions of section 16 of the Court of Wards Act, nor was any issue struck on this point before the parties went to trial. The taking of evidence in the case commenced on January 11th, 1910, and was practically concluded on March 4th, 1910. On April 13th, 1910, one stray witness for the defendants, who had somehow been left over, was examined. That same day a petition was put in on behalf of the Collector of Ghazipur which has been printed on page 156A This petition tendered in evidence a notification which appeared on page 768 of the United Provinces Gazette (Part II) of the 25th of April 1903, and a similar notification from the Vernacular Gazette of May 23rd, 1903. It was merely

stated that these papers had an important bearing on the case, and "should be placed on the record and read along with the evidence." This having been permitted by the Court, these papers were made the basis of an entirely fresh set of pleadings, the contentions raised being of such a nature that, if accepted in their entirety, they would involve the dismissal of the entire suit. The Notifications in question are those required to be issued by section 16 (1) of the United Provinces Court of Wards Act (Local Act III of 1899), calling upon all persons having claims against the ward (in this case, against Dulhin Kam Kuar) or her property, to notify the same in writing to the Collector of Ghazipur within six months of the date of the publication of the said notices. It is admitted that the claim upon which the present suit is based was never notified to the Collector as thus required; and it is quite clear that it ought to have been so notified. Dulhin Ram Kuar is the substantial defendant in the case; she was impleaded as "a subsequent transferee of all the properties mortgaged in the documents sued on." She is in fact the present owner of the said properties; for the validity of her document of title in no way depends on the respective rights of Babisa Kuar, of Ram Saran Singh or of the heirs of Nanku Singh. In the sale-deed of December 7th, 1902, upon which her title rests, she took the precaution of getting included amongst her vendors every single person who had any possible claim to the ownership of the property transferred, and she thus obtained a clear title unaffected by any question which might afterwards be raised as to the respective rights of her vendors, so long as any one of them had a good and valid title.

The possible penalties provided by law for failure to notify a claim to the Collector, as required by section 16 of the Court of Wards Act, are two:—

(*i*) By reason of section 18 of the said Act, a claim not notified under section 16, "shall, notwithstanding any law, contract, decree or award to the contrary, cease to carry interest from the date of the expiry of the period prescribed in that section."

(*ii*) By reason of section 20 of the same Act, if any document in the possession or under the control of any person is not produced by him, "*as required by section* 16," such document shall not be admissible in evidence against the ward in any suit brought thereafter to enforce any liability under the same, "unless good cause be shown to the satisfaction of the Court for the non-production thereof before the Collector."

The appellant claims the benefit of both these provisions. The plaintiffs-respondents have put forward substantially three arguments in reply.

First.—It is contended on their behalf that there has been, on the part of the Collector of Ghazipur, no sufficient publication of the notice required by section 16 of the Court of Wards Act, so as to entail any penalty whatsoever on the plaintiffs by reason of their failure to notify their claim to that officer. The required notices in the United Provinces Gazette are shown to have been duly published both in English and in the Vernacular; but it is not shown that there was any other publication than this. The second clause of section 16 of the Court of Wards Act provides as follows:—

"The notice shall also be published at such places and in such other manner as the Court of Wards may, by general or special order, direct."

There is no suggestion that any special orders were issued in the present case directing further publication of the notice to be effected in any particular manner. So far as we can ascertain, no general orders have been issued by the Board of Revenue, which is the Court of Wards for the United Provinces of Agra and Oudh (*vide* section 4 of the Court of Wards Act III of 1899) directing publication of notices under section 16 of the said Act otherwise than in the Provincial Gazette. On any reasonable construction of the provisions of the Act above quoted, it would appear that the Collector of Ghazipur having received no general or special orders from the Board of Revenue directing him to publish this notice at any other place or in any other manner, lay under no obligation to do anything more than get the notice published in English and in the Vernacular in the Provincial Gazette. Nor can it be said that the Board of Revenue lay under any positive obligation to issue general or special orders, for the words of

the section, as quoted, leave the Court of Wards a discretion in the matter. We were referred to a ruling of this Court in *W. Barrow* v. *Gaya Prasad* (1); but this was based on the wording of sections 10A and 10B of the Bengal Court of Wards Act (Act IX of 1879) as amended by Act I of 1906. The provisions of these sections differ from those of section 16 of our Local Act in one matter of detail which happens to be of decisive importance as regards the point under discussion. By the United Provinces Act, as soon as the required notice has been duly published by the Collector, a double obligation is laid upon creditors; they must not only notify their claims against the ward or his property, giving full particulars of the same, but they must produce before the Collector *with the statement of claim* every document on which they rely in support thereof. Under the Bengal Act, after the creditor has put in a written statement of claim and furnished full particulars, he is only bound to "produce all documents which are in his possession, power or control" within such time as the Court of Wards may appoint. That is to say, the officer acting for the Court of Wards in the matter has laid upon him, after a claim has been filed, the duty of appointing a time within which documents must be filed. It was held by this Court that if such officer failed to fulfil this duty, and did not give the creditor concerned the requisite notice that his documents must be filed within a certain time, no penalty could be enforced against a creditor merely on the ground that he had failed to produce his documents before the Court of Wards There is no similar provision in the United Provinces Act, nor was any obligation laid upon the Collector of Ghazipur in this case to give the present plaintiffs notice that any mortgage-deed in their possession which they desired to make the basis of any claim against the property of Dulhin Ram Kuar must be presented before him by some fixed date subsequent to the presentation of their claim. On the contrary, both by the wording of the Court of Wards Act itself, and by that of the notice published in the Gazette, all creditors were required to present their claims and the documents on which the same were founded to the Collector within six months of the publication of the notice. Provisions of law, which operate so as to impose a penalty or disability upon a person who fails to comply with them, require, no doubt, to be strictly interpreted; and, for this reason, in the reported case, it was held that the serious penalty of excluding his document of title from admission in evidence should not be imposed upon a creditor until it was shown that every notice required by law had been duly given to him, and every obligation imposed by law upon the Court of Wards strictly performed. In the present case, the law as it stands required nothing more from the Collector of Ghazipur, once he had got the notice published in the Gazette in English and in Vernacular than to sit still and await the presentation of claims, the law itself laid upon creditors the obligation to produce detailed statements of claim, accompanied by all necessary documents, within the period limited by the notice itself. The first contention on behalf of the plaintiff-respondents, therefore, fails.

Secondly:—It was suggested that the obligation to produce documents is laid upon creditors who notify their claims. The argument is that a creditor who does not notify his claim at all may make himself liable to the provisions of section 18 already quoted, but cannot be held liable to the further disability laid down by section 20. There is nothing in the wording of the Act to support this contention; indeed, it appears contrary to the clear intention of the provisions under consideration. Something was said about the proviso embodied in the second clause of section 17; but it would be contrary to all sound principles of interpretation to apply this proviso to the subsequent sections 18 and 20. We must overrule this contention also.

There remains, however, a *third* argument for the plaintiffs, which must, in our opinion, prevail, so far as the penalty imposed by section 20 is concerned. The provisions of this section left the Court below a discretion to admit the plaintiffs' documents of title in evidence, despite their non-production before the Collector. That discretion has been exercised in favour of the plaintiffs, and we are not prepared to hold that it was exercised wrongly. On behalf of the appellant, it was contended that there had been no real exercise of discretion, because the plaintiffs had never been called upon to explain the non-production of these documents before the Collector. It

(1) 9 A. L. J. 558; 15 Ind. Cas. 729.

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has already been pointed out that the admission of these documents in evidence was not challenged at the proper time, and, strictly speaking, was not challenged at all. At a late stage of the case, long after the documents had been put in evidence and after the suit had gone to trial on the basis of the said documents, a petition, was put in which, on the face of it, asked for nothing beyond the admission of two documents in evidence on behalf of the Court of Wards. After the Gazette notifications had thus been got on to the record, they were used in argument to attack the very foundation of the plaintiff's case. The Court had no real opportunity at this stage to turn round on the plaintiffs and call upon them to explain the non-production of thei rmortgage-deeds before the Collector. We can conceive of no reason for their non-productton if the plaintiff in fact saw the notices in the Provincial Gazette and understood the obligation thereby cast upon them. We cannot relieve the plaintiffs of all the consequence of their failure to comply with the provisions of section 16 of Act III of 1899; but to exclude their documents of title altogether from the record would be to exact an extreme penalty for a piece of neglect due to mere ignorance. The Court of Wards Act of 1899 had not long been in force; the Board of Revenue had neglected to avail itself of its powers to direct publication of the Collector's notice in some more effective form. The Civil Court having a discretion as regards the admission of these documents, it seems clear to us, under all the circumstances, that this discretion has been rightly exercised in favour of the present plaintiffs.

We cannot relieve them from the consequences of the provisions of section 18 of the Act as regards interest; here the law has left us no discretion. We so far accept this appeal that we direct the decree of the Court below to be modified by dissallowing all interest after the 23rd of November 1903, six months from the date on which the Collector of Ghazipur completed the fulfilment of the duty laid upon him. As regards the costs of the suit, we feel bound to take notice that the appeal has failed on the issues of fact to which the bulk of the evidence was directed. We order that the parties pay and receive costs in both Courts in proportion to success, but that the charges of printing and translating the record in this Court be borne entirely by the appellant.

Decree modified.

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL No. 504 OF 1911.

June 27, 1912.

Present:—Sir N. G. Chandavarkar, KT., Ag. Chief Justice, and Mr. Justice Batchelor.

HARIDAS NANABHAI—APPELLANT

versus

VITHALDAS KISANDAS—RESPONDENT.

Limitation Act (IX of 1908), *Sch. I, Art.* 179—*Execution of decree—Limitation—Step-in-aid of execution —Application for time to procure copies of judgment and decree.*

An application for time, made by a decree-holder after presenting a petition for execution of a decree, for procuring copies of the decree and judgment, is a step-in-aid of execution.

Kunhi Mannan v. *Seshagiri Bhakthan*, 5 M. 141, followed.

Kartick Nath Pandey v. *Juggernath Ram Marwari*, 27 C. 285, dissented from.

Second appeal from the decision of the District Judge of Ahmednagar, in Appeal No. 130 of 1910, confirming that passed by the first class Subordinate Judge of Ahmednagar, in *Darkhast* No. 162 of 1910.

Mr. *K. H. Kelkar*, for the Appellant.

JUDGMENT.—We are of opinion that the application for time, which was made by the appellant after he had given the *darkhast* of November 1906, to enable him to procure copies of the decree and judgment, was a step-in-aid of execution. We agree with the judgment of the Madras High Court in *Kunhi Mannan* v. *Seshagiri Bhakthan* (1), and dissent from the judgment of the Calcutta High Court in *Kartick Nath Pandey* v. *Juggernath Ram Marwari* (2).

The decree is, therefore, reversed and the *darkhast* sent back to be disposed of according to law on the merits.

Costs hithero incurred will be costs in the *darkhast*.

Decree reversed.

(1) 5 M. 141.
(2) 27 C. 285.

Re WYSE, *Ex parte* CHOWKSEY.

SIND JUDICIAL COMMISSIONER'S COURT.

MISCELLANEOUS CIVIL APPEAL No. 11 OF 1911.

February 13, 1912.

Present:—Mr. Pratt, J. C.

Re H. WYSE, *Ex parte* K. B. CHOWKSEY.

Provincial Insolvency Act (III of 1907), s. 16 (3) and (5)—Reputed ownership, doctrine of, inapplicable to secured creditor—Sale of mortgaged property—Failure by mortgagee to object to sale—Assignment—After-acquired property—Covenant to replace goods sold by other goods—Lien—License—Equitable mortgage.

Under the Provincial Insolvency Act, a secured creditor cannot lose his security by the doctrine of reputed ownership. Section 16 (5) excludes the applicability of the doctrine to a secured creditor. After the insolvency of his debtor, a secured creditor is entitled to realize his security.

The effect of a receiving order under English law is not to divest the debtor of his property and to make him insolvent.

The property of the insolvent is only divested by the adjudication order.

The failure on the part of a mortgagee to object to the sale of the mortgaged goods does not deprive him of his interest in the goods, and his right to realize his security out of the sale-proceeds remains unaffected by the sale.

Where there was a mortgage of certain shop goods then lying on the premises to secure payment of a debt and the mortgagor covenanted to keep on the premises stock to the extent of the amount of the debt, re-placing sold goods by goods of equal value:

Held, (1) that the transaction was not a mere license but an equitable mortgage of the goods subsequently substituted for the goods previously existing;

(2) that there was a complete assignment of after-acquired property.

It is not necessary that the covenant as to after-acquired property should be one which could be enforced by a suit for specific performance. The only condition is that the goods, when they come into existence, should answer to the description of the assignment and be capable of being identified as the things assigned.

Mr. *Wadhumal Oodharam*, for K. B. Chowksey.

Mr. *Rupchand Bilaram*, for Haji Ahmed Karim Mahomed.

JUDGMENT.—The appellant in Miscellaneous Appeal No. 11 was mortgagee by a deed, executed on the 31st October 1907 of the goods and chattels on the premises of the insolvent.

The mortgage was in the form of an assignment of the goods and chattels then lying on the premises and also of all outstanding debts due to the insolvent on condition that the assignment would become void on payment of the debt secured, that is, Rs. 9,000 and interest. There was also a covenant by the mortgagor, the insolvent, to keep on the premises stock to the value of Rs. 9,000 re placing sold goods by goods of equal value.

The mortgagor was, on 22nd March 1911, adjudged insolvent and his property vested in the Official Receiver.

The Official Receiver, on the 12th April 1911, sold the goods and chattels then existing on the premises and realized the sum of Rs. 3,621-7-0. The mortgagee applied to be paid this amount in realization of his security.

The Official Receiver, rejected the claim on the ground that the property had vested in the insolvent under the doctrine of reputed ownership. He also directed that the mortgagee should rank for dividend as an unsecured creditor.

The mortgagee has appealed against this order and the petitioning creditor has filed a Cross Appeal No. 10 objecting that section 31 is a bar to the mortgagee ranking with the unsecured creditors for his debt.

The doctrine of reputed ownership has been applied by the Official Receiver on the strength of various Indian cases decided under 11 and 12 Victoria, Chapter 21. But in that statute, there is no provision excluding secured creditors from the application of the doctrine. They have, therefore, no bearing in the present case which is under the Provincial Insolvency Act, 1907. In that Act, the doctrine of reputed ownership is enunciated in section 16 (3) and then para. (5) of the same section is as follows :—

"Nothing in this section shall affect the power of any secured creditor to realize or otherwise deal with his security in the same manner as he would have been entitled to realise or deal with it if this section has not been passed."

It seems very clear, therefore, that under the Provincial Insolvency Act, a secured creditor cannot lose his security under this doctrine.

Mr. Rupchand contends that the provisions of the English Bankruptcy Act, 1883, are similar and cites English cases in which the Courts have applied the doctrine to mortgagees. But the English Act is very different. Section 9 (1) provides that on the making of

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a receiving order, no creditor shall have any remedy against the property and person of the bankrupt. Para. (2) of the section then enacts that the section does not affect the power of a secured creditor to realize his security as if the section had not been passed. This section, however, does not in any way correspond with section 16 of the Provincial Insolvency Act for the effect of the receiving order is not to divest the debtor of his property or to make him insolvent, *Rhodes* v. *Dawson* (1). The property of the insolvent is only divested by the adjudication order under section 20 (1). There is no proviso to this section, saving the interest of secured creditors which may be lost under the doctrine of reputed ownership which is enacted in section 44 (*iii*).

Section 9 (2) of the English Act, therefore, falls very far short of section 16 (5) of the Indian Act.

Mr. Rupchand, however, seeks to support the order of the Official Receiver on the grounds which seem to me to be equally untenable.

His first contention is that the mortgagee not having appealed against the order of the Official Receiver selling the goods, he is not now entitled to claim payment out of the sale-proceeds. But the order for the sale of the goods does not deprive the mortgagee of his interest and was not expressed to be in any way adverse to him. It merely had the effect of converting the mortgagee's interest into cash, and if the mortgagee did not object to this, he was in no sense a person aggrieved nor was there any occasion for him to appeal. If the Official Receiver sold on behalf of the mortgagee, it is open to the mortgagee to ratify and adopt the sale. If the Official Receiver did not sell on behalf of the mortgagee, it is still open to the mortgagee to claim the sale-proceeds as belonging to him and not to the estate of the insolvent.

Next, it is contended that the form of the deed is similar to that of a Bill of Sale and that the Bill of Sales Act, 1878, invalidates any assignment of after-acquired property. It is sufficient to say that this English Statute is not law in India.

(1) (1886) 16 Q. B. D. 548 at p. 554; 55 L. J. Q. B. 134; 34 W. R. 240.

Next, Mr. Rupchand quotes the cases of *Belding* v. *Read* (2) and in *In re D'Epineuil Tadman* v. *D'Epineuil* (3), where similar covenants as to after-acquired property were held to be not sufficiently specific to support an assignment in equity.

Both these cases, however, were overruled in *Tailby* v. *Official Receiver* (4). It was there pointed out that it was not necessary that the covenant as to after-acquired property should be one which could be enforced by a suit for specific performance. There is only one condition, and that is, that the goods when they come into existence shall answer to the description of the assignment or in the other words that they should be capable of being identified as the things assigned. That condition is here fulfilled.

Lastly, Mr. Rupchand refers to the case of *Thompson* v. *Cohen* (5) and on its authority argues that the power to take the after-acquired goods was a mere license which did not convey any property in the goods and which was determined by the insolvency. But the deed in *Thompson* v. *Cohen* (5), made an assignment of present goods with a power to seize and sale, and then followed a covenant by which further goods "*other than or in addition to*" the said goods might be also seized and sold by the mortgagee. These future goods were, therefore, no part of the original security and the case was decided on the ground that there was no equitable mortgage of them as in the case of *Holroyd* v. *Marshall* (6), but that the covenant was merely a collateral license. The deed now under consideration is very different. There is an assignment of present goods as a security for Rs. 9,000 and then a covenant to always keep in the shop stock to the extent of Rs. 9,000 *re-placing* sold goods by goods of equal value.

The future goods are in substitution of the previously existing goods and a covenant to assign them as part of the security is clearly implied.

(2) (1865) 34 L. J. Ex. 212; 3 H. & C. 955; 11 Jur. (N. S.) 547; 13 L. T. 66; 13 W. R. 867.

(3) (1882) 20 Ch. D. 758; 47 L. T. 157; 30 W. R. 702; 51 L. J. Ch. 491.

(4) (1888) 13 A. C. 523; 58 L. J. Q. B. 75; 60 L. T. 162; 37 W. R. 513.

(5) (1872) 7 Q. B. 527; 41 L. J. Q. B. 221; 26 L. T. 693.

(6) (1860) 10 H. L. Cas. 191; 32 L. J. Ch. 193; 9 Jur. (N. S.) 213; 7 L. T. 172; 11 W. R. 171.

The case, therefore, falls within the rule of *Holroyd* v. *Marshall* (6), for a man can contract to assign future property and when it has come into existence, equity treating as done that which ought to be done fastens upon that property and the contract to assign, thus becomes a complete assignment. As to these goods, the transaction is an equitable mortgage and not a mere license.

The order of the Official Receiver admitting proof of the whole debt as an unsecured debt evidently proceeds on the assumption that the mortgagee has relinquished his security. As a matter of fact, he is realizing it and it will be open to him later on to apply for leave to prove the balance.

I reverse the order of the Official Receiver and direct the sale-proceeds to be paid to the applicant mortgagee. Appeal No. 11 allowed with costs.

Appeal allowed.

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 833 OF 1910.

September 17, 1912.

Present:—Mr. Justice Sundara Aiyar and Mr. Justice Sadasiva Aiyar.

PURUSHOTAMA DAS PRAGJI SAIT AND OTHERS—PETITIONERS

versus

JETA BHAI NAGJI SAIT AND ANOTHER—RESPONDENTS.

Arbitration—Award of arbitrators made out of Court—Filing of award—Absence of reference in award to a matter in dispute—Duty of Court to remit award—Acting in excess of jurisdiction—Right of arbitrators to ignore any matter—Abandonment of claim.

Per *Sadasiva Aiyar, J.*, (*confirming the order of the lower Court*).—An award of arbitrators is not a reasoned judicial decision and the arbitrators need not give reasons for their decision, and may even ignore any position advanced by the parties.

Nanjappa v. *Nanjappa Rao*, 23 M. L. J. 290; 12 M. L. T. 133; 16 Ind. Cas. 478; (1912) 1 M. W. N. 1091 and *Ram Dhari Sahu* v. *Ram Charitar Sahu*, 38 C. 143; 7 Ind. Cas. 333, referred to.

Arbitrators are not bound to decide a point, if the parties showed by their conduct that they did not want a formal decision thereon.

Ramji Ram v. *Saligram*, 14 C. L. J. 188; 11 Ind. Cas. 481, referred to.

The Court, in filing an award wherein the arbitrators have failed to give a decision on any matter, the subject of dispute, cannot be deemed to have exercised a jurisdiction not vested in it by law, or to have failed to exercise a jurisdiction vested in it by law.

Per *Sundara Aiyar, J.*,—Arbitrators are bound to decide all matters in dispute in their award and their failure to do so cannot be condoned because the Court, on the merits, does not sustain the contention which was not dealt with by them.

The Court, in filing an award, wherein a subject of dispute has not been decided, acts with material irregularity and fails to exercise a jurisdiction vested in it to remit the award.

If the parties abandon any claim before the arbitrators, that need not appear in the award; the award would not be vitiated by absence of reference thereto, but it may be proved by the evidence of the arbitrators.

Petition, under section 115, Civil Procedure Code, praying for revision of the decree of the Subordinate Judge of North Malabar, in A. S. No. 197 of 1909, presented against that of the District Munsif of Cannanore in O. S. No. 19 of 1908.

The Hon'ble Mr. *J. L. Rosario*, Advocate-General, for the Petitioners.

The Hon'ble Mr. *T. Richmond*, for the Respondents.

JUDGMENT.

SUNDARA AIYAR, J.—This is a petition under section 115 of the Civil Procedure Code against the judgment of the Subordinate Court of North Malabar refusing to set aside an order passed by the District Munsif of Cannanore filing an award. The reference to arbitrators in the case was without the intervention of any Court; the arbitrators passed an award. Amongst the objections taken by the defendant to its being filed, one was that the arbitrators had not decided all the questions in dispute between the parties. Before proceeding further, it would be desirable to refer to the *muchilika* or *karar* by which the reference was made to the arbitrators. It states :—" You are empowered by us and with our consent to settle by arbitration all the disputes going on between Nos. 1, 2 and 3 herein regarding the ware-house No. 776 in Ward D of Cannanore town, the buildings included therein and the rent thereof which form the joint acquisition of myself, Purushothama Das Pragji Sait No. 1, and of Megji Anji Sait, the deceased father of Nos. 2 and 3, and which had been managed under the possession of myself, Purushotham Das Pragji Sait No. 1." The award is Exhibit J and, according to the statement in paragraph 4, the only dispute raised by the defendant was that he had given Rs. 400 to one of the plaintiffs in advance as a loan and that he

was entitled to interest thereon. It will be observed that the *muchilika*, Exhibit A, itself does not state what the disputes between the parties were. The learned Counsel for the respondents does not deny the allegation of the appellant that one of the disputes before the arbitrators, in the first instance at any rate, related to the claim set up by the defendant to the share of one of the plaintiffs in the ware house in question under Exhibit II. The question was certainly a substantial and important one. There is no reference to it in the award of the arbitrators. The District Munsif was apparently of opinion that the claim under Exhibit II was given up before the arbitrators. If that was the fact, then I think the award would not be vitiated by the fact of no express reference being made in it to that claim. I cannot go so far as to hold, as the learned Advocate-General has asked us to do, that it must appear in the award itself that the claim was abandoned. I think the abandonment may be proved by the evidence of the arbitrators. But the Subordinate Judge, on appeal, does not, as far as I can see, find that the defendant abandoned his right under Exhibit II. He says:—" Exhibit II was a teer-deed by 1st plaintiff of his interest in the plaint shop. It would appear that it was a colourable creation intended to defeat 1st plaintiff's creditors. . . . . The arbitrators were, therefore, justified in dealing with these documents in the manner they have done." The arbitrators have not dealt with these documents at all in their award. The Subordinate Judge evidently meant to say that they were justified in not dealing with them, when he observed that they were justified in dealing with them in the manner they have done. The reason for justification given by the Subordinate Judge is that it appeared to him that Exhibit II was a colourable transaction intended to defeat the 1st plaintiff's creditors. His judgment then amounts to this: that because he himself was of opinion that Exhibit II evidenced a fraudulent transaction, the arbitrators were right in not dealing with it. It is hardly necessary to say that such a proposition cannot be sustained. The arbitrators were bound to decide any matter in dispute between the parties and their failure to do so cannot be condoned because the Court on the merits would not sustain the contention which the arbitrators did not deal with. The learned Counsel for the respondents says that in reality the Subordinate Judge intended to agree with the Munsif. Possibly he did; but I cannot find any support for that view in the Subordinate Judge's judgment. The District Munsif, in paragraph 28 of his judgment, observes with reference to Exhibit II that one of the arbitrators deposed that defendant had told him that his right under Exhibit II had ceased. This, indeed, is not the same as saying that Exhibit II was executed to defraud creditors. The other arbitrator deposed that the defendant told him that he had caused the teer-deed to be executed simply to defraud the creditors of the plaintiff's father. Having referred to the deposition of these two witnesses, the Munsif says: "The arbitrators, therefore, did not consider the teer-deed." He does not say that the defendant abandoned his right under Exhibit II. In paragraph 32, however, the Munsif observed:—"I find that the defendant's interests, if any, under Exhibits II and VI had ceased long ago and that he represented so to the arbitrators and that they were justified in not having considered Exhibits II and VI even if Exhibit VI had been shown to them." It is not clear to my mind whether the Munsif meant to say that the claim under Exhibit II was abandoned, or whether he intended to say that on account of the strong admissions contained in the statements before the arbitrators made by the defendant, they were justified in not considering Exhibit II. Probably he meant the latter. The arbitrators themselves do not seem to have stated in their depositions that the claim was abandoned. Apparently, they meant to justify themselves in making no reference to the defendant's claim under Exhibit II as the statements he made were against the sustainability of any such claim. However that may be, I cannot hold that the Subordinate Judge has found that the defendant's claim under Exhibit II was abandoned. Without such a finding, he could not hold that the arbitrators were right in not dealing with the claim. The law expressly requires that an award should be remitted if arbitrators fail to decide any of the matters submitted to them. The Subordinate Judge

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apparently agrees that one of the matters in dispute was not decided by the arbitrators. He had no power to confirm the Munsif's order filing the award without finding that the claim under Exhibit II was abandoned. In passing the order of confirmation without doing so, he must, in my opinion, be deemed to have acted with material irregularity and to have failed to exercise the jurisdiction vested in him to direct the award to be remitted, by entertaining a wrong impression that the failure by the arbitrators to decide a point submitted to them might be overlooked if the party urging the point had no substantial merits. It may also be said that he exercised a jurisdiction not vested in him in confirming the Munsif's order without finding that the claim under Exhibit II had been withdrawn. I would, therefore, ask the Subordinate Court to submit a finding on the question whether the defendant withdrew or abandoned his claim under Exhibit II. Mr. Richmond has contended that the appeal to the Subordinate Judge was incompetent as it was against the decree passed on the award. According to the provisions of the Civil Procedure Code, no appeal would lie against the decree in such a case except in so far as it might be in excess of, or not in accordance with, the award. At the same time, section 104 provides an appeal against an order filing an award. The Munsif's order directing the award to be filed was passed on the 23rd December 1906. The decree also was on the same date. No objection was taken before the Subordinate Judge with respect to the maintainability of the appeal. I think the appellant's contention may be upheld that the appeal was in reality against the order directing the award to be filed, especially as no objection was taken to it in the lower Appellate Court. The order passed on appeal was not itself appealable and the defendant adopted the proper course in filing a civil revision petition in this Court.

SADASIVA AIYAR, J.—I am of opinion that this petition under section 115 ought to be rejected. The parties went to arbitration and executed a *muchilika*, Exhibit A, to the arbitrators and they referred all their disputes regarding a ware-house and the buildings appurtenant to the ware-house and the rent collected from the ware-house to the decision of the arbitrators. The award does deal with the ware-house and with the buildings and with the rents which were the matters referred to arbitration and it decides that the defendant should pay the plaintiffs certain compensation for their half share of the properties in dispute within a certain period and, in default, that the plaintiffs should pay to the defendant compensation for his half share and take the whole of the properties themselves. I do not see that this award has left any dispute between the parties as regards their rights undecided. No doubt, the defendant produced before the arbitrators the two documents, Exhibits II and VI. As regards Exhibit VI, I understood that the learned Advocate-General did not press any contention in reference to it. As regards Exhibit II, the arbitrators, notwithstanding its production, held that the defendant is entitled only to a half share in the disputed properties. They were not bound to state why they came to such conclusion. It has been held in *Nanjappa* v. *Nanjappa Rao* (1) that an award need not be a reasoned judicial decision, and that arbitrators need not even give their reasons for their conclusions and they are not even bound to record anything of the proceedings [see *Ramdhari Sahu* v. *Ram Charitar Sahu* (2)]. They need not have mentioned in their award the reasons why they ignored Exhibit II. One of the arbitrators says that he ignored it because the defendant did not put forward any claim before the arbitrators and, in fact, said that he had given up all claims under it. The other arbitrator says that he believed it to be a colourable document and, therefore, that it did not give any rights to the defendant as claimable under it. I think, under these circumstances, there is nothing illegal in the award and I am unable to say that the arbitrators failed to decide any of the matters referred to them for arbitration. The Munsif also finds that Exhibit II was a nominal document and that the defendant did not put forward before the arbitrators any right under it at the hearing before them [see *Ramjee Ram* v. *Saligram* (3) as to the arbitrators not being bound to decide a point if the parties showed

(1) 23 M. L. J. 290; 12 M. L. T. 133; 16 Ind. Cas. 478; (1912) 1 M. W. N. 1091.
(2) 33 C. 143; 7 Ind. Cas. 333.
(3) 14 C. L. J. 188; 11 Ind. Cas. 481.

by their conduct that they did not want a formal decision on it]. The Subordinate Judge refers to paragraphs 27 to 34 of the Munsif's judgment and he evidently means to adopt the reasoning therein without any reservation. He also seems to say that the arbitrators did consider the document, Exhibit II, and have dealt with it in some way, that is, they came to the conclusion that the defendant did or could claim no rights under it. At least, that is how I understand the Subordinate Judge's judgment. I do not find that the Subordinate Judge or the Munsif has exercised a jurisdiction not vested in either of them by law or failed to exercise a jurisdiction vested in them or that they acted perversely in ignoring or refusing to follow any provision of law and I cannot find any material irregularity in either of the judgments. I must also point out that the Munsif's order filing the award became final because no appeal was filed *against that order* and, so far as the decree was passed by him in accordance with, and not in excess of, the award, no appeal at all lay against that decree even to the Subordinate Judge. The Subordinate Judge, to whom the appeal was made against the Munsif's decree, was, therefore, right in dismissing it as the decree was not in excess of the award. The present revision petition is against the Sub-Judge's decree dismissing the appeal preferred to him and, as I said just now, the Sub-Judge's said decree is perfectly right on the short ground that the Munsif's decree which was not in excess of the award, could not be interfered with in appeal [see Civil Procedure Code, second Schedule, clause 16 (2)]. Under these circumstances, I would dismiss this civil revision petition with costs. [See *Ram Saran Das* v. *Mohammad Nawaz Khan* (4) and *Narpat Rai* v. *Devi Das* (5), which show that neither appeal nor revision petition lies in such cases].

ORDER.—The result is that the petition is dismissed with costs.

Petition dismissed.

(4) 9 Ind. Cas. 38; 7 P. W. R. 1911; 14 P.L.R. 1911.
(5) 14 Ind. Cas. 375; 16 P. W. R. 1912.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 122 OF 1912.

April 11, 1912.

Present:—Mr. Justice Robertson.

H. H. THE MAHARAJA BRIJ INDAR SINGH OF FARIDKOT—PLAINTIFF—APPELLANT

versus

BANSI LAL—DEFENDANT—RESPONDENT.

Custom—Hindu Law—Non-agricultural Banias *of town—Adoption of sister's son, validity of—Occupancy-holding—Adopted son, whether succeeds—Punjab Tenancy Act (XVI of* 1887), *s.* 59.

Non-agricultural *Banias*, who reside in a town, are not governed by the Customary Law, and amongst them the adoption of a sister's son is valid, and the adopted son succeeds to an occupancy-tenancy.

Hernaman v. *Atma Ram*, 24 P. R. 1900; P. L. R. 1900 p. 437; *Muhammad Din* v. *Jawaher*, 69 P. R. 1907; 170 P. L. R. 1906; *Chuttan* v. *Ram Chand*, 86 P. R. 1904; *Munsa* v. *Surta*, 99 P. R. 1909; 16 P. L. R. 1910; 170 P. W. R. 1909; 4 Ind. Cas. 853; *Bhagwan Singh* v. *Bhagwan Singh*, 21 A. 412 (P. C.); 26 I. A. 153; 3 C. W. N. 454, referred to.

Dad v. *Bhag Singh*, 34 P. R. 1883 (F.B.), followed.

Second appeal from the decree of the Additional Divisional Judge, Delhi Division, dated the 1st July 1911.

FACTS.—The facts of this case are as follows:—

One T. M., a *Bania*, held some agricultural land as the occupancy-tenant of the plaintiff. On his death, mutation in respect of the occupancy-tenure was effected in favour of the defendant, his sister's son, who had been adopted by him. The plaintiff contested the validity of the adoption, and brought a suit to have it cancelled. The Courts below found the adoption to be valid and dismissed the plaintiff's suit, whereupon the plaintiff appealed to the Chief Court who delivered the following judgment:—

Mr. *Muhammad Tufail*, for the Appellant.

Pandit *Rambhaj Datta*, for the Respondent.

JUDGMENT.—The only question before me is whether or not the adoption in this case of a sister's son is valid. Both Courts have found in favour of the validity of the adoption as a form of adoption amounting in the tract in question to an adoption, and not a mere appointment of an heir. That in the South-East Punjab such adoptions are often recognized is quite certain and I see no reason, after consulting the rulings quoted, for differing from the two lower Courts in their finding that the adoption of a sister's son was valid [see *Harnaman* v. *Atma Ram* (1),

(1) 24 P. R. 1900; P. L. R. 1900 p. 437.

Muhammad Din v. *Jawahir* (2), *Chuttan* v. *Ram Chand* (3), *Mansa* v. *Surta* (4) and *Bhagwan Singh* v. *Bhagwan Singh* (5)—as discussed and explained in these rulings].

It was not really contested in the first Court that if the adoption was a real adoption and not merely the customary appointment of an heir, the adopted son could succeed to the tenancy. It was contested in the grounds of appeal, but is not urged in the grounds for revision here, though the learned Counsel argued the points. As to this, in face of *Dad* v. *Bhag Singh* (6), I see no ground to interfere specially as it is not specifically mentioned in the grounds raised under section 70 (1) (*b*) nor was notice specifically issued on this point. The appeal fails and is dismissed with costs.

Appeal dismissed.

(2) 69 P. R. 1907; 170 P. L. R. 1906.
(3) 86 P. R. 1904.
(4) 99 P. R. 1909; 16 P. L. R. 1910; 170 P. W. R. 1909; 4 Ind. Cas. 853.
(5) 21 A. 412 (P. C.); 26 I. A. 153; 3 C. W. N. 454.
(6) 34 P. R. 1883 (F. B.).

SIND JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 23 OF 1910.
March 14, 1912.
Present:—Mr. Pratt, J. C., and Mr. Hayward, A. J. C.

AJUMAL AND OTHERS—APPELLANTS
versus
THE SECRETARY OF STATE FOR INDIA IN COUNCIL—RESPONDENT.

Railways Act (IX of 1890), s. 47 (1) (F)—North-Western Railway Tariff Rule No. 464 (V)—Construction of statutory rule—Plain meaning of words—Goods available for delivery—Loss by negligence of servants—Liability of Railway—Right to rescind contract—Partial failure—Proper course—Contract Act (IX of 1872), s. 39—Construction of contract or grant.

Tariff Rule 464 (V) of the North-Western Railway is a rule passed under section 47 (1) (F) of the Railways Act, and has the force of law.

The rule must be construed according to the plain meaning of the words used which are wide enough to include loss due to negligence of the Railway of its servants. Consequently, the Railway is exempted from liability to pay for damage caused to goods by the negligence of its servants after the goods have been made available for delivery to the consignee and the time fixed for taking delivery has expired.

The canons of construction applicable to contracts and grants are out of place in considering a statutory rule or order.

A party to a contract has no right to rescind the contract unless the other party fails to perform the contract in its entirety.

Where cotton consigned to a Railway is damaged, the proper course for the consignee is to take delivery and then sue for damages for deterioration of the cotton.

Obiter dicta:—In contracts by a common carrier, stipulations in general words exempting the carrier from liability will be held to limit his liability as an insurer, and not his liability for negligence, unless negligence is expressly included in the exemption.

Sheikh Mahomed v. *The British Indian Steam Navigation Company*, 32 M. 95; 4 M. L. T. 110 (F. B.); 18 M. L. J. 497; 1 Ind. Cas. 977 and *Price and Company* v. *The Union Lighterage Company*, (1903) 1 K. B. 750; 72 L. J. K. B. 374; 5 W. R. 477; 88 L. T. 428; 19 T. L. R. 328; 8 Com. Cas. 155; 9 Asp. M. C. 398, relied upon.

In all contracts or grants, words of exception are construed strictly against the party in whose favour they are inserted. The principle is founded on the maxim that no man shall derogate from his grant.

Appeal from the decree of H. N. Crouch, A. J. C.

The Hon'ble Mr. *Harchandrai Vishindas*, for the Appellant.

Rai Bahadur Lala *Tekchand Udhavdas*, for the Respondent.

JUDGMENT.—The plaintiffs sued to recover the value of cotton consigned by their Tando Jam firm to their Karachi firm.

They had refused to accept delivery from the Railway because the cotton had been damaged by rain.

They claimed Rs. 5,066-4-0, the value of the cotton and Rs. 356 interest, in all Rs. 5,066-4 0.

The cotton had been carried by the Railway "at railway risk" and it is admitted that the cotton reached Karachi on the 4th June and that the liability of the Railway as carriers ceased at mid-day on the 6th June. The damage was caused by rain both before and after mid-day of the 6th June. As the plaintiffs refused to accept delivery, the cotton was sold by auction by the Railway in August for a sum of Rs. 2,238-4-5.

The lower Court awarded the plaintiffs the sum of Rs. 2,238-4-5 and Rs. 81 for damage caused to the cotton prior to mid-day of the 6th June. The Court further held that the defendant was not liable for damages caused to the cotton after mid-day of the 6th June, but directed that the defendant should bear his own costs.

Plaintiffs appeal on the grounds that—

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(i) the damages awarded for the period prior to mid-day, the 6th June, are inadequate,

(ii) that the defendant is liable for damage done after that time.

The defendant has filed cross-objections for costs.

As to the damage caused prior to mid-day the 6th June, it is sufficient to say that there is no evidence beyond that of the Station Master which the Judge has accepted. The plaintiffs made no survey on the 6th June and they have been unable to prove by any evidence of their own what part of the damage was caused in this period.

The damage subsequent to the mid-day of the 6th June was caused while the defendant company was in possession as a warehouseman. The liability of the Railway in this capacity is defined in Tariff Rule 464 (V), which provides that "besides incurring wharfage charges, goods will be entirely at the risk of the owner." The lower Court has held that this rule exempts the Railway from all liability. For the plaintiffs, it is strenuously contended in this appeal that the damage was due to the negligence of the Railway in not protecting the goods and that the general words of the rule do not cover negligence.

The case cited in support of this contention is that of *Sheikh Mahomed* v. *The British India Steam Navigation Company* (1). In that case, goods were shipped under a bill of lading which gave the Shipping Company the option of landing them—and the bill of lading contained the following stipulation: "In all cases and under all circumstances, the liability of the Company shall cease absolutely when the goods are free of the ship's tackle and thereupon the goods will be at the risk, for all purposes and in every respect, of the shipper or consignee." The shipping Company negligently landed the goods when rain was falling and it was held that the general words in the bill of lading did not exclude liability for negligence. There is a superficial resemblance between the two cases, for in both cases, the stipulation was that the goods should be at owner's risk and in both cases the damage was caused by exposure to rain while in the possession of the defendant. The resemblance, however, is merely superficial. The principle involved in *Sheikh Mahomed* v. *The British India Steam Navigation Company* (1) is that laid down in *Price & Company* v. *The Union Lighterage Company* (2) and cases there cited, that in contracts by a common carrier, stipulations in general words exempting the carrier from liability will be held to limit his liability as an insurer—and not his liability for negligence unless negligence is expressly included in the exemption. This rule follows on the more general principle that in all contracts or grants, words of exception are construed strictly against the party in whose favour they are inserted, and it is founded on the maxim that no man shall derogate from his grant.

But this canon of construction is out of place in the consideration of a statutory rule or order. Here the Railway Company have made no private contract to exempt themselves from liability as bailees. The exemption is made by law, for the Tariff Rule is a rule passed under section 47 (1) (F) of the Railways Act, IX of 1890, and has the force of law. The Tariff Rule must be construed according to the plain meaning of the words used and these words are wide enough to include loss due to negligence of the Railway Company or its servants. Section 75 of the Railways Act was so construed by the Bombay High Court in *Balaram* v. *The S. M. Railway Company* (3). The lower Court was, therefore, right in its conclusion that the defendant is not liable for damage done after mid-day the 6th June.

As to the cross-appeal, the defendant has not been allowed his costs as he was in possession of the sale-proceeds up to the time the suit was filed. But the defendant is not to blame on this account. The plaintiffs misconceived their rights from the beginning. They refused to accept delivery on the ground that the goods were damaged. This was tantamount to rescinding the contract and the suit has been filed on the basis of a contract rightfully rescinded for they claim the full value of the cotton by way of damages. But the plaintiffs had no right to rescind for the defendant had not failed to perform the contract in its entirety—section 39, Indian Contract Act. Their proper course was to take delivery and then sue for

(1) 32 M. 95; 4 M. L. T. 110 (F. B.); 8 M. L. J. 497; 1 Ind. Cas. 977.

(2) (1903) 1 K. B. 750; 72 L. J. K. B. 374; 5 W. R. 477; 88 L. T. 428; 19 T. L. R. 328; 8 Com. Cas. 155; 9 Asp. M. C. 398.

(3) 19 B. 159.

damages for the deterioration to the cotton. If they had done this, they would not have been deprived of the sale-proceeds of the cotton.

We, therefore, confirm the decree of the lower Court, but direct that defendant should recover costs in proportion of Rs. 5,422-4-0, the total claim, to Rs. 81, decreed in the lower Court. We dismiss this appeal with costs.

Appeal dismissed.

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 119 OF 1912.

September 25, 1212.

Present:—Mr. Justice Sundara Aiyar and Mr. Justice Sadasiva Aiyar.

B. M. VENKATAPPA NAYANIVARU —PETITIONER

versus

RAMI REDDI AND OTHERS—RESPONDENTS.

Inamdar, *suit against, by proprietor of estate for* jodi *and* fasli jasti—*Small Cause suit—Jurisdiction of Revenue Court.*

A suit by the proprietor of an estate against an *inamdar* for an amount made up of *jodi* and *fasli jasti* is a Small Cause suit and is not triable, by a Revenue Court.

Narayansawmi Naidu v. *Venkatasubrayadu*, 9 M. L. T. 315; 9 Ind. Cas. 642, referred to.

Petition, under section 25 of Act IX of 1887, praying the High Court to revise the order of the Court of the District Munsif of Chittur in Small Cause Suit No. 615 of 1191, dated 10th November 1911.

Messrs. *V. Ramadoss* and *N. S. Narasimhachariar*, for the Petitioner.

Messrs. *Vencatasubba Row* and *Radha Krishnaya*, for the Respondents.

JUDGMENT.—This is a petition to revise the order of the District Munsif of Chettur in a Small Cause suit filed by the proprietor of an estate against an *inamdar*. The plaintiff claims to recover a sum of Rs. 2-11-9. It appears from the plaint that the amount is made up of *jodi* and *fasli jasti*. The claim is made against the defendant on the ground that he is bound to pay it as *inamdar*. It is not, therefore, based on the relationship between the plaintiff and defendant as landlord and *ryot*. The claim is against the person who himself possesses an interest in the *malvaram*.

The suit was, therefore, not triable in a Revenue Court and was rightly instituted in the District Munsif's Court on the Small Cause side. See *Narayanaswamy Naidu* v. *Vencata Subaraydu* (1). We reverse the order of lower Court and direct that the plaint be restored to the file and the suit disposed of according to law. Costs will abide the result.

Petition allowed.

(1) 9 M. L. T. 315; 9 Ind. Cas. 642.

SIND JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 6 OF 1910.

March 22, 1912.

Present:—Mr. Pratt, J. C., and Mr. Hayward, A. J. C.

PARUMAL AND OTHERS—APPELLANTS

versus

Wadero MAHOMEDALI AND OTHERS — RESPONDENTS.

Muhammadan Law—Pre-emption—Assertion of right before completion of sale—Formalities for pre-emption—Talab-i-istishhad—*Reference to* talab-i-mowasibat, *when necessary—Co-owners' right to pre-empt* per capita—*Assignment—Right of third parties to impeach—Admissibility of oral evidence—Colourable transaction—Evidence Act (I of 1872), s. 92—Merger in decree—Fraud.*

The assertion of a right of pre-emption before the completion of a sale is premature and ineffectual.

Under Muhammadan Law, a pre-emptor must ordinarily comply with the following formalities after the completion of a sale:

(1) *talab-i-mowasibat*, or assertain of right immediately on receiving information of sale;

(2) *talab-i-istishhad*, or demand in the presence of witnesses made either to the buyer or to the seller or on the premises in dispute;

(3) the *talab-i-istishhad* should refer expressly to the *talab-i-mowasibat*.

Where, however, the occasion for performing the *talab-i-mowasibat* does not arise until all the conditions for a *talab-i-istishhad* had occurred, there is no scope for the operation of the rule that *talab-i-istishhad* should refer expressly to the *talab-i-mowasibat* and the maxim applies *cessante ratione legis, cessat et ipsa lex.*

Rajjab Ali v. *Chandi Churn*, 17 C. 543; and *Mubarak Husain* v. *Kaniz Bano*, 27 A. 160; (1904) A. W. N. 201; 1 A. L. J. 569, distinguished.

All persons having an equal right of pre-emption are entitled under Muhammadan Law to divide the property equally *per capita*.

Where an assignment is impeached on the ground that it is colourable and has the effect of defeating the rights of third parties, such third parties have

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the right to produce evidence to show the real nature of the transaction. Section 92 of the Evidence Act is no bar to the production of oral evidence by such third parties. It makes no difference that the transaction has merged in a decree, for decrees only bind the parties thereto or persons claiming under them.

An assignment can be assailed by third parties on the ground of fraud.

Fraud is an extrinsic and collateral act which vitiates the most solemn proceedings of Courts of Justice.

Appeal from the decree of the Assistant Judge, Hyderabad.

The Hon'ble Mr. *Harchandrai Vishindas*, for the Appellants.

Mr. *Gopaldas Jhamatmal*, for Respondents Nos. 1 and 2.

JUDGMENT.—In this suit, the two plaintiffs seek to enforce a right of pre-emption arising out of a sale in 1908 by the first five defendants to the 6th defendant.

The original sharers in the porperty were :—

Plaintiffs, 8-annas.
Ghulam Hussain, 4-annas.
Mir Hassan, 4-annas.

In 1898, by a decree passed upon an award between defendant No. 6 as plaintiff and Ghulam Hussain and Bahadar, son of Mir Hassan, as defendants, the two 4-annas shares of Ghulam Hussain and Mir Hassan were given to defendant No. 6 in satisfaction of a debt of Rs. 5,000.

Ghulam Hussain's estate was then under management and it is clear that the decree could only give Ghulam Hussain's life-interest to defendant No. 6. There is a dispute as to the effect of the decree on the share of Mir Hassan. On the one side, it is contended that Bahadar represented all the heirs of Mir Hassan and that the whole 4-anna share passsd under the decree. On the other side, it is contended that there were three other heirs, two brothers, Sher Mahomed and Allahdino, and a sister ; that they were not parties to the suit and that their interest in the 4-anna share was not affected by the decree. As to the sister, a son of Ghulam Hussain, Exhibit 58, no doubt, says that there was a sister who died before Bahadar, but this sister is not referred to in the award and from the pleadings, it is clear that it was common ground between the parties that the heirs of Mir Hassan were the three sons, Bahadar and defendants Nos. 4 and 5—see plaint para. 2 and written statement, Exhibit 10, para. 5. The heirs of Mir Hassan alive at the time of the award were, therefore, three sons and only one of these sons joined in the award. The District Judge has found that the award and decree passed only the share of that one son Bahadar. We concur in that finding. Bahadar did not profess to represent his co-heirs. The statement in the award that the two brothers had relinquished their rights is opposed to the fact that they were parties to and received the consideration for the subsequent sale in 1908. The decree, therefore, only affected Bahadar's one third share of Mir Hassan's 4-annas and the life-interest of Ghulam Hussain.

At Ghulam Hussain's death, therefore, the shares in the estate were :—

Plaintiffs, 8 annas.
Defendant No. 6, $\frac{1}{3}$ *by* 4-annas.
Co-heirs of Bahadar, $\frac{2}{3}$ *by* 4-annas.
Heirs of Ghulam Hussain, 4-annas.

It was then that the sale-deed of 1908 was passed by the co-heirs of Bahadar and by the heirs of Ghulam Hussain to defendant No. 6 for the sum of Rs. 6,500 in order to perfect his title to the two 4-annas shares which the award professed to give him.

It is to this sale that the plaintiffs claim pre-emption and, on the facts recited above, the District Judge has awarded plaintiffs 4-annas on payment of Rs. 3,250 to defendant No. 6. It is, of course, obvious that the subject-matter of the sale was 4-annas *plus* $\frac{2}{3}$ *by* 4-annas, *i. e.*, a share of 6-anna 8-pies and that the plaintiffs could only be entitled to pre-emption of such part of that share as the Muhammadan Law allows them.

Defendant No. 6 has appealed on three main grounds : (1) that the sale of 1908 is not a transaction which gives rise to the right of pre-emption, (2) that the plaintiffs have not observed the formalities necessary for the purpose of establishing a right of pre-emption, and (3) that the share of the pre-emptors is wrongly estimated. The plaintiffs cross-object that they should have been allowed to show by evidence that the award and decree of 1898 was collusive and that the transaction was a mortgage,

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Now, it is difficult to understand why the transaction of 1908, which is embodied in the sale-deed, Exhibit 58, should not give rise to a claim for pre-emption. The argument advanced is that it was not a sale, but a confirmation of the transfer of title effected by the award and the decree of 1898. If Exhibit 58 had merely been an indemnity bond, by which the transferors or the heirs of the transferors of 1898 covenanted to indemnify the defendant No. 6 for any flaws in the title conveyed under the award and decree, there would have been much force in this argument. But the transaction was of a different nature altogether. Fresh consideration was paid and a conveyance obtained of all rights left outstanding by the decree. This was a perfect sale and there can be no doubt that it did give rise to a right of pre-emption.

The next question is as to the preformance of the formalities required by Muhammadan Law for the purpose of giving effect to the right.

The plaintiffs were informed of the intended sale while they were at their water-wheel in their village on the 1st March. They at once, in the presence of two witnesses, Exhibits 83 and 88, declared their intention to assert their right of pre-emption. They started at once for Hala to see if the deed had been executed. They made inquiries at the *Mukhtayarkar* Office and at Sub-Registrar's Office, but were unable to obtain any information. They returned on the 2nd to their own village and raised money to pay for the land in case their demand was complied with and then started for Hyderabad. They reached Hyderabad at dawn on the 3rd. They found defendant No. 1 and then they questioned him about the sale. He put them off and said he would speak to the other defendants about it. The plaintiffs then consulted a Pleader and at his advice went to the Court to see if any award effecting the transfer was being filed. They failed to obtain any information at the Court, but hearing that the defendants were going to Hala the next day, plaintiff, Ahmed, went also to Hala on the 4th and stood guard outside the Sub-Registrar's Office. He saw the defendants going into the Sub-Registrar's Office. He then sent for two witnesses and went into the office with them. He says that the first real information he had of the sale was when he entered the office and saw the deed in the Sub-Registrar's hand (Exhibit 82, lines 52 and 90). He then made a formal demand and assertion of his right in the presence of the parties and of the witnesses. The deed had been executed at 6 P. M. on the 3rd in a Pleader's office.

Now, it must be conceded that the *talab-i-mowasibat* on the water-wheel on the 1st was ineffectual—for it was made before the sale was completed. No right of pre-emption had, therefore, arisen and the assertion of the right was, therefore, premature. But it seems to us that what took place in the Sub-Registrar's Office was a sufficient compliance with all the formalities of the Muhammadan law. These are (1) *talab-i-mowasibat*, or assertion of right immediately on receiving information, (2) a *talab-i-istishhad*, or demand in the presence of witnesses made either to the buyer or seller or on the premises in dispute and it is also necessary, (3) that the *talab-i-istishhad* should refer expressly to the *talab-i-mowasibat*. But there is this special feature in this case that the occasion for performing the *talab-i-mowasibat* did not arise until all the conditions for a *talab-i-istishhad* had occurred The demand made in the Sub Registrar's Office was in itself an assertion of the right and there was, therefore, no scope for the operation of the rule that the *talab-i-istishhad* should refer expressly to the *talab-i-mowasibat* and the maxim applies that *cessante ratione legis, cessat ipsa lex.*

We are aware that the decision of the Calcutta High Court in *Nundo Pershad* v. *Gopal* (1), that the reference to the first *talab* may be omitted in the second *talab*, has been overruled by a Full Bench of that Court in *Rujjub Ali* v. *Chandi Churn* (2), which has been followed by the Allahabad High Court in various cases of which the latest is *Mubarak Husain* v. *Kaniz Bano* (3). But the facts in these cases were different. The *talabs* were performed on different occasions and the omission of a reference to

(1) 10 C. 1008.
(2) 17 C. 543.
(3) 27 A. 160; A. W. N. (1904) 201; 1 A. L. J. 569.

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the first *talab* was sought to be excused merely on the ground that the witnesses had themselves heard it. The reason was inadequate for the reference seems to be required not for the purpose of informing the witnesses but for the purpose of giving notice to the vendor or vendee that there has been no waiver of the right. The contention of defendant No. 6 is that the plaintiffs were informed by defendant No. 1 on the evening of the 3rd of the execution of the deed and that they neglected to perform the *talab-i-mowasibat*. Defendant No. 1 is the only witness on this point and we disbelieve him. If plaintiffs had received that information, then there was no occasion for them to have pursued the parties to Hala. We find, therefore, that the formalities of the Muhammadan Law have been observed and that the plaintiffs have established their right to pre-empt.

The property subject to the right of pre-emption is a share of 6-annas 8-pies. The other *shafees* were the two plaintiffs who had an 8-annas share and defendant No. 6 who had a share of 1-anna 4-pies. Plaintiffs claim that they are entitled to $\frac{2}{3}$ and not $\frac{1}{3}$ of the property that is liable to pre-emption. Defendant No. 6 contends that the two plaintiffs should be regarded as representing one share. We follow the rule, deduced from an examination of the original authorities in *Amir Hasan* v. *Rahim Baksh* (4), that all persons having equal right of pre-emption are entitled under Muhammadan law to divide the property equally *per capita*. Plaintiffs are, therefore, entitled to pre-empt as to $\frac{2}{3}$ of 6-annas 8-pies on payment of $\frac{2}{3}$ of Rs. 6,500.

This finding, however, proceeds on the assumption that the award and decree of 1898 operated as a sale. The plaintiffs contend that it was in reality a mortgage and that, therefore, the whole 8-annas share is subject to pre-emption. The plaintiffs were not allowed to lead evidence on this point in the lower Court on the ground that the decree could not be impugned by a third party having no interest in the transaction. Now, it is quite true that in the case of an assignment of a debt, it is not open to the debtor to impeach the assignment on the ground of want of consideration for that is a matter entirely between the assignor and the assignee. But when the assignment is impeached on the ground that it is colourable and has the effect of defeating the rights of third parties, different considerations apply. Here the provisions of section 92, Indian Evidence Act, are no bar to the production of oral evidence by such third parties and, moreover, the assignment can be assailed on the ground of fraud for, as Lord Hardwicke said in *Chesterfield* v. *Janssen* (5): "Particular persons in contracts shall not only transact *bona fide* between themselves, but shall not transact *mala fide* in respect of other persons who stand in such a relation to either as to be affected by the contract or the consequences of it." In such a case, though in England third parties except creditors may not challenge the transaction if it is by deed, yet in this country it is always open to third parties to show the real nature of the transaction —and this is the rule recognized in *Mulji* v. *Nathubhai* (6). It makes no difference that the transaction was merged in a decree for decrees only bind the parties thereto or persons claiming under such parties and fraud, it has been said, is an extrinsic and collateral act which vitiates the most solemn proceedings of Courts of Justice.

We, therefore, frame the following issue:—

(1) Was the transaction represented by the decree of 1898 in reality a mortgage?

and refer it for trial to the lower Court. Both parties to be at liberty to adduce evidence. Finding and evidence to be returned to this Court in two months.

On this judgment being read out, Mr. Gopaldas says that he does not wish to raise the issue as to the decree of 1898 being really a mortgage.

We, therefore, vary the decree of the lower Court and decree that plaintiffs do recover possession of a share of $\frac{2}{3}$ *by* 6-annas 8-pies in the property in suit on payment of $\frac{2}{3}$ of Rs. 6,500 to the 6th defendant—payment to be made within one month. Appellants to pay proportionate costs in both Courts.

Decree varied.

(4) 19 A. 466; A. W. N. (1897), 118.

(5) (1750) 2 Ves. 125; 1 Atk. 352.

(6) 15 B. 1.

RAJARAM RAO v. TULJARAM RAO.

MADRAS HIGH COURT.

ORIGINAL SIDE APPEAL No. 42 OF 1909.

October 21, 1912.

Present:—Sir Ralph Benson, Kt., Judge, and Mr. Justice Sankaran Nair.

T. V. RAJARAM RAO—APPELLANT

versus

T. V. TULJARAM RAO—RESPONDENT.

Evidence Act (I of 1872), s. 92—Compromise of subject-matter of appeal—Adjustment of 'all matters in dispute'—Oral evidence of independent agreement—Written compromise silent as to certain provisions.

Where the subject-matter of an appeal is compromised by the parties by means of a written agreemet which recited that '*all matters in dispute*' were adjusted, it is not open to any of the parties to tender oral evidence of a separate agreement not comprised in the written deed of compromise on the ground that it related to a matter on which the compromise was silent.

Appeal from the decree of the Hon'ble Mr. Justice Wallis in Ordinary Original Civil Jurisdiction in Suit No. 150 of 1906.

Mr. *T. R. Venkatarama Sastri*, for the Appellant.

Mr. *V. Masilamani Pillai*, for the Respondent.

JUDGMENT.—Civil Suit No. 266 of 1886 was brought by a member of the family to which the parties belonged for partition against the other members of the family, the plaintiff, Rajaram Rao being the 3rd defendant and the present defendant, Tuljaram Rao, being the 4th defendant, in that suit. The present defendant, Tuljaram Rao, was the managing member of the family. He was held liable to account for Rs. 3,23,000 odd by the final decree passed on the original side of this Court. On appeal against the preliminary decree, he was held accountable for an additional sum of Rs. 1,40,000. The decree on the original side also declared that a half share of the Scottish Press which was purchased by Tuljaram Rao had been purchased by him on behalf of the family and that he must account to the family for a half of his drawings from the Press, which half amounted to Rs. 1,03,000 odd, so that he was accountable for a sum of Rs. 5,70,000 in all. The amount payable to the plaintiff in the present suit, who was then the 3rd defendant, amounted to over Rs. 86,000. It was also decreed that the present plaintiff and defendant were each entitled to $\frac{1}{4}$th share of certain jewels then deposited in Court by the 5th defendant in that suit. It also held that each of them was entitled to a fourth share of certain outstandings due from the Nadar family. An appeal was filed against the final decree by Tuljaram Rao, the 4th defendant therein. While the appeal was pending, the matters in dispute between all the parties were compromised. The agreements entered into between them were embodied in separate documents. The terms of the compromise differed as between them, apparently because the circumstances were different. Exhibit BB is a memorandum of agreement between the plaintiff and the defendant and it recites that "with a view to terminate the litigation that has been going on in the family for the past eleven years and more, and to make an amicable settlement of *all matters in dispute* between the several members of the family of the parties hereto" that agreement was entered into. Under Exhibit BB., the present plaintiff was to give up his claim for the Rs. 86,000 odd decreed to him; he was to enter up satisfaction of the decree in his favour for that amount; Tuljaram Rao was to withdraw his appeal which was then pending before the High Court and there were also certain other provisions to which it is unnecessary to refer. The plaintiff accordingly entered up satisfaction of the decree in his favour. The other parties did the same and the defendant Tuljaram Rao withdrew the appeal filed by him.

The plaintiff's case now is that, in ac 5 ion to the consideration therein set forth, 455 ram Rao further agreed to assign to him ed $\frac{1}{4}$th share of the jewels which, as we have already said, were deposited in Court by the 5th defendant and also his $\frac{1}{4}$th share of the outstandings which were recovered from the Nadar family. The plaintiff alleged that Tuljaram Rao also agreed to give him certain other properties; but, as they are not the subject-matter of the appeal, it is unnecessary to refer to them. Wallis, J., who heard the suit, decided that it was not open to the plaintiff to adduce evidence to prove this claim as the terms of the contract between the parties had been reduced to writing and the claim now put forward is opposed to those terms. The question which we have to decide is whether the learned Judge is right in taking that view.

It is contended before us that this was a separate oral agreement as to a matter on

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which the document is silent and that it is not consistent with its terms and, as such, it may be proved under the proviso to section 92 of the Evidence Act. This is clearly not so. Exhibit BB distinctly provided that the appeal against the decree in the civil suit was to be withdrawn, and the original decree was to regulate the right of the parties except in those cases where it was varied by the terms stated in Exhibit BB. According to that decree, Tuljaram Rao was to get his $\frac{1}{4}$th share in the properties now in dispute. There was no provision in the memorandum of agreement which varied that decree in this respect. The agreement set up, therefore, is quite inconsistent with its terms and we are of opinion, therefore, that it cannot be proved. Nor can this be treated as a case where a contract has not been reduced to writing. Exhibit BB., itself distinctly recites that the agreement was entered into to terminate the litigation that had been going on in the family for over 11 years and to make a settlement of *all matters in dispute.* It must be taken, therefore, that the contract has been reduced to writing and the plea advanced before the learned Judge, so far as we can judge from the evidence, was not that the contract between the parties was not reduced to writing but that this was an independent oral agreement with reference to which the contract was silent. We must, therefore, disallow this contention.

Another question which was argued in appeal had reference to a loan alleged to have been advanced to the defendant. According to the plaintiff, there was a loan advanced to Messrs. Graves, Cookson and Company, and there was another loan given by the plaintiff to the defendant personally on pledge of the defendant's own jewels. According to the defendant, there was only one transaction and there were not two distinct loans. Both the Commissioner and the learned Judge had disallowed the contention of the plaintiff. The Commissioner has fully discussed the evidence in the case and we see no reason to differ from his conclusion. We confirm the learned Judge's finding on this question. We accordingly dismiss the appeal with costs.

The memorandum of objections is not pressed and we dismiss it also with costs.

Appeal dismissed.

SIND JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 44 OF 1911.

March 22, 1912.

Present:—Mr. Pratt, J. C., and Mr. Hayward, A. J. C.

PARUMAL AILMAL—APPELLANT

versus

MOTUMAL AND OTHERS—RESPONDENTS.

Court Fees Act (VII of 1870), *s.* 7, *cls. I, IV (d)—Suit for rent and declaration of title with injunction—Valuation—Jurisdiction.*

A., as the heir of one *D.*, brought a suit against *B.* and *C.* As against *B.*, the relief claimed was the recovery of arrears of rent on the basis of a lease of the property in dispute by *D.* As against *C.* the relief claimed was a declaration of title and injunction as it was alleged that *C.* prevented *B.* from paying rent to *A.*:

Held, (1) that the suit was based on two distinct causes of action, for money and for declaration of title, with injunction;

(2) that the suit fell within clauses I and IV (*d*) of section 7 of the Court Fees Act;

(3) that the value for purpose of jurisdiction was the value for computation of Court fees.

Appeal against the order of the Sub-Judge, Sukkur.

Mr. *Rupchand Bilaram*, for the Appellants.

Mr. *Parsram Tolaram*, for the Respondents.

JUDGMENT.—The plaintiff sued to recover rents due to him by the first two defendants. The property had been leased to these defendants by the plaintiff's sister, Radhibai and plaintiff claimed to be entitled as heir of Radhibai—the other heirs having relinquished their rights in his favour. He joined as parties to this suit a brother of Radhibai and a brother of Radhibai's husband who, he said, were preventing the defendants from paying rent to him. The cause of action against the tenants was on the lease to Radhibai. The cause of action against the third and fourth defendants was on title for it was alleged that they were interfering with plaintiff's possession. There were thus two distinct causes of action (1) for money and (2) for an injunction. The second class Sub-Judge of Shikarpur refused to entertain the suit and returned the plaint for presentation to the first class Sub-Judge Sukkur. The first class Sub-Judge returned the plaint for presentation to the proper Court.

This is an appeal from the order of the first class Sub-Judge.

We think the first class Sub-Judge was right. The plaint proceeds on the supposi-

tion, not clearly expressed it is true, but nevertheless clearly implied by the relief sought, that the plaintiff was in possession through his tenants. The suit, therefore, was one under clause I and clause IV (*d*) of section 7 of the Court Fees Act and was stamped *ad valorem* on each claim. Therefore, under section 8 of the Suits Valuation Act, the value as determinable for computation of Court Fees and the value for the purposes of jurisdiction are the same. See in this connection *Vachhanni Keshabhai* v. *Vachhani Nanbha Bawaji* (1). The value as computed for Court-fee was under Rs. 5,000 and, therefore, the 2nd class Sub-Judge had jurisdiction.

It may be that the plaintiff is not really in possession and, in that case, he will not be entitled to a decree against the 3rd and 4th defendants unless he sues for possession. It may also be that in view of the ruling *Rathnasaba Pathi* v. *Ramasami Iyer* (2), the relief by way of injunction cannot be decreed merely on a constructive possession through tenants. But these are matters which will be decided upon after the plaint is admitted. *Prima facie*, the 2nd class Sub-Judge has jurisdiction to try the suit in the form given to it by the plaint and it is not open to the defendants to contest the valuation which section 8 of the Suits Valuation Act enables the plaintiff to put upon the suit.

Mr. Rupchand wishes us to interfere in revision with the order of the second class Sub-Judge, but we decline to do so as no appeal has been filed against that order and, as we are not satisfied that the plaintiff has not brought his suit in its present form merely with a view to avoid paying Court-fee on the value of the property. For it is really the title to that property which is being litigated in the guise of a suit for rent.

We, therefore, confirm the order of the lower Court and dismiss this appeal. No order as to costs.

Application dismissed.

(1) 33 B. 307; 5 M. L. T. 230; 11 Bom. L. R. 30; 1 Ind. Cas. 108.

(2) 33 M. 452; 7 M. L. T. 311; 20 M. L. J. 301; 5 Ind. Cas. 630; (1910) M. W. N. 112.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL No. 1878 OF 1909.

June 29, 1911.

Present:—Mr. Justice Mookerjee, and Mr. Justice Carnduff.

MOTICHAND AND OTHERS—DEFENDANTS—APPELLANTS

versus

BAJRANG SAHAI AND OTHERS—PLAINTIFFS—RESPONDENTS

Revenue Sale Law (Act XI of 1859), s. 9—Contract Act (IX of 1872) s. 69—Mortgage by co-sharer—Default in paying revenue by other co-sharers—Payment of their share by mortgagee—Suit by mortgagee for recovery of sums paid—Whether suit maintainable without specifying share of revenue payable by each co-sharer—Contribution suit, nature of—"Defaulting proprietor," meaning of—Person not proprietor paying revenue—Remedies.

A co-sharer proprietor of an estate mortgaged his share to the plaintiff. Under the terms of the mortgage contract, the Government revenue was payable by the mortgagor. The other co-sharers of the estate made default in the payment of the revenue, and the plaintiff was obliged to deposit several sums to avert the sale of the properties and save his interest. He then brought this suit for the recovery of the sums against the defaulting co-sharers:

Held, that the suit was maintainable on the principle recognised in section 9 of the Revenue Sale Law Act of 1859, and also under section 69 of the Contract Act; that the plaintiff was not bound to claim against each co-sharer the specific amount of Government revenue payable by him proportionate to his share in the estate, as the present suit was not a contribution suit.

Bholanath Chatterjee v. *Inder Chand Doogur*, 14 W. R. 373, *Rujaput Rai* v. *Mahomed Ali Khan*, 5 A. H. C. R. 215, *Hira Chand* v. *Abdul*, 1 A. 455 and *Ibn Husain* v. *Ramdai*, 12 A. 110, distinguished.

The nature of a contribution suit explained.

If the arrears of revenue due have been paid by a person who is not a proprietor he has a threefold remedy. If he is a party to a suit pending before a Court of Justice for possession of the estate, it is competent to the Court to put him temporarily in possession. In the second place, he is entitled to have a personal decree against the defaulting proprietors for the amount paid by him to save the estate from danger. In the third place, he is entitled to have a lien on the estate for the amount paid.

The expression "defaulting proprietor" in section 9 of the Revenue Sale Law Act of 1859 means, where there is more than one proprietor, the entire body of such proprietors.

The reasonable interpretation of section 69 of the Contract Act is that it applies only to cases in which the person who makes the payment is himself not liable to pay, but is interested in the payment of the money.

Appeal from the decree of the District Judge of Saran, dated the 25th May 1909,

reversing that of the Subordinate Judge, 2nd Court of Saran, dated the 31st August, 1908.

Babu *Jogendra Chandra Ghose*, for the Appellants.

Babus *Umakali Mukerjee* and *Surendra Nath Ghosal*, for the Respondents.

JUDGMENT.—This is an appeal on behalf of the defendants first party in a suit for recovery of money alleged to have been paid by the plaintiff to satisfy the arrears of Government revenue in respect of an estate. The case for the plaintiff is that one Mukut Nath Prasad was interested to the extent of a third share in one of the *Mouzahs* by name Balapur included within the estate. On the 4th July 1874, Mukut Nath executed an usufructuary mortgage in favour of the plaintiff, and since then the plaintiff has been in possession of the properties covered by the mortgage. Under the terms of the mortgage contract, the Government revenue was payable by the mortgagor. In 1905, however, some of the proprietors of the estate made default in the payment of Government revenue, and the result was that the plaintiff was obliged to deposit several sums on various occasions to avert the sale of the properties. He now seeks to recover this sum from the defendants who are admittedly the proprietors of the estate. The suit was resisted principally by the first six defendants, who are the purchasers of the interest of the mortgagor of the plaintiff. Their defence was two-fold, namely, *first*, that the suit had not been properly constituted, because the plaintiff had asked for a joint decree in respect of the whole sum paid by him as against the entire body of proprietors; and *secondly*, that some of the payments, alleged to have been made by the plaintiff, were voluntary payments, because at the time they were made, the Government revenue had not actually fallen due

The Court of first instance held that both these objections were well founded and dismissed the suit. The plaintiff then appealed and it is not disputed that he abandoned a portion of his claim to which exception had been taken on the ground that the payments covered thereby were voluntary. The District Judge overlooked this point, and, as he came to the conclusion that the suit had been properly constituted, he made a full decree in favour of the plaintiff. The first six defendants have now appealed to this Court, and on their behalf it has been contended, *first*, that the frame of the suit is bad and, therefore, it ought to be dismissed; and, *secondly*, that if any decree is made in favour of the plaintiff, there cannot be a decree for an amount in excess of the value of the appeal presented to the District Judge. A subsidiary point has also been raised that the District Judge ought not to have allowed interest at the rate of 12 per cent. per annum.

In so far as the first ground urged on behalf of the appellants is concerned, it has been contended that the suit is in the nature of a contribution suit and the plaintiff is, therefore, bound to claim against each proprietor the specific amount of Government revenue payable by him proportionate to his share in the estate. In support of this proposition, reliance has been placed upon the cases of *Poornochunder Gangooly* v *Kishen Chunder Ghose* (1) and *Gunga Gobind Mundul* v. *Ashootosh Dhur* (2). In our opinion, the cases mentioned are clearly distinguishable and do not assist the appellants. It may be conceded, as laid down in the cases of *Bholanath Chatterjee* v. *Inder Chand Doogur* (3), *Rujaput Rai* v. *Mahomed Ali Khan* (4), *Hira Chand* v. *Abdal* (5) and *Ibn Husain* v. *Ramdai* (6), that a claim for contribution must distinctly set forth the amount due by each of the parties. That principle, however, has no application to the case before us, because the suit is not one for contribution within the meaning of this Rule. In a suit for contribution, the plaintiff alleges that he and the defendants were jointly liable to meet a specified demand, that he has been obliged to satisfy the demand by a payment in excess of his legitimate share, and that, consequently, he is entitled to call upon his co-sharers to contribute to the payment of this money. In a case of this description, the foundation of the claim of the plaintiff is that he has made a payment in excess of what is payable by him propor-

(1) 5 W. R. 112.
(2) 21 W. R. 255.
(3) 14 W. R. 373.
(4) 5 N. W. P. H. C. R. 215.
(5) 1 A. 455.
(6) 12 A. 110; A. W. N. (1890), 31.

tionate to his liability; consequently, his share of the liability must, in the first instance, be ascertained. If there is an ascertainment of his share, there is no reason why the shares of the other persons should not equally be ascertained in the same litigation. If this principle were not followed, the result would be that the plaintiff would have a decree to be satisfied jointly by all the defendants; and each of the latter would be entitled to bring successive suits for contribution after the demand of the plaintiff has been satisfied. To prevent multiplicity of litigation, it is thus obviously desirable that in a suit of this description, the plaintiff should get a decree for an ascertained sum against each of the persons originally liable to satisfy the joint demand. In the case before us, the position is entirely different. The plaintiff asserts that under the terms of the mortgage contract he was not liable to pay any share of the Government revenue. He has, however, been compelled, by reason of the default made by one or more of the entire body of proprietors, to satisfy the demand of the Government. If he had not done so, the estate would have been sold, and not merely the interest of the proprietors but his own interest as mortgagee would have been completely destroyed. Under these circumstances he seeks to recover what he has paid from the entire body of proprietors. In our opinion, he is obviously entitled to do so on the principle recognized in section 9 of Act XI of 1859. That section deals with deposit by persons not proprietors. The Legislature has provided that if the arrears of revenue due have been paid by a person who is not a proprietor, he may have a three-fold remedy. If he is a party to a suit pending before a Court of Justice for possession of the estate, it is competent to the Court to put him temporarily in possession. In the second place, he is entitled to have a personal decree against the defaulting proprietors for the amount paid by him to save the estate from danger. In the third place, he is entitled also to have a lien on the estate for the amount paid. It was pointed out by their Lordships of the Judicial Committee in the case of *Nugender Chunder Ghose* v. *Sreemutty Kaminee Dossee* (7), that it is open to a person, who has made such a payment, to obtain a personal decree against the defaulting proprietor; and it was pointed out by this Court, in the cases of *Upendra Chandra Mitter* v. *Tara Prosanna Mukerjee* (8) and *Rakhohir Chattaraj* v. *Bipra Das Dey* (9), that a person in this position is entitled to add the sum so deposited to his mortgage security. In the case before us, the plaintiff seeks a personal remedy against the defaulting proprietors. In answer to this claim, it has been argued that the defaulting proprietors are not all jointly and severally liable for the entire sum paid by the plaintiff, because, it is asserted, some of them deposited what they thought was proportionate to their share of the entire Government revenue. In our opinion, the answer suggested is obviously fallacious. In so far as the Revenue Authorities were concerned, as no separate accounts had been opened, the Collector was not bound to recognise any partial payment made by a co-sharer. If the entire demand was not satisfied, the estate was liable to be sold under the provisions of Act XI of 1859. Consequently, if one or more of the proprietors made a partial payment, they did not cease to be defaulting porprietors, because they were the component members of an entire body from whom the whole sum was legally recoverable. We are of opinion that the expression "defaulting proprietor" in section 9 of Act XI of 1859 means, where there is more than one proprietor, the entire body of such proprietors. It is clear, therefore, that under section 9 of Act XI of 1859, the plaintiff is entitled to succeed. We may add that the plaintiff is also entitled to succeed under section 69 of the Indian Contract Act. That section provides that a person, who is interested in the payment of money which another is bound by law to pay, and who, therefore, pays it, is entitled to be reimbursed by the other. The reasonable interpretation of this section is that it applies only to cases in which the person who makes the payment is himself not liable to make the payment. In the case before us, as already explained, the plaintiff was not bound to pay any portion of the Government revenue; the defendants, on the other hand, were so liable. The plaintiff was also interested in the payment of this money, because if the money was not paid, his interest as mortgagee was liable to be extinguished

(7) 11 M. I. A. 241; 8 W. R. (P. C.) 17.

(8) 30 C. 794; 7 C. W. N. 609.

(9) 31 C. 975.

by the sale. He has accordingly made the payment. He is, therefore, entitled to be reimbursed by the others, that is, by the whole body of proprietors who were bound by law to pay the entire sum of the Government revenue. It is clear, therefore, that, from whatever point of view the case may be considered, the plaintiff is entitled to a decree as against all the proprietors. The suit, therefore, has been properly constituted.

In so far as the second contention of the appellant is concerned, it has been conceded by the learned Vakil for the respondent that the plaintiff is entitled to a decree only for the sum at which he valued his appeal to the District Judge. In fact, the point appears to have been overlooked by the Court below, and if the attention of the learned District Judge had been drawn to the matter, the error would have been avoided. The decree, therefore, will be varied.

In so far as the subsidiary point as to interest is concerned, there is no substance in it. No objection appears to have been taken at any stage of the suit that the amount claimed as interest was excessive. We see no reason, therefore, to allow interest at a rate lower than 12 per cent.

The result is that, subject to the variation in the amount of the decree, it will be affirmed. As the appeal has substantially failed, the appellants must pay the respondents their costs in this Court.

Appeal dismissed: Decree varied.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 111 OF 1911.

October 4, 1912.

Present:—Mr. Justice Sundara Aiyar and Mr. Justice Sadasiva Aiyar.

THUPPATI VEERI CHETTI AND OTHERS —APPELLANTS

versus

MOLUGUVAM RENGANAYAKULU AIYAR AND ANOTHER—RESPONDENTS.

Accounts—Mutual, open and current accounts, test for determining—Limitation.

The test for determining whether accounts are mutual, open and current, is whether there were mutual demands and not mere payment by one party to the other on account of a debt due by the former to the latter. The fact that balances were constantly shifting, sometimes in favour of one party and sometimes in that of the other, affords no real test of mutuality, though this would be an important matter in considering whether there were mutual demands.

Shiv Gowda v. *Fernandez*, 34 M. 513; 8 M. L. T. 412; 8 Ind. Cas. 141; (1911) 1 M. W. N. 1; 21 M. L. J. 391 and *Velu Pellai* v. *Ghose Mahomed*, 17 M. 293; 4 M. L. J. 140, referred to.

Second appeal against the decree of the District Court of Salem in A. S. No. 283 of 1907, preferred against that of the Principal District Munsif of Salem, in O. S. No. 67 of 1906.

The Hon'ble Mr. *T. V. Seshagiri Aiyar*, for the Appellants.

Mr. *S. Varadachariar*, for the Respondents.

JUDGMENT.—This appeal is by the defendants and the question argued is, that the suit is barred by limitation as there were no mutual, open and current accounts between the parties. The District Munsif and the District Judge both held that there were such accounts between them. The District Munsif proceeds mainly on the ground that the accounts showed that the balances were constantly shifting, sometimes in favour of one party and sometimes in that of the other. This is not the real test to be applied in deciding whether the accounts are mutual, open and current. The test is whether there were mutual demands and not mere payment by one party to the other on account of a debt due by the former to the latter. See *Shiv Gowda* v. *Fernandaz* (1) and *Velu Pillai* v. *Ghose Mahomed* (2). The fact that the balance was shifting between the parties would, no doubt, be an important matter in considering whether there were mutual demands. As the lower Courts seem to have proceeded on the footing that it would be sufficient if the balance was a shifting one, we cannot accept the finding that the accounts between the parties were mutual, open and current accounts. The question must be decided by applying the test we have already mentioned. We reverse the decree of the lower Appellate Court and remand the appeal for fresh disposal according to law. Costs will abide the result.

Appeal allowed.

(1) 34 M. 513; 8 M.L.T. 412; 8 Ind. Cas. 141; (1911) 1 M. W. N. 1; 21 M. L. J. 391.

(2) 17 M. 293; 4 M. L. J. 140.

EMPEROR *v.* CHANDA SINGH.

PUNJAB CHIEF COURT.

CRIMINAL APPEAL No. 219 OF 1912.

October 23, 1912.

Present:—Sir Arthur Reid, KT., Chief Judge, and Mr. Justice Rattigan.

EMPEROR—APPELLANT

versus

CHANDA SINGH AND OTHERS—RESPONDENTS.

Criminal Procedure Code (Act V of 1898), ss. 417, 423 (a)—Riot case—Duty of Police to ascertain guilty party—Duty of Court —Re-trial of appeal, power of High Court to direct.

It is not the duty of the Police to determine in a riot case "which of two mutually destructive stories is the correct one." The Police are not called upon, nor is it within their province, to determine in a case of this kind which of the two parties concerned was in the wrong. It is for the Courts to determine upon the evidence on the record which of the two parties has been guilty of the offence charged against them, and none-the-less so because the record is lengthy and the case complicated and difficult.

The fact that a Sessions Judge obviously failed to apply his mind to the determination of questions before him, and declined to adjudicate therein himself, because the Police did not attempt to adjudicate as to the guilt or innocence of persons implicated, is an indication of a complete misconception of the respective duties of the Courts and the Police, and the High Court will in such a case, under the wide powers conferred upon it by section 423 (*a*) of the Code of Criminal Procedure, direct a lower Appellate Court to re-try an appeal which was before it for determination.

Queen-Empress v. *Ganesh Khanderao*, 13 B. 506, referred to.

Appeal from the order of the Sessions Judge, Amritsar Division, dated the 10th October 1911, reversing that of the Magistrate, 1st Class, Gurdaspur, dated the 29th August 1911, and acquitting the respondents.

Mr. *Bevan Petman*, Government Advocate, for the Appellant.

Lala *Hukam Chand*, for the Respondents.

JUDGMENT.—This, and the connected case (Criminal Appeal No. 220 of 1912) are two appeals by the Local Government, under section 417 of the Criminal Procedure Code, from the orders of the Officiating Sessions Judge of Amritsar, dated the 10th October 1911, acquitting certain persons, who had been convicted by the Magistrate, 1st class, Gurdaspur, of various offences.

For obvious reasons, we have no desire, in view of the action which we have decided to take upon these appeals, to give expression to any opinion regarding the facts, but in order to explain matters, we may briefly summarise the findings of the Magistrate.

These were as follows:—On the 14th May 1911, a dispute arose between one Tahl Singh and his brother Ganda Singh, on the one side, and one Chet Singh, on the other side, regarding the construction of a water channel. Lachhman Singh, son of Hardit Singh, and his brothers, (Khushal Singh, Sangat Singh and Ganda Singh), happened to be present, and though not interested in the dispute, took sides with Tahl Singh, with the result that Lachhman Singh received injuries amounting to grievous hurt. For this offence, certain members of the opposite side (Ganda Singh, son of Sundar Singh; Mahan Singh; Amohal Singh; Ishar Singh; and Surain Singh) were charged under section 325, Indian Penal Code. Mahan Singh was discharged and Ganda Singh was acquitted by the Magistrate, who, however, found Ishar Singh, Amohal Singh and Surain Singh guilty and sentenced them, each to one year's rigorous imprisonment and to a fine of Rs. 40. On the following day (the 15th May), a riot took place in which the persons concerned were Lachman Singh and his supporters on the one side, and Fauja Singh and his supporters on the other side. In the course of this riot, one man, Sawan Singh, was killed and three persons, Tahl Singh, Narain Singh and Sundar Singh, suffered injuries amounting to grievous hurt, while Fauja Singh, Asa Singh, Lachhman Singh No. 2, (a different person from the Lachhman Singh previously referred to), Suchet Singh and Surain Singh received injuries amounting to simple hurt. Of all these nine persons, eight were members of the party of Fauja Singh, and one only (Surain Singh) belonged to the party of Lachman Singh No. 1.

The Police sent up both parties for trial, as also the persons alleged to have inflicted grievous hurt on Lachman Singh No. 1 on the 14th May.

The Magistrate in a somewhat lengthy judgment, which dealt with all these cases, found (as already stated) that three persons, (Ishar Singh, Amohal Singh and Surain Singh), were guilty of the offence of having caused grievous hurt to Lachman Singh No. 1 on the 14th May, and that in respect of the riot which occurred on the 15th May, the eleven persons of Lachman Singh No 1's

party, who were charged with offences under sections 304, 325 and 148, Indian Penal Code, were guilty of offences under sections 325 and 148. Of these persons, all but Lachman Singh No. 1, were sentenced, each to three years' rigorous imprisonment and a fine of Rs. 100, Lachman Singh No. 1, in view of the fact that owing to the injuries received by him on the previous day, he could not have taken a very active part in the affray being sentenced merely to six months' rigorous imprisonment and a fine of Rs. 25. All the 19 persons belonging to Fauja Singh's party were discharged.

From this order of the Magistrate, two appeals were preferred to the Sessions Judge (1) by the three persons who had been convicted of causing grievous hurt to Lachman Singh No. 1 on the 14th May, and (2) by the eleven members of Lachman Singh No. 1's party who had been convicted under sections 325 and 148, Indian Penal Code, for offences committed on the 15th May.

The learned Sessions Judge disposed of both appeals in one judgment. He has made no attempt to discuss the facts and has acquitted the appellants in both cases on the ground that "owing to the extraordinary inadequacy of the Police inquiry," the occurrences of the 15th May "are wrapped in mystery, that it is now impenetrable owing to the failure to make any attempt to ascertain which of the diametrically opposed stories regarding that day was the true one," and that it is "impossible to say anything at all with regard to the common intention of the parties in respect of the various acts done by them on the two days in question." He further adds that the "Police investigation in fact has been so unsatisfactory that it is now quite impossible for the Court to determine with sufficient certainty, to justify a conviction what did, and what did not occur, on the two days in question."

It is from this order of the Sessions Judge that the present appeals have been preferred by the Local Government.

In our opinion, these appeals must be accepted. We are unable to accept the view of the Sessions Judge that in cases of this kind, it is the duty of the Police Authorities to ascertain "which of two mutually destructive stories is the correct one." The Police are not called upon, nor is it within their province, to determine, in the case of a riot, which of the two parties concerned was in the wrong, and in sending both parties up for trial, the Police in the present case acted with propriety and in accordance with well recognized rules of practice in such affairs. It is for the Courts to determine, upon the evidence on the record, which of the two parties has been guilty of the offence charged against them, and none-the-less so because the record is lengthy and the case complicated and difficult. In the present case, we regret to say that the learned Sessions Judge has obviously failed to apply his mind to the determination of the questions before him. He has taken exception to the action of the Police and because the Police have not attempted to adjudicate as to the guilt or innocence of the persons implicated, he has declined to adjudicate therein himself. This is an entirely indefensible position for a judicial officer to take, and it indicates a complete misconception of the respective duties of the Courts and the Police in cases of this kind.

As a result of the Sessions Judge's action, the appeals before him have not been decided, as they should have been, on the merits, and the only course open to us is to accept those appeals and to return the record to the Court of the Sessions Judge, Amritsar, for re-trial of the appeals before him in accordance with law.

We do not feel called upon ourselves to determine those appeals and thereby to relieve the Sessions Judge of the duty imposed upon him by law. Under the wide powers conferred upon this Court by section 423 (*a*) of the Criminal Procedure Code, we are authorised to direct a lower Appellate Court to re-try an appeal which was before it for determination. [See *Queen-Empress* v. *Ganesh Khanderao* (1) and cases there cited]. We accordingly accept these appeals and reversing the orders of the Sessions Judge, we direct that the record be sent to the Sessions Judge, Amritsar, for the determination of the appeal before him in accordance with law.

Appeal accepted.

(1) 13 B. 506.

MADRAS HIGH COURT.

CRIMINAL REFERENCE No. 10 OF 1912.

September 3, 1912

Present:—Mr. Justice Ayling and Mr. Justice Napier.

In re ADABALA MUTHIYALU—ACCUSED.

Penal Code (Act XLV of 1860), ss. 397, 326—Robbery—Robbery not proved—Conviction for grievous hurt under section 326.

A Jury, in a Sessions case is competent, where a charge under section 397, Indian Penal Code, is not established, to convict the accused of an offence under section 326, Indian Penal Code, where the facts proved establish the commission of that offence.

Queen-Empress v. *Anga Valayan*, 22 M. 15; *King-Emperor* v. *Krishna Ayyar*, 24 M. 641 and the opinion of Bashyam Iyengar, J. in *Pattikadan Ummaru* v. *Emperor*, 26 M. 243, referred to.

Reference under section 307, Criminal Procedure Code, by the Sessions Judge of Godaveri, in Case No. 33 of the Calender for 1912.

FACTS,—The facts are sufficiently clear from the following charge of the Sessions Judge to the Jury:—

GENTLEMEN OF THE JURY,

The accused is charged, under section 397 of the Indian Penal Code, with having committed robbery of a *kuttikantu* and at the time of the committing of the said robbery with having used a knife and voluntarily caused grievous hurt to Mandapati Seshamma, the 1st witness for the prosecution. Seshamma was, at about lamp-lighting time on the 30th April last, going to a Komati's shop to buy soap-nuts. The shop was at a distance of about 70 or 80 yards from her house. Between the shop and her house, there were only two vacant houses. As she was going along the punta, was the accused rushed at her from the vacant house which was nearer to Seshamm's house and snapped the *kuttikantu* she was wearing on her neck. Seshamma held the *kuttikantu* fast in her hand and did not let it go. The accused then cut her at her neck with a knife and also stabbed her at the abdomen. She received an injury on the left thumb when she was holding the *kuttikantu* with her left hand. Seshamma fell down. The *kuttikantu* was not lost; but two gold beads and one five franc piece out of it, were found missing. She could not say whether the accused had taken away the gold beads and the five franc piece or whether they were lost in the scuffle. Pullayya, her brother, the 3rd witness, searched for the missing beads and the five franc piece near the spot but could not find them out. As soon as Seshamma was cut by the accused, she cried out according to her, "Adabala Mutyalu is cutting me away." The 3rd witness Pullayya, the brother of Seshamma, who had just then returned home from his field, heard the cry of his sister. He says the cry he heard was "Ammo Babo, he is stabbing me". He at once ran to the spot. When he was at a short distance from it, he saw the accused running away. Finding that his sister was lying on the ground with bleeding wounds, he did not run after the accused, but went to the help of his sister. Reddeyya, the Village Naick, who was following the Kernam and the Revenue Inspector, when they were going home after their field measurement, also heard the cry of some one. He at once ran to the spot. He found a person lying on the ground and another running away. He gave chase to the latter, but the man ran southwards towards the sea and disappeared. Returning to the very spot, he found that the person that had been lying there was not there. He heard some noise at Seshamma's house, and, going there, found Seshamma covered with injuries. Thence he went to the Kernam and reported the matter to him. Taking leave of him, he went home. The Village Munsif sent word to him to fetch the report books and, with the Village Munsif, the 6th witness again went to Seshamma's house. The 4th witness Reddeyya, the Village Naick, was not able to identify the accused or the person hurt. The husband of Seshamma, the 5th witness, was at his master's field. Word was sent to him that his wife had been cut. He returned home and questioned Seshamma as to her injuries. She is said to have narrated the same story. At the spot itself, Pullayya, the brother of Seshamma, had questioned her. She narrated the same story. Carrying her home and leaving her there, Pullayya went to the Village Munsif and reported the occurrence to him. The Village Munsif came to Seshamma's house and found the injuries upon her person. He sent her to the hospital at Rajole for treatment. He, at about 10 P. M., also despatched his report Exhibit B to the Magistrate, which corroborates the evidence of Seshamma.

2. The chief witness in the case is

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Seshamma herself. She had known the accused before and she distinctly says that she identified the accused as the person that had snapped the *kuttikantu* and cut her with a knife. The 3rd witness Pullayya had also known the accused. He, too, states that he saw the accused run away from the spot as soon as he went to her assistance. The 4th witness Reddayya's evidence will corroborate the other two witnesses' evidence Nos. 1 and 3. The Village Munsif, 6th witness, soon after the occurence sent his report, Exhibit B, to the Magistrate. In the report, these facts are set out. The distance from this Village to Rajole is about eight miles and the report reached the Magistrate, you will find from the endorsement on it, at about 3 A. M. Seshamma was taken to the hospital at 2-45 A. M. The medical witness, the 2nd witness, the Sub-Assistant Surgeon, examined her injuries and gave the certificate Exhibit A. There were three incised wounds, one at the neck, one at the abdomen and the other on the left thumb. The wound on the abdomen was an incised and penetrating one such as to endanger life. It was a serious wound. Seshamma was at the hospital for 21 days as an in-patient. On the 21st May afternoon, she left the hospital and did not return for treatment. At the time she left the hospital, the wound at the abdomen was not completely healed. During the 21 days she was at the hospital, according to the medical witness, she was unable to follow her ordinary pursuits of life.

3. The accused denies his guilt. He says he was not in the village at all on the night of the occurrence. He does not cite any witnesses.

4. Now, the principal question for your consideration would be, whether the evidence of these witnesses for the prosecution, namely witnesses Nos. 1, 3, 4 and 6, should be believed. There was nothing elicited in the cross-examination of these witnesses or mentioned in the statement of the accused, to show that these witnesses were not giving true evidence. The fact that Seshamma had received the injuries that night is clear from the evidence of these witnesses and also from the evidence of the Sub-Assistant Surgeon. Who had caused the injuries is the question for your consideration. You may take it that the occurrence took place between 7 and 8 P. M. that night. It was a moonlight night The accused had been known to Seshamma and her brother Pullayya. Seshamma had every opportunity of identifying the man when he caused the wounds. She says he was the accused himself. If any other had caused the injuries, there was no reason why she should foist the crime upon the accused and not upon the real offender. So, if you believe the evidence of the prosecution witnesses, you may take it that he snapped the *kuttikantu* and also caused these injuries to Seshamma.

5. Now, I shall briefly explain to you the law as far as it bears upon this case. You will remember that the accused was charged with robbery and, at the time of the committing of the said robbery, with having caused grievous hurt to Seshamma. The two offences embodied in this charge are robbery and voluntarily causing grievous hurt at the time of committing the robbery.

6. First, I shall explain to you what the charge of voluntarily causing grievous hurt is. Whenever any bodily pain is caused to any person, hurt is caused. It becomes grievous hurt when the hurt endangers life. Also, any hurt which causes the sufferer to be during the space of 20 days unable to follow the ordinary pursuits is grievous hurt. In this connection, you will remember that the medical evidence was to the effect that the injury at the abdomen was such as to endanger life. If that portion of the evidence alone is relied on, the hurt caused at the abdomen will be grievous hurt. Further, the medical witness has stated that, during the space of 21 days, Seshamma could not have followed her ordinary pursuits. Taking that portion of the evidence even, it would follow that the hurt caused to Seshamma was grievous.

7. Now, I shall explain to you the charge of robbery. Whoever, intending to take dishonestly any moveable property out of the possession of any person without that person's consent, moves that property in order to such taking is said to commit theft. Mere motion of the property in order to take it dishonestly from the possession of another would be sufficient to constitute the offence of theft. In other words, it is not necessary that the property, or any portion of it, should have been actually lost. It need not be carried away

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by the offender. If, in this case, Seshamma's evidence is believed, the accused snapped her *kuttikantu*. Apparently, if he had done so, his intention would have been dishonest. If he had snapped it, as deposed to by Seshamma, theft would be committed even though the property was not lost.

8. Theft becomes robbery, if in order to the committing of the theft, or in committing the theft or in carrying away or attempting to carry away property obtained by the theft, the offender, for that end, voluntarily causes hurt to any person. In the present case, Seshamma has deposed that as she did not leave hold of her *kuttikantu* she was stabbed by the accused. If her evidence is believed, it would follow that the hurt was caused in order to the committing of the theft or in committing the theft and the act would amount to robbery.

9. Then, if, at the time of committing robbery, the offender uses any deadly weapon or causes grievous hurt to any person, the act would fall under section 397. The charge against the accused is under section 397 of the Indian Penal Code. Section 397 is, as I have told you, a combination of offences, robbery and voluntarily causing grievous hurt. If, in the circumstances, it happens that you do not believe that any robbery was committed, but if you believe that the accused had voluntarily caused grievous hurt with a knife, then it would be open to you to find him guilty under section 326, Indian Penal Code, alone.

10. Thus, taking all the circumstances of the case into consideration as disclosed by the evidence for the prosecution and regarding also the statement of the accused, you will give your verdict. If there is any reasonable doubt in the case, the accused is entitled to the benefit of it and your verdict should lean towards acquittal.

11. One fact, I had forgotten to bring to your notice and I wish you will take that also into consideration in arriving at your verdict. The *kuttikantu* or the portion of it that remained was not taken possession of by the Police nor has it been produced before this Court. Seshamma states that she has it at her house and that she has not been using it since the occurrence in consequence of her wound at the neck. You will please take this circumstance also into your consideration in arriving at your verdict.

VERDICT OF THE JURY:—

Unanimous. Not guilty.

ORDER.—The Jury have unanimously found the accused not guilty of any offence. I am unable to agree with the verdict. I should find the accused guilty of voluntarily causing grievous hurt by means of a knife, an offence falling under section 326, Indian Penal Code, though I would give him the benefit of a reasonable doubt as regards the robbery. I am clearly of opinion that it is necessary for the ends of justice to submit the case to the High Court. I shall accordingly do so."

Mr. *L. A. Govindaragava Iyer*, Acting Public Prosecutor, in support of the Reference.

JUDGMENT.—The Judge has referred the case under section 307, Criminal Procedure Code, on the ground that the evidence establishes an offence under section 326, Indian Penal Code.

On a consideration of the evidence and giving due weight to his opinions and that of the Jury, we think that is so.

According to the view taken by this Court in *Queen-Empress* v. *Anga Valayan* (1) and *King-Emperor* v. *Krishna Ayyar* (2), it would have been open to the Jury in this case to have convicted the accused of an offence under section 326, Indian Penal Code, and the same view was taken by Bashyam Iyengar, J., in *Pattikadan Ummaru* v. *Emperor* (3), though Benson, J., was of a different opinion. We follow these decisions and deem ourselves empowered under section 307, Criminal Procedure Code, to convict the accused of an offence under section 326, Indian Penal Code, which we accordingly do and sentence him to five years' rigorous imprisonment. The stab in the abdomen was a very serious wound which might have ended fatally.

(1) 22 M. 15.
(2) 24 M. 641.
(3) 26 M. 243.

WADHAWA SINGH *v.* EMPEROR.

PUNJAB CHIEF COURT.
CRIMINAL APPEAL NO. 744 OF 1911.
April 9, 1912.
Present:—Mr. Justice Shah Din and Mr. Justice Chevis.
WADHAWA SINGH AND OTHERS—ACCUSED—APPELLANTS
versus
EMPEROR—RESPONDENT.

Criminal Procedure Code (Act V of 1898), ss. 403(4), 213—Trial of several accused by Magistrate first class—Some acquitted, others convicted—Appeal by convicts to Sessions Judge—Power of Sessions Judge to direct commitment of acquitted persons for murder on same facts—Commitment under direction—Penal Code (Act XLV of 1860), ss. 148, 149, 302, 304, part 2, 325, 326—Unlawful assembly—Object—Death of one person by injuries caused—Murder—Death by rash act.

Certain persons were tried by a Magistrate, 1st class, for offences under sections 325, 326, 148, Penal Code. They were all convicted of the offences except *A.* and *B.*, who were acquitted. On appeal by the convicts, the Sessions Judge quashed the convictions and directed that all accused persons, including *A.* and *B.*, be committed for trial to the Court of Session as the offence committed was *prima facie* one of murder. In pursuance of that order, the accused were committed to the Court of Session and convicted of an offence under section 302:—

Held, (1) that the subsequent trial of *A.* and *B.* for the offence of murder was justified under section 403 (4), Criminal Procedure Code;

(2) that the order of the Sessions Judge directing their trial was legal;

(3) that the commitment of *A.* and *B.* to the Court of Session was valid.

Emperor v. *Zuji Manu Dibrit*, 5 Bom. L. R. 125, relied upon.

Baijanath Pandey v. *Gauri Kanta Mandal*, 20 C. 633, distinguished.

Certain persons who were reaping their crops were assaulted by the accused with sharp edged weapons and heavy sticks, the object being to prevent the latter by force from carrying away the produce.

As the result of the injuries inflicted on the attacked party, one of them died. It was not proved that the intention of the accused was to cause the death of any person or to inflict such bodily injuries as were likely to result in death:

Held, (*a*) that the accused constituted an unlawful assembly;

(*b*) that the offence of causing fatal injury was such as the members of the assembly knew to be likely to be committed in prosecution of their common object;

(*c*) that each of the accused was, therefore, guilty of an offence under section 304, part 2, read with section 149, Indian Penal Code;

(*d*) that none of the accused was guilty of an offence under section 302.

Appeal from the order of the Sessions Judge, Lahore Division, dated the 7th November 1911.

Mr. *Beschey*, for the Appellants.

Mr. *Bevan-Petman*, Government Advocate, for the Respondent.

JUDGMENT.—This appeal is connected with Criminal Appeals Nos. 17 to 22 of 1912, and they can all be conveniently disposed of together.

The 15 appellants in the seven appeals have been convicted by the Sessions Judge of Lahore, of the offence of murder under section 302, read with section 149, Indian Penal Code, and they have all been sentenced to transportation for life. Hakim Singh, son of Sher Singh, who was also tried and convicted along with these appellants, has since died in Jail.

The facts of the case are fully given in the judgment of the Sessions Judge, and it is not necessary to recapitulate them here at length. In the year 1903, Hakim Singh, deceased, and Wadhawa Singh, appellant, mortgaged a plot of land situate in the village of Sandra to one Uttam Singh, but they retained possession of the land as tenants under the mortgagee. A dispute arose between the parties owing to non-payment of rent, and Uttam Singh was obliged to bring a civil suit for possession of the land against the mortgagors, and in due course, he obtained a decree, in execution of which he got possession on the 2nd October 1909. On the 3rd October, Uttam Singh gave a lease of the land to Kakku *Arain* of the adjoining village of Makhi Khurd, as no resident of *Mauza* Sandra was willing to take the land on lease for fear of incurring the displeasure of Hakim Singh and Wadhawa Singh who had a large and influential following in village Sandra. Kakku appears to have taken actual possession of the land and to have cultivated it for two or three harvests. Hakim Singh and Wadhawa Singh naturally resented the intrusion of Kakku into their village, and they resolved upon disputing his possession and interfering with his peaceful enjoyment of the produce of the land. On the afternoon of the 23rd October 1910, while Kakku, with his four sons and a nephew, was cutting and collecting *jowar* ears, Hakim Singh and Wadhawa Singh, accompanied by a large number of their relations and friends, altogether 15 in number, came to the

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field, armed with *chhavis*, choppers, and *dangs* and attacked Kakku and his party, and after having beaten them severely and causing more or less serious injuries to all of them, they collected the *jowar* in the *chadars* belonging to the *Arains* and made off to their homes. Mahni, a fifth son of Kakku, who was at that time in *Mauza* Makhi Khurd, was informed of the attack on his father and brothers by one Bhagtu, potter. Mahni came to the spot, accompanied by some fellow villagers, and took back the wounded persons on beds and ponies to his home. The night was spent in attending to the injuries of the wounded, and the next morning Mahni went to the *lambardar* to ask for help. The *lambardar*, who was anxious not to displease his fellow *Jats*—the attacking party—refused to accompany him to the *thana*, whereupon Mahni himself went off to make the report, reaching the *thana* at 11 A. M. In the report which he made there, he mentioned the names of seven persons out of those who had attacked his father and brothers, adding at the same time that he had forgotten the names of the rest, and that full details would be given later by the wounded persons themselves. The latter were in due course taken off to the hospital and all of them recovered from their injuries except Kakku, an old man of 60, who died in hospital on the afternoon of the 31st October.

The case was challaned by the Police under sections 325, 326 and 148, Indian Penal Code, there being at that time altogether 15 accused persons, including the deceased Hakim Singh. Atar Singh *alias* Dhannu was then absconding. The Magistrate, Lala Labhu Ram, who decided the case, acquitted Jowala Singh and Buta Singh and convicted the rest, some under sections 326 and 148, Indian Penal Code, and others under sections 325 and 148, Indian Penal Code, and sentenced them to various terms of imprisonment. This was on the 31st January 1911. On an appeal being preferred by the convicts to the Court of Session, the learned Sessions Judge by order, dated 19th May 1911, quashed the convictions and directed under section 423 (1) (*b*) of the Criminal Procedure Code that all accused persons, including Buta and Jowala who had been acquitted by the Magistrate, be committed for trial by the Court of Session. As regards the last named accused, action was taken by the learned Judge under section 403 (4), Criminal Procedure Code, and commitment was ordered on the ground that the offence committed by them was *prima facie* one of murder and that the Magistrate who had tried them, was not competent to try that offence. In pursuance of the order of the Sessions Judge, the appellants now before us were committed by another Magistrate, Sardar Sohan Singh, to the Court of Session to stand their trial for an offence under section 302, Indian Penal Code, and as a result, they have all been convicted of that offence and sentenced to transporation for life.

The first contention advanced by Mr. Beechey, who appeared for the appellants in this appeal (No. 744), was that the order of the Sessions Judge directing the commitment of Buta and Jowala Singh, appellants, who had been acquitted by the Magistrate Lala Labhu Ram, was illegal, and that the subsequent trial of these appellants in the Court of Session was one held without jurisdiction. We do not see our way to accept this contention. In our opinion, the subsequent trial of Buta and Jowala Singh for the offence of murder was justified under sub-section (4) of section 403 of the Criminal Procedure Code, notwithstanding the fact that they had been acquitted by the Magistrate of offences under sections 325, 326 and 148, Indian Penal Code, inasmuch as, although the subsequent offence with which they were charged was constituted by the same acts which, according to the Magistrate's finding, constituted the offences of which they had been acquitted by him, the Magistrate was not competent to try the offence of murder with which they were subsequently charged. The trial of these persons in the Court of Session took place after a valid order of commitment made under section 213, Criminal Procedure Code, and the said order was none-the-less valid because it was made in pursuance of a direction given by the Sessoins Judge. We are fortified, in our opinion, by a decision of the Bombay High Court reported as *Emperor* v. *Zuii Manu Dibri* (1), which is a case very similar to the present one. The ruling of the Calcutta High Court in *Baijanath Pandey* v. *Gauri Kanta Mandal* (2), which was relied upon by Mr. Beechey, has reference

(1) 5 Bom. L. R. 125.
(2) 20 C. 633.

to section 436, Criminal Procedure Code, which relates to the power of a Sessions Judge to order commitment of an accused person in a case in which he has been improperly discharged by an inferior Court. It has no bearing on the point before us in this case, which is one covered by section 403 (4) of the Code, as the order by the Magistrate which we are considering was one of acquittal and not one of discharge. We accordingly hold that the trial of Buta and Jowala Singh in the Court of Session was one held with jurisdiction, and we overrule the first contention urged by Mr. Beechey.

On the merits, the case does not present many difficulties, the witnesses for the prosecution who have deposed to the assault by the appellants on Kakku and his party on the afternoon of the 23rd October 1910 fall into two groups:—

(1) The four sons of Kakku, namely, Jamna, Bhaga, Jamal and Shahab Din, and Kakku's nephew, Dina, and

(2) five persons who were present at the time of the assault in a neighbouring field and who are referred to in the judgment of the Sessions Judge as the *Mahant's* party. They are *Mahant* Mukand Das, his *chela* Sewa Das, a *Brahmin*, named Jiwan Ram, and two *Kammis* named Nabi Bakhsh and Ghoga, *Telis*.

The first set of prosecution witnesses give full details of the attack by the appellants upon themselves and upon Kakku, and, taken together, they identify all the appellants.

It was urged by Mr. Beechey that since in the first report the names of only seven appellants were mentioned by Mahni, those of the appellants, who were not named in the report, ought not to have been convicted. But Mahni was not an eye-witness of the occurrence, nor, it seems, was he personally acquainted with all the appellants. The names of the assailants were given to him by his father and brothers, and it is not to be wondered at that in his confused state of mind, and owing to the mental anxiety he was in, he should have forgotten the names of some of them; in fact, in the report he distinctly stated that he did not remember the names of some of the persons who had taken part in the assault and that full details would be given later by his father and brothers. As soon as the Police came to the spot for investigation, they examined Kakku and his sons, and the names of all the appellants were then mentioned to the Police and all the details of the assault were given. Exhibit P 7, which is a statement made by Kakku, deceased, to Amir Ali, Inspector of Police, on the 26th October, contains the names of all the appellants, and, in our opinion, the omission of the names of some of the appellants in the first report is sufficiently explained. There are doubtless some minor discrepancies in the statements of the first group of prosecution witnesses, but they are such as would naturally be found in the evidence of truthful witnesses, and they do not detract from the substantial truth of the prosecution story.

The second group of witnesses, namely, *Mahant* Mukand Das, Sewa Das, Jiwan, Nabi Bakhsh and Ghoga, give direct evidence in support of the prosecution, and we agree with the learned Sessions Judge that their evidence is worthy of belief. The *Mahant* and his party witnessed the assault from a distance of about 10 *karams* only, and we see no reason for disbelieving them as regards the main details of the assault. As the Sessions Judge points out, at least three men of this party, namely, the *Mahant*, Jiwan and Ghoga, knew all the appellants before and that they had no difficulty in recognizing them, as the assault took place in broad daylight and no attempt seems to have been made by the assailants to conceal their identity. In the evidence of the *Mahant*, we can find no indications of any animus against the appellants; the mere fact that he is mortgagee of the land of Wadhawa Singh, appellant, being insufficient, in our opinion, to establish any bias on his part in favour of Kakku and his party. No doubt, the *Mahant* and his companions did not intervene in the interests of the attacked party; but this does not show that they were not present on the occasion, it being quite natural for them to have studied their own safety by keeping aloof from an infuriated mob of Sikh *Jats*, who were armed with lethal weapons. Both groups of prosecution witnesses state that some of the appellants were armed with *chhevis*, others with *choppers*, and the rest with *dangs*; and the medical evidence on the record shows that sharp-edged instruments

were used by the assailants. In our opinion, the evidence for the prosecution is amply sufficient to establish the participation in the assault of all the appellants before us, the only doubt being as regards the presence of Atar Singh *alias* Dhannu on the spot. There is considerable diversity in the evidence as to his presence there; about five of the witnesses, namely, Jamnu, Mukand Das, Ghogu, Nabi Bakhsh and Sewa Das, state that Dhannu was not present on the occasion; while five others, namely, Bhoga, Jamal, Dina, Shahab Din, and Jiwan Ram say that he was present. Of the last named five witnesses, the evidence of Jamal and Shahab Din is unsatisfactory on the point. Jamal did not mention Dhannu before the Committing Magistrate; while Shahab Din contradicted himself as regards his presence in his statement before the Sessions Judge. We think, therefore, that on evidence such as this it cannot be held proved beyond reasonable doubt that Atar Singh *alias* Dhannu, participated in the assault on Kakku and his companions; and, giving him the benefit of the doubt, we accept his appeal and acquit him.

As regards the remaining appellants, we hold that their presence on the occasion in question is fully established, and that they took part in the assault on the *Arains*.

The next question for decision is whether these appellants have been rightly convicted by the learned Sessions Judge of the offence of murder under section 302, read with section 149, Indian Penal Code. In connection with this part of the case, we think that there is considerable force in Mr. Beechey's contention that the medical evidence on the record shows that there was no intention on the part of the appellants to cause the death of Kakku or to cause such bodily injuries to him or to any of his companions as the assailants knew were likely to result in death. A full description of the injuries found on the persons of Kakku and his sons and nephew is given in the evidence of the Sub-Assistant Surgen, Faqir Chand, and Assistant Surgeon, Chaman Lal, and although it appears from that evidence that sharp-edged weapons were used by the appellants, they do not seem to have been used with any great force, or with a reckless disregard of consequences. On the person of Kakku, no incised wounds were discovered; the injuries found on him had been caused by blunt weapons. The cause of death was the fracture of the skull with hæmorrhage and consequent pressure on the brain. Two of his ribs were also broken. He lived for about five days after the assault; and it would seem from the medical evidence that it was only the head injury that proved fatal. The injuries caused to the sons of Kakku do not appear to have been very serious. Jamnu sustained one grievous hurt, the result of an incised wound; Shahab Din and Jamal had only slight injuries, all of them amounting to simple hurt; Bhoga had three incised wounds and one injury caused by a blunt weapon which amounted to grievous hurt; while Dina received four incised wounds, of which three constituted simple hurt and one grievous hurt. The Sessions Judge does not seem to be right in saying that the medical evidence hardly does justice to the injuries caused to Bhoga Those injuries are fully described by the Sub-Assistant Surgeon, Faqir Chand, and the fact that a year afterwards, the Sessions Judge saw huge scars on Bhoga's body is insufficient to show that he had received the wounds indicated by those scars on the occasion when he was assaulted by the appellant. He is not a man of very good antecedents, and it may well be that he has been a participant in many a fight or affray, and that some of the scars on his person were the remnents of the injuries he had received on those occasions at the hands of other people.

On the whole, we think that the appellants, though they were armed with sharp-edged weapons and *dangs*, did not use them with the intention which it was necessary for the prosecution to establish in order to bring their case within the purview of section 300, read with section 149, Indian Penal Code, and, in our opinion, they should have been convicted under the second part of section 304 only. We agree with the learned Sessions Judge that all the appellants assaulted Kakku and his companions in prosecution of a common object, which was to prevent them by force from taking away the produce of the land of which they were in rightful possession; that they (the appellant) constituted an unlawful assembly, and that the offence committed under section 304, part 2, by the members of that assembly who caused the fatal injury to Kakku was such

as the members of that assembly knew to be likely to be committed in prosecution of their common object. Each appellant is, therefore, guilty of an offence under section 304, part 2, read with section 149, Indian Penal Code, and we alter the conviction of each to one under the aforesaid section. As the assault was committed under circumstances showing utter defiance of law and authority, we think that the maximum punishment provided in the section should be awarded to each of the appellants, and we accordingly sentence all the appellants (except Attar Singh *alias* Dhannu who is acquitted) to undergo rigorous imprisonment for 10 years including three months' solitary confinement, and to pay a fine of Rs. 100, or in default, to undergo further rigorous imprisonment for one year each. Out of the fines, if realised, half the amount shall be paid to the complainants, namely, Jamnu, Shahab Din, Jamal, Bhoga and Dina in equal shares.

PUNJAB CHIEF COURT.

CRIMINAL REVISION PETITION No. 652 OF 1912.

October 12, 1912.

Present:—Mr. Justice Robertson.

BAGGU MAL—ACCUSED—PETITIONER

versus

EMPEROR—RESPONDENT.

Criminal Procedure Code (Act V of 1898), *s.* 526 *(8) —Transfer—Magistrate's duty—Full opportunity not given—Proceedings void—Sufficiency or insufficiency of reasons by whom to be decided—Proceedings under section* 110, *Criminal Procedure Code, whether can be transferred.*

After an application for transfer has been made under section 526 (8), Criminal Procedure Code, a Magistrate is competent to hear and record all the evidence for the prosecution, if he considers that the grounds set forth as reasons for the transfer are insufficient and unlikely to be acceded to by a superior Court. But when the evidence for the prosecution is completed, it is the bounden duty of the Magistrate, irrespective of the sufficiency or insufficiency of the grounds set forth for transfer, to allow a fair and reasonable opportunity to the accused to apply for a transfer before calling upon him for his defence.

It is for the High Court, and not for a Magistrate to decide, whether the grounds set forth for a transfer are good or not.

Unless full opportunity is given to an accused who has made an application for a postponement of the case in order to enable him to apply for transfer before he is called upon for his defence, the proceedings are void.

This was a case under section 110, Criminal Procedure Code, and the High Court directed it to be transferred from the District Magistrate to another Magistrate.

Petition, under sections 439 and 435 of the Criminal Procedure Code, for revision of the order of the Sessions Judge, Ferozepore Division, dated the 22nd April 1912, confirming that of the District Magistrate, Ferozepore, dated the 7th March 1912, ordering the petitioner to furnish a bond in the sum of Rs. 3,000 for a period of three years jointly and severally.

Mr. *Beechey*, for the Petitioner.

Lala *Mul Chand*, for the Government Advocate, for the Respondent.

JUDGMENT.—In this case, it is necessary to consider one question only, and that is whether it is not necessary to quash the whole proceedings in view of the illegal refusal of the Magistrate trying the case, to grant an adjournment to enable the accused to move this Court for a transfer, under section 526 of the Code of Criminal Procedure. In regard to this application, the District Magistrate has made the following remarks:—

"Similarly, is the application under section 526, Criminal Procedure Code. That application was put in at Mamdot, when I heard the case on the spot. I was able to tell his Counsel that I had had no share in ordering the inquiry or in taking part in it, and Mr. Whistler, Assistant Superintendent Police, showed that Baggu Mal had known for more than a month that he was to be sent up under section 110, Criminal Procedure Code. He was, therefore, in no way prejudiced, and my order was one rejecting the application at that the initial stage of proceedings, as it was intended to defeat the local inquiry, which I had arranged to make on the spot, where the truth could more readily and easily be obtained. Since then, though a further date was given at Jalalabad, and again here, Counsel has taken no step to make the application to the Chief Court and I, therefore, consider any further adjournment unnecessary. I would remark that Baggu Mal has throughout had the services of Counsel, and no effort has been spared to try to discredit the evidence."

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The facts of the case, which it is necessary to state for the purposes of this order, are few and simple. On the 26th February last, a notice was issued to one Baggu Mal to show cause why the said Baggu Mal should not be called upon to give security to be of good behaviour, under section 110 of the Criminal Procedure Code. This summons was served upon Baggu Mal at Ferozepore on the evening of the 27th February for hearing at Mamdot on the 29th. Immediately when the case was called on for hearing on the 29th, an application was put in by the Pleader for the accused, under section 526 (8), Criminal Procedure Code, asking that the Magistrate, who was Magistrate of the District, would either transfer the case himself to some other Magistrate in the District, or would allow an adjournment to enable the accused to apply to this Court for transfer. The Magistrate proceeded to inquire what the grounds for transfer were, and considering them insufficient in his opinion, he declined to accede to the request of the accused, would not transfer the case to another Magistrate and did not allow any opportunity to the accused to move this Court. On the contrary, he proceeded to hear the evidence for the prosecution on the 29th. He then adjourned the case for hearing to the 4th March. That day being apparently devoted to the Horse fair at Jalalabad, the case did not come on; it was, however, taken up on the 5th March, certain of the accused's witnesses were heard on that day, an adjournment to hear other witnesses, who had been summoned through Court but who had not appeared was refused, and the case was set down for orders on the 7th March, upon which date the accused was called upon to furnish security. Other irregularaties are complained of, and some undoubtedly appear to have occurred, but I confine my attention to the question above stated.

Now, it appears perfectly clear that no opportunity whatever was accorded to the accused to make an application to this Court. Under section 526 (8), the Magistrate was perfectly competent to hear and record all the evidence for the prosecution if he considered that the grounds which were set forth as reason for the transfer were insufficient and unlikely to be acceded to by a superior Court. But when the evidence for the prosecution had been completed, it was the bounden duty of the Magistrate under the law, to allow a fair and reasonable opportunity to the accused to apply for a transfer before calling upon him for his defence. It was then for this Court, and not for the Magistrate himself, to decide whether the grounds set forth for a transfer were good or not. That no such opportunity was afforded is perfectly obvious. The case only came on for first hearing on the 29th February. On the 1st, 2nd, 3rd and 4th March, the Court did not sit, these days being one a Sunday and the others holidays, on the 5th further evidence was taken and judgment was given on the 7th. All the authorities agree that unless full opportunity is given to an accused, who has made an application for a postponement of the case in order to enable him to apply for transfer before he is called upon for his defence, the proceedings are void and must be quashed. Some of the rulings go further and affirm that even though abundant opportunity has been given to apply for such a transfer, if the provisions of the law are complied with in the letter and an application has been made before the commencement of the hearing, it is imperative that an adjournment should be made in order to give an opportunity to the accused to make the desired application for transfer. But, be that as it may, the authorities quoted below are quite unanimous that unless such an opportunity has been given, the proceedings are void and must be quashed The only authority of this Court which was quoted to me [*Emperor* v. *Ali Raza Shah* (1)] is very emphatic on the point. The other authorities are *Joharuddin Sarkar* v. *Emperor* (2), *Kali Charan Ghose* v. *Emperor* (3), *Queen Empress* v. *Virasami* (4); *Dhone Kristo Samanta* v. *Emperor* (5).

It is not necessary to discuss the judgment of the learned Sessions Judge, much of which is irrelevant. It is clear that he has misunderstood the effect of the rulings quoted. The attention of officers trying cases for security, under section 110, may well be called to *Sher Zaman Shah* v. *Queen-Empress* (6) and *Nur-ud-Din* alias *Kada* v. *Emperor* (7).

(1) 24 P. L. R. 1904; 1 Cr. L. J. 109.
(2) 31 C. 715; 8 C. W. N. 910.
(3) 33 C. 1183; 10 C. W. N. 793; 3 C. L. J. 637; 3 Cr. L. J. 477.
(4) 19 M. 375.
(5) 6 C. W. N. 717 at p. 719.
(6) 10 P. R. 1899.
(7) 27 P. R. 1903 Cr.; 21 P. L. R. 1904; 1 Cr. L. J. 99.

EMPEROR *v.* KISAN KEVJI.

It is clear that the Magistrate acted illegally in this case in not allowing to the accused any reasonable opportunity to prosecute his application for transfer in this Court before calling upon him for his defence, and that this illegality is one which vitiates the whole proceedings. I accordingly quash the proceedings and the order of the District Magistrate, dated the 7th March 1912 and return the case for a re-trial. Under the circumstances, I direct that the re-trial shall take place before another Magistrate.

Case returned.

BOMBAY HIGH COURT.

CRIMINAL REVISION PETITION No. 123 OF 1912.

July 11, 1912.

Present:—Sir N. G. Chandavarkar, KT., Ag. Chief Justice, and Mr. Justice Batchelor.

EMPEROR—PROSECUTOR.

versus

KISAN KEVJI—ACCUSED.

Criminal Procedure Code (Act V of 1898), *s.* 110—*Proceedings initiated under the section must be disposed of by the same Magistrate—Case cannot be sent up to another Magistrate—Bombay Regulation XII of* 1827, *s.* 27.

Proceedings under section 110, Criminal Procedure Code, should be disposed of by the Magistrate before or by whom they were initiated. The Code requires that he should pass the final order *himself* either discharging or taking security from the accused.

Therefore, where a 1st class Magistrate, before whom proceedings under section 110, Criminal Procedure Code, were initiated recorded evidence in the case and then sent it up to the District Magistrate who, acting under section 27 of Bombay Regulation XII of 1827, placed certain restrictions upon the personal liberty of the accused:

Held, that the 1st class Magistrate had no jurisdiction to send up the case to the District Magistrate and the latter had no jurisdiction to dispose of it.

Mr. *S. S. Patkar*, for the Accused.

Mr. *G. S. Rao*, Government Pleader, for the Crown.

JUDGMENT.—The proceedings in this case were initiated under section 110 of the Code of Criminal Procedure and the Magistrate who initiated them ought to have disposed of them himself; but instead of doing so, he sent up the case to the District Magistrate for action under Regulation XII of 1827. That he had no jurisdiction to do. The Code requires that he should pass the final order himself, either discharging or taking security from the accused.

The District Magistrate, to whom the case was sent up by the first class Magistrate, assumed jurisdiction under Regulation XII of 1827 and has passed an order placing certain restrictions * upon the personal liberty of the petitioners.

Whether, if the District Magistrate had passed such an order independently of the proceedings under section 110, it would have been legal is not the question before us now. But the proceeding having been initiated under section 110, the Magistrate before whom it was initiated ought to have himself disposed of it. The District Magistrate had no jurisdiction to dispose of it.

On this ground, the District Magistrate's order must be quashed and the proceedings sent back to the Magistrate, first class, to be dealt with and disposed of according to law.

Order quashed.

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* The District Magistrate's order against the accused was to the following effect:

"Whereas in the interests of the public peace and order it is desirable to keep a watch over your movements, the following instructions are hereby issued to you:

(*a*) You are required to attend the roll-call once in the morning and once in the night at the Police Chowri Borad before the Police Patil and should not leave your house after sunset and before sunrise.

(*b*) You are forbidden to leave the limits of your village without the permission in writing of the Police Patil of your village. Such permission shall state the period for which you intend to absent yourself from your village and the place you propose to visit and the purpose of your visit.

(*c*) And you are hereby warned that in the event of your failing at any time to comply with any order given above, or if you absent yourself from your village beyond the period covered by the permisson granted under clause (*b*), or if you are found in any town or village other than which you are permitted to visit, you render yourself liable to be punished with simple imprisonment for a period not exceeding six months."

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GAJI v. JUMANSHAH.

SIND JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REVISION PETITION No. 158 OF 1911.
February 8, 1912.
Present:—Mr. Pratt, J. C., and
Mr. Hayward, A. J. C.
GAJI *valad* LALDINO—APPLICANT
versus
JUMANSHAH *valad* GHULAM HUSEIN AND OTHERS—OPPONENT.

Criminal Procedure Code (Act V of 1898), s. 202, scope of—Preliminary inquiry—Order after issue of process—Judicial order—Construction.

An order under section 202, Criminal Procedure Code, is one by virtue of which the Magistrate decides to postpone issuing process against the accused.

Such an order can only be passed after recording reasons in writing.

An order for holding a preliminary inquiry under section 202 cannot be passed after process has been issued against the accused.

If a judicial order can be construed as either legal or illegal, the construction that makes it legal must prevail.

Mr. *Achalsing M. Advani*, for the Applicant.

Mr. *T. G. Elphinston*, for Opponent No. 1.

The *Public Prosecutor*, for the Crown.

JUDGMENT.—The applicant filed a complaint against the opponents of an offence under section 498, Indian Penal Code, on the 26th April 1911, before the Magistrate, second class, Garhi Yasin. The Magistrate held an elaborate preliminary inquiry, examining all the witnesses cited by the complainant and dismissed the complaint on the 17th May.

Against this order of dismissal, the applicant applied in revision to the Additional Sessions Judge who ordered further inquiry.

For the purpose of this further inquiry, the case was referred to the Sub-Divisional Magistrate, Shikarpur, who, on the 14th September, made the following order :—

"Summons to issue to accused and witnesses for September 29th, 1911, on payment of process fees."

Accused's summons were issued to the opponents to answer the charge preferred against them under section 498, Indian Penal Code. Nevertheless the Magistrate, on the 29th September 1911, elected to hold a preliminary inquiry under section 202 and this was confirmed in revision by the Additional Sessions Judge.

The applicant applies in revision that this order of confirmation to proceed under section 202 should be set aside.

Now, it may be conceded that the order of the Additional Sessions Judge for further inquiry did not restrict the Magistrate to any particular course of action. But, apart from this order, it seems to us quite clear, both in law and on the merits, that the Magistrate should not have proceeded under section 202.

The order under section 202 is one by virtue of which the Magistrate decides to postpone issuing process against the accused. The order is one that can only be passed after reasons to be recorded in writing. See also Sind Criminal Circular, page 63, of Magisterial Procedure. Here the Magistrate recorded no reasons and did, as a matter of fact, issue process. Therefore, on the 29th September, the case had passed the stage at which the Magistrate could exercise the option of holding a preliminary inquiry. Mr. Raymond contends that by the issue of process, the Magistrate did not intend to exercise a discretion not to proceed under section 202. But, if that were so, the summons issued to the accused were illegal and if the order of the 14th September can be construed as either legal or illegal, the construction that makes it legal must prevail.

Again, all the witnesses for the complainant had already been examined by the 2nd class Magistrate—it was surely then a futile proceeding to record all this evidence over again under section 202. Nor was there any object in so doing for the accused were present in Court and ready to answer to the charge. The procedure adopted by the Magistrate involved not only a waste of the complainant's money but also a serious waste of public time. If, in the course of the trial, the charge appeared to be unfounded, the Magistrate could at any stage of the case have discharged the accused under section 253 (2).

We accordingly reverse the order of the Magistrate ordering a preliminary inquiry under section 202 and direct him to proceed with the trial of the case.

Order reversed.

EMPEROR *v.* CHAGAN RAJARAM.

SIND JUDICIAL COMMISSIONER'S COURT.

CRIMINAL APPEAL No. 21 OF 1912.

March 25, 1912.

Present:—Mr. Crouch, A. J. C., and Mr. Hayward, A. J. C.

EMPEROR—PROSECUTOR

versus

CHAGAN RAJARAM AND OTHERS—APPELLANTS

Jury—Charge—Misdirection—Death caused by injury with weapon—Omission to put case of grevious hurt before Jury—Penal Code (Act XLV of 1860), ss. 304 (2), 320 (8).

Where death has been caused by a blow with a weapon, that does not necessarily suggest an intention to cause such bodily injury as would, in the ordinary course of nature, cause death, and it is presumed, in the accused's favour, that he had no knowledge that the injury which he intended to cause was likely to cause the death of the person injured. In such cases, if the circumstances are such that an intention merely to cause hurt dangerous to life might not unreasonably be inferred, the Jury should be directed that it is open to them to find the accused guilty of the lesser offence, namely, of causing grievous hurt under section 320 (8) of the Penal Code.

Section 304 (2) is not appropriate to a case where there was a deliberate intention to inflict bodily injury to the person whose death resulted from such injury.

Mr. *P. V. McInerney*, for the Appellants.

The *Public Prosecutor*, for the Crown.

JUDGMENT.—Appellants were convicted by a Jury, by a majority of three to two, of an offence under section 304(1), Indian Penal Code. The learned Judicial Commissioner in his judgment stated that his view of the evidence appeared sufficiently from the comments that he had made on it in the course of his charge to the Jury, that it was quite possible that Jivi, one of the eye-witnesses, may have seen the accused committing the assault and that he could not, therefore, assert affirmatively that the verdict involved such a clear miscarriage of justice as to necessitate a reference to the High Court. He found all the accused guilty and sentenced accused No. 1 Chagan to seven years' transportation and accused Nos. 2 and 3 to five years' rigorous imprisonment each.

In the course of his summing up, the learned Judge pointed out good reasons for disbelieving all four of the alleged eye-witnesses.

The case is, therefore, one in which it is difficult to avoid a suspicion that the Jury were labouring under some misunderstanding.

Mr. McInerney, for the appellants, contends that there were misdirections by the Judge on the following points:—

(1) The Jury were not explained the difference between the first and second parts of section 304, Indian Penal Code, nor were they told that the case might be held to come under the second part.

(2) The Jury should have been informed that it was open to them to find the accused guilty of grievous hurt, or simple hurt.

(3) The case of each accused should have been distinguished and the Jury should have had explained to them the sections dealing with common intention.

The passages in the heads of charge, which deal with the law questions involved, are the following:—

"Law explained" sections 304 and 299 read and explained to the Jury.

'Doctor's evidence shows that the bodily injuries—two wounds and two contusions on the head—caused death. You will have no difficulty in finding that these injuries were likely to cause death.

"The only question in the case is, were the accused the persons who inflicted these injuries?"

Now, the story of the prosecution was that the deceased was, on the night of the offence reciting prayers in a very small temple situated in the centre of a compound wherein a large number of people reside; that at about 2 A. M., the three accused, all of whom have quarters in the compound, came out of the house of one of their number, and made for the temple; that one of them picked up a stone weighing 195 tolas, near the temple, and with it struck the deceased several blows on the head. The other two were carrying, one a small stick, and the other a piece of wood shaped like a very small cricket bat, weighing 30 tolas, used by *dhobis* for beating clothes. The injured man died soon afterwards from rupture of one of the meningeal arteries.

Now, if the assailant intended to cause the bodily injury from which death resulted, he would have been guilty of murder under the third part of section 300, for the Surgeon's evidence is to the effect that the rupture was sufficient in the ordinary course of nature to cause death.

In re MAHADEV YADNESHWAR JOSHI.

But the charge was under section 304 (1); it was merely alleged by the prosecution that the assailant intended to cause such injury as was likely to cause death; nor was it imputed to him that he actually knew that the injury which he intended to inflict was likely to cause the death of the particular person, the deceased. Had such knowledge been imputed, the charge would, properly, have been of murder (section 300, *secondly*). Where, as in the present case, death has been caused by a blow with a weapon, that does not necessarily suggest an intention to cause such bodily injury as would in the ordinary course of nature cause death and it is presumed, in accused's favour, that he had no knowledge that the injury which he intended to cause was likely to cause the death of the person injured, and the circumstances are such that an intention merely to cause hurt dangerous to life might not unreasonably be inferred, we are of opinion that the Jury should be directed that it is open to them to find the accused guilty of the lesser offence, namely, of causing grievous hurt under section 320 (8).

We consider that section 304 (2) is not appropriate to a case where there was a deliberate intention to inflict bodily injury to the person whose death resulted from such injury, but we consider that the omission to put the case of grievous hurt under section 320 (8) to the Jury was a misdirection.

We are of opinion also that it should have been pointed out to the Jury that as the party approached the temple, one was unarmed, and the other two had weapons from which nothing more than an intention to cause simple hurt could be fairly inferred, that it was for them to determine whether or not the picking up of a heavy stone and dealing severe blows with it on the head of the deceased was in furtherance of the common object of all three; and that the omission to point this out to the Jury was a misdirection.

We consider that the misdirection on these two important points led to an erroneous verdict. The only question really put to the Jury was—did the three accused form the party by whom the assault was committed; and their verdict cannot fairly be construed as being any thing more than an affirmative answer to this question. To this extent, but no further, we consider we should accept it. We cannot treat it as a finding that all three accused had a common intention to inflict an injury which was likely to cause death or to endanger life, for the question whether or not they had such common intention was not put to them.

The actual assailant was, no doubt, guilty of a very serious offence, but that accused No. 1 was such assailant has not, in our opinion, been established beyond reasonable doubt nor was it so established in the opinion of the learned Judge or of two of the Jury. We do not, therefore, feel justified in holding that he was the actual assailant.

We alter the verdict and find all three accused guilty of an offence under section 323, Indian Penal Code, and reduce the punishment of each to six months' rigorous imprisonment.

Conviction altered; Sentences reduced.

BOMBAY HIGH COURT.

CRIMINAL REVISION PETITION NO. 131 OF 1912.

July 11, 1912.

Present:—Sir N. G. Chandavarkar, KT., Ag. Chief Justice, and Mr. Justice Batchelor.

In re MAHADEV YADNESHWAR JOSHI AND OTHERS—APPLICANTS.

Criminal Procedure Code (Act V of 1898), s. 195—Perjury and its abetment during Police investigation of a theft case—Theft case ending in conviction—Sanction to prosecute, whether necessary—Penal Code (Act XLV of 1860), s. 193—Perjury during Police investigation.

The petitioners were placed for trial before a Magistrate under section 193, Indian Penal Code, for making and abetting the making of certain false statements during the Police investigation of a theft case which ended in a conviction. A sanction to prosecute the petitioners for perjury and its abetment was not obtained from the Court which had tried the theft case:

Held, that the sanction of the Court was necessary and without its sanction, the petitioners could not be tried.

The words "in relation to an offence" in section 195 of the Criminal Procedure Code are wide enough to include evidence which was adduced before a Court and which was heard by the Court.

In re Khanderao Yeshwant, 14 Bom. L. R. 362; 13 Cr. L. J. 527; 15 Ind. Cas. 799, followed.

Criminal application for revision of an order passed by the first class Magistrate of Ahmednagar.

Mr. *K. H. Kelkar* (with him Mr. *G. K. Chitale*), for the Applicants.

PUBLIC PROSECUTOR *v.* ARUMUGAM CHETTY.

Mr. *G. S. Rao*, Government Pleader, for the Crown.

JUDGMENT.—We must hold that in this case, a sanction is necessary and the offence cannot be tried in the absence of a sanction from the Court which tried Shelke and before which the evidence, which is now said to have been fabricated, was adduced.

The words "in relation to an offence" in section 195 of the Criminal Procedure Code are wide enough to include evidence which was adduced before a Court and which was heard by the Court.

That has been the case here and this case falls within the line of the decision of this Court in *In re Khanderao Yeshwant* (1). Following it, we must hold that the trial is void in the absence of a sanction.

We, therefore, set aside the proceedings before the Magistrate and direct him not to try the case as he has no jurisdiction to try it for want of the requisite sanction.

Proceedings set aside

(1) 14 Bom. L. R. 362; 13 Cr. L. J. 527; 15 Ind. Cas. 9.

MADRAS HIGH COURT.

CRIMINAL APPEAL No. 197 OF 1912.

September 6, 1912.

Present:—Sir Ralph Benson, Offg., Chief Justice, and Mr. Justice Napier.

THE PUBLIC PROSECUTOR—APPELLANT

versus

ARUMUGAM CHETTY—ACCUSED.

Witness—Deliberate false statement—Prosecution for perjury—Penal Code (Act XLV of 1860), *s.* 193.

A witness, who deliberately gives false evidence but who, when confronted with incontestable proof of his falsehood, admits it to be false, is guilty of perjury.

Appeal, under section 417 of the Code of Criminal Procedure, against the judgment of acquittal passed on the accused in Criminal Appeal No. 32 of 1911 by the Sessions Judge of Ramnad (C. C. No. 63 of 1911 on the file of the Joint Magistrate of Ramnad).

Mr. *L. S. Viraragava Iyer*, for the Appellant.

Mr. *K. N. Aiya*, for the Accused.

IMPERATOR *v.* KHUSHALDAS.

JUDGMENT.—The dictum of the Sessions Judge that a witness who deliberately gives false evidence, but who, when confronted with incontestable proof of its falsehood then admits it to be false, ought not to be prosecuted for perjury, is one that cannot be approved.

In the present case, the accused deliberately denied that his daughter was married to the son of the person in whose favour he was called as a witness. This was not a matter in regard to which he could have made any mistake. Indeed, in his statement next day he did not suggest any mistake but admitted the offence and asked to be excused. I must, therefore, set aside the acquittal by the Sessions Judge, and find the accused guilty of an offence punishable under section 193, Indian Penal Code.

As to sentence, it is urged on behalf of the accused that he is an elderly man of 50 years of age, and has already undergone rigorous imprisonment for 1 month and 7 days. The Public Prosecutor does not press for further imprisonment, being only anxious to have the correct view of the law maintained. In the circumstances, I refrain from imposing sentence of further imprisonment.

The sentence will be one of rigorous imprisonment for the period already suffered.

SIND JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REPORT No. 161 OF 1911.

February 8, 1912.

Present:—Mr. Pratt, J. C., and Mr. Hayward, A. J. C.

IMPERATOR—APPLICANT

versus

KHUSHALDAS TOPANDAS—ACCUSED.

Criminal Procedure Code (Act V of 1898), *ss.* 4 (*h*), 250—*Complaint—Information laid by Police Officer—Police report—Compensation—Bombay District Municipal Act (IV of* 1890), *ss.* 51, 68 (*c*).

The definition of complaint in section 4 (*h*) of the Criminal Procedure Code excludes only such Police reports as are made under section 173 after the conclusion of the Police investigation.

Ahmad Khan v. *Empror* 5 S. L. R. 1; 12 Cr. L. J. 92; 2 Ind. Cas. 492, relied upon.

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Where a Police officer lays an information against a person under section 51 or section 68 (*c*) of the Bombay District Police Act, such information is a complaint within the meaning of section 4 (*h*), Criminal Procedure Code; compensation can be awarded against the Police officer, if the case is frivolous or vexatious.

Emperor v. *Sada*, 26 B. 150; 3 Bom. L. R. 586, followed.

Queen Empress v. *Sakar Jan Mahomed*, 22 B. 934, dissented from.

Mr. *Wadhumal Oodharam*, for the Accused.

The *Public Prosecutor*, for the Crown.

JUDGMENT.—The District Magistrate, Sukkur, has reported to this Court a proceeding of the City Magistrate under section 250, Criminal Procedure Code.

The City Magistrate has fined, under section 250, a Police officer who had laid an information before him under section 68 (*c*) of the Bombay District Police Act.

The District Magistrate refers to the case of *Queen Empress* v. *Sakar Jan Mahomed* (1) but that case has been overruled in the case of *Emperor* v. *Sada* (2), which, we think, has been rightly decided. The information laid by the Police officer was in the form of a complaint and prayed for issue of process against the accused. No doubt the definition of complaint in the Code excludes a Police report. But the Police report here referred to is a report made under section 173, Criminal Procedure Code, after the conclusion of the Police investigation—see *Ahmedkhan* v. *Emperor* (3). The Police office is empowered under section 51 of the Bombay District Police Act to lay an information as such an information is a complaint within the meaning of section 4 (*h*) of the Code. The Magistrate, therefore, had jurisdiction to impose a fine if he decided that the case was frivolous or vexatious.

We, therefore, decline to interfere.

Interference declined.

(1) 22 B. 934.
(2) 26 B. 150; 3 Bom. L. R. 586.
(3) 5 S. L. R. 1; 9 Ind. Cas. 492; 12 Cr. L. J. 92.

MADRAS HIGH COURT.

CRIMINAL REVISION CASE No. 44 OF 1912.
CRIMINAL REVISION PETITION No. 42 1912.
October 2, 1912.

Present:—Mr. Justice Ayling and Mr. Justice Napier.

T. KAMAL KUTTY AND OTHERS—SECOND PARTY Nos. 2, 3, 4 AND 6—PETITIONERS

versus

UDAYAVARMA RAJA VALIA RAJA OF CHIRAKAL—FIRST PARTY—RESPONDENT.

Criminal Procedure Code (Act V of 1898), *ss.* 145, 439, 537—*Revision—Charter Act, s.* 15—*Jurisdiction—Interference by High Court.*

A petition does not lie under section 439, Criminal Procedure Code, to revise proceedings under section 145 of the Code.

The words in section 439, "the record of which has been called for by itself," are not limited to cases where the High Court acts *suo motu*. They are not used in contradistinction to "which otherwise comes to its knowledge" but as contrasted with "which has been reported for orders" they have reference to the recognised channels by which the High Court becomes seized of the case; that is to say, either by calling for the records itself or by having the case reported to it under section 438 by a Sessions Judge or a District Magistrate who has himself called for the records under section 435. In either case, the Court is acting both of its own motion and on petition. There is, therefore, no room for the reading of the words "otherwise comes to its knowledge" as having reference to petition.

Hurbullubh Narain Singh v. *Luchmeswar Prosad Singh*, 26 C. 188; 3 C. W. N. 49; *Jagomohan Pal* v. *Ram Kumar Gope*, 28 C. 416, *Loke Nath Saha Chowdhry* v. *Nidu Biswas*, 29 C. 382; 6 C. W. N. 489 and *Khosh Mahomed Sirkar* v. *Nazir Mahomed*, 33 C. 352 (F. B.); 2 C. L. J. 259; 9 C. W. N. 1059; 2 Cr. L. J. 637; *Maharaj Tewari* v. *Harcharan Rai*, 26 A. 144; A. W. N. (1903) 212; *Jhingai Singh* v. *Ram Partap*, 31 A. 150; 6 A. L. J. 113; 9 Cr. L. J. 382; 1 Ind. Cas. 482; *In re*, *Pandurang Govind*, 24 B. 527, *In re*, *Pandurang Govind*, 25 B. 179, referred to.

The words "or otherwise comes to its knowledge" in section 439 have no reference to any power outside the Criminal Procedure Code.

Nobin Kristo Mookerjee v. *Russick Lall Laha*, 10 C. 268, approved.

Under section 15 of the Charter Act, it has never been customary to interfere except when it can be said that the Magistrate's order was passed without jurisdiction.

Bhaskaruni Kesavarayadu v. *Bhaskaruni Chalaptriyadu*, 31 M. 318; 18 M. L. J. 343; 8 Cr. L. J. 205; 4 M. L. T. 301; *Reid* v. *Richardson*, 14 C. 361; *Hurbullubh Narain Singh* v. *Luchmeswar Prosad Singh*, 26 C. 188; 3 C. W. N. 49; *Mahadeo Kunwar* v. *Bisu* 25 A. 537; A. W. N. (1903) 102; *In re Pandurang Govind*, 24 B. 527, referred to.

The failure by a Magistrate to comply with any provision of the Code as to his preliminary procedure does not destroy his jurisdiction to take action under the Code.

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Nusserwanjee Pestonjee v. *Meer Mynoodeen Khan* wallud *Meer Subroodeen Khan Bahadur*, 6 M. I. A. 134, explained.

Subramania Aiyar v. *King-Emperor*, 25 M. 61; 11 M. L. J. 233; 3 Bom. L. R. 540; 5 C. W. N. 866; 28 I. A. 257 (P. C.); *Khosh Mahomed Sirkar* v. *Nazir Mahomed*, 33 C. 352 (F.B.); *Posuka Kulla* v. *Chikka Hiria*, 4 M. L. T. 213; 8 Cr. L. J. 399; *Sayid Mahomed Ghouse Sahib* v. *Sayid Khadir Badshaw Sahib*, 16 M. L. J. 146; 3 Cr. L. J. 487; *In the matter of Chinnappudayan*, 30 M. 548; 3 M. L. T. 18; 7 Cr. L. J. 28, referred to.

Semble:—Such irregularity would be covered by section 537, Criminal Procedure Code. The essential requisite to give a Magistrate jurisdiction under section 145, Criminal Procedure Code, is that he must be satisfied from information of some sort that a dispute exists likely to cause a breach of the peace concerning land or water or the boundaries thereof in his jurisdiction. Once he is so satisfied his jurisdiction is complete and his subsequent action must be considered in relation to procedure, not jurisdiction.

Petition, under sections 435 and 439 of the Code of Criminal Procedure, praying the High Court to revise the order of the Joint Magistrate of Tellicherry, in Miscellaneous Case No. 30 of 1909.

Mr. *T. V. Seshagiri Aiyar*, for the Petitioners.

Messrs. *E. R. Osborne* and *V. Ryru Nambiar*, for the Respondent.

ORDER.—This is a petition put in under section 439 of the Criminal Procedure Code, asking for revision of an order of the Joint Magistrate of Tellicherry in Miscellaneous Case No. 30 of 1909 on the 16th October 1911, passed under section 145 of the Criminal Procedure Code. The preliminary objection is taken that the Court, in the exercise of its revisional powers under the Code, cannot deal with orders made under that section and reliance is placed on section 435, clause 3, which provides that proceedings under Chapter XII are not proceedings within the meaning of that section. It is contended, however, on behalf of the petitioners that the Court can exercise its powers under section 439 without calling in aid section 435. The point has been argued at great length and most ably by Mr. Seshagiri Aiyar. He relies on the words "which otherwise comes to its knowledge" in section 439, clause (1), and contends that that phrase has reference to action taken by the High Court on petition in contradistinction to action taken when the record has been called for "*by itself*" in the earlier words of the section which, he contends, is limited to action by the High Court *suo motu*. He further relies on similar words in section 438, which, he argues, entitles a Sessions Judge or District Magistrate likewise to examine records of proceedings of inferior Magisterial Officers otherwise than by calling for the records under section 435. He admits that the result of this interpretation of the sections would be that the Sessions Judge or District Magistrate cannot call for and examine and report for the orders of the High Court the records of proceedings of inferior Criminal Courts under section 144, Chapter XII and section 176, but that he can, under some power referred to as "otherwise," but the authority for which does not appear, get the record without calling for it, and report the case for the orders of the High Court under section 438. That is to say, that the ordinary channel by which proceedings under these sections and all other judgments and orders are examined by the Sessions Judge and the District Magistrate and reported for orders, is blocked up by the Legislature with respect to these proceedings, but that those officers can still exercise the power of reporting if the record comes before them in some other manner not explained. Now, this could hardly have been the intention of the Legislature. The recognized procedure, by which those Courts exercise revisional jurisdiction over the proceedings of inferior Courts, isby calling for the records under section 435. The Legislature has taken away that jurisdiction, presumably intending that these proceedings, which are all of a special nature, should not be interfered with either by the High Court or the Sessions Judge or the District Magistrate. These proceedings are none of them criminal or punitive. Sections 143, 144 and 145 are prohibitive in the interest of the public peace and public good. Section 176 is a special section empowering a Magistrate to hold an investigation where any person dies when in the custody of the Police. We have no doubt that the Legislature intended to leave action under these sections, where cause is shown, to the unfettered discretion of the local Magistracy; and we cannot, from the use of this word "otherwise" in section 438, infer a power in the Sessions Judge and the District Magistrate to interfere with such orders when they are expressly forbidden by section 435 to call for the records. In our opinion, the words in section 439 "the record

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of which has been called for by itself" are not limited to cases where the High Court acts *suo motu*. It must be borne in mind that although when the earlier Criminal Procedure Codes were passed, the Legislature had chiefly in view the exercise of revisional powers by the High Court and those superior officers on inspection of the calendars, it recognized as early as 1872 that parties would invoke these powers by petition. But, in any case, whether the High Court or these officers act of their own initiative or on petition, they must call for the records and in fact the petition invariably asks them to do so in so many words. The reason why the limiting powers are found only in section 435 will be found on an examination of the history of this legislation.

Act X of 1872 is the first Code after the establishment of the High Court. Chapter XXII is headed "Superintendence and revision" and begins with section 292 which empowers the High Court to issue general rules for the keeping of books, etc., by all Criminal Courts and for the preparation and transmission of any calendars or statements to be prepared and submitted by such Courts. Section 293 provides that all subordinate Courts shall send to the High Court such periodical statements or calendars of trials held by such Courts as the High Court prescribes exhibiting the offences charged, the offences of which the accused are convicted and the sentences or orders passed upon them. Section 294 proceeds to lay down that the High Court may call for and examine the record of any case tried by any Subordinate Court for the purpose of satisfying itself as to the legality or propriety of any sentence or order, and the regularity of the proceedings of such Court, and section 295 gives the same power to the Court of Session or the Magistrate of the District with regard to the sentences, orders and proceedings of Subordinate Courts. These four sections obviously set out the machinery for revision. The High Court has to make rules for the transmission of the calendars by all Courts. All Subordinate Courts are then required to send certain calendars, such as the High Court prescribes, direct to the High Court; and if, on the examination of a calendar, the High Court thinks that there may be something illegal or improper about the order, the next process is to call for and examine the record of such case. The language used in each succeeding section adopts the language of the prior section and it is obvious that these sections contain the machinery. Then comes section 297, which is practically identical with the present section 439, and this lays down what the High Court can do after examination of the record. It follows, therefore, that the words "called for by itself" in section 297 have reference to the whole of the powers of revision given by that Chapter to the High Court. The last clause of section 297 makes it clear that the High Court can hear any person either personally or by agent in the exercise of its powers of revision, which sufficiently indicates that the Legislature contemplated that these powers would be exercised on petition. It will thus be seen that the method by which the records came to the High Court was in one set of sections, namely, 294, 295 and 296 and the power of the High Court to deal with the record was in another section 297, just as now sections 435 and 438 provide the machinery and section 439 gives the power to dispose of the record.

Act X of 1882, the next Code, was practically the same as the present Code and continued this method of treatment and in this Code sections 143, 144 and 176 were excluded from the revisional powers. The only alteration made by the present Code is that orders under section 145 are added to those excluded. It seems clear, therefore, that the language in section 439, "the record of which has been called for by itself", is not used in contradistinction to "which otherwise comes to its knowledge" but as contrasted with "which has been reported for orders" and that it has reference to the recognized channels by which the High Court becomes seized of the case, that is to say, either by calling for the record itself or by having the case reported to it under section 438 by a Sessions Judge or District Magistrate, who has himself called for the records under section 435; and whether it has called for the record itself or is dealing with it where the record has been called for by a Sessions Judge or District Magistrate and reported to it, in either case the Court is acting both of its own motion and on petition. There is, therefore, no room for the reading of those words "otherwise comes to its knowledge" as having reference to petition.

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It cannot be suggested that without those words or the word "otherwise" in section 437, the High Court, a Sessions Judge or a District Magistrate could not act on petition. When once this is clearly understood, the difficulty raised by the omission of the Legislature to insert the words "section 439" in the exception clause disappears. Section 435 is the initial power whether exercised by the High Court or the Sessions Judge or the District Magistrate, and whether of their own motion or on petition. When the Legislature took away this power, it cut off the jurisdiction of the High Court at its fountain head. The machinery, by which the High Court became seized of the case under the Criminal Procedure Code being gone, it was unnecessary to forbid the exercise of powers which depended on such seizin. This view of the meaning of the sections has been uniformly adopted by all the High Courts. It is the recognized practice of this Court never to interfere with the excepted proceedings under its revisional powers, but only under the Charter.—*Hurbullubh Narain Singh* v. *Luchmeswar Prosad Singh*(1); *Jagomohan Pal* v. *Ram Kumar Gope* (2); *Loke Nath Saha Chowdhry* v. *Nidu Biswas* (3) and *Khosh Mahomed Sirkar* v. *Nazir Mahomed* (4) all clearly establish the view of that Court that this jurisdiction of the High Court to revise under the Criminal Procedure Code is gone. *Maharaj Tewari* v. *Harcharan Rai* (5) and *Jhingai Singh* v. *Ram Partap* (6) show that the Allahabad High Court takes the same view. And *In re Pandurang Govind* (7) and *In re Pandurang Govind* (8) lay down the same principle. On the above reasoning and uniform authority of all the High Courts, we hold that a petition does not lie under section 439 to revise these proceedings.

It is next argued by Mr. Seshargiri Aiyar that these words "otherwise comes to its knowledge" might have reference to the power of the High Court under the Charter in the exercise of its superintendence and that the High Court can call for records under those powers and then proceed to exercise the powers under section 439. The answer to this is that the High Court, in its exercise of its powers under the Charter, has never purported to deal with cases except where there has been an improper exercise of jurisdiction. Further, it would be an extraordinary reading of the Criminal Procedure Code to suggest that it clothed the High Court in the exercise of its powers under the Charter with the whole of the powers that it can exercise on appeal, while at the same time it provided a special machinery apart from the Charter by which the High Court could exercise those powers.

It has never yet been suggested that the Criminal Procedure Code intended to set up two different procedures in revision; one, the ordinary procedure under section 435, 438 and 439; and another by the Charter Act and section 439. Whatever these words in section 439 and the word "otherwise" in section 438 have reference to, it must be some power which the Legislature assumed to exist in the High Court, the Sessions Judge and the District Magistrate under the Criminal Procedure Code. This has been expressly decided with reference to the words in section 438 in *Nobin Kristo Mookerjee* v. *Russic's Lall Laha* (9), where the Court used the following language at page 272: "We think that these words 'or otherwise' being words of general import following the particular words 'under section 435' must be construed according to the usual rule and that they mean not in an any other way whatsoever but in any other way provided by the Code" and the Court declined to accept the contention that they *gave* the District Magistrate a power quite, independent of the power conferred upon him in cases in which he has proceeded under section 435. We entirely concur with this view. That these words "or otherwise" in section 438 of the Criminal Procedure Code cannot, of course, have reference to any power outside the Criminal Procedure Code, is clear from the fact that the Code created the Judicial Officers whose powers are dealt with therein and that their powers must necessarily be found within the four corners of the Code. That being so, there is no reason why a wider meaning

(1) 26 C. 188; 3 C. W. N. 49.
(2) 28 C. 416.
(3) 29 C. 382; 6 C. W. N. 469.
(4) 33 C. 352 (F. B.); 2 C. L. J. 259; 9 C. W. N. 1059; 2 Cr. L. J. 637.
(5) 26 A. 144; A. W. N. (1903) 212.
(6) 31 A. 150; 6 A. L. J. 113; 9 Cr. L. J. 382; 1 Ind. Cas. 762.
(7) 24 B. 527.
(8) 25 B. 179.
(9) 10 C. 268.

should be given to the words "or otherwise comes to its knowledge" in section 439 and reference sought to be made to the Charter to explain their meaning. If the words in section 438 are limited to powers to be found in the Code, as they must be, the words in section 439 should be similarly limited. They are not words which confer a power. They are words which save any power that exists and it is not unusual for statutes to contain saving general words of this nature.

The practical importance of the question we have just considered lies in this. If the order is open to revision under section 439, Criminal Procedure Code, the petitioners may ask us to go into the record of the case, at any rate, to the extent of considering whether there is evidence to support the Magistrate's conclusion, or whether any grave irregularity in procedure has been committed, and to bear such facts in mind in deciding as to whether to interfere or not. Of course, the power of interference in revision is discretionary; but under section 439, the advisability of interference would be determined on the same consideration as in an ordinary criminal case.

Under section 15 of the Charter Act, on the other hand, it has never been customary to interfere—certainly in cases of this class—except where it can be said that the Magistrate's order was passed without jurisdiction. This is most clearly laid down by a Bench of this Court in *Bhaskaruni Kesavarayudu* v. *Bhaskaruni Chalapatriyadu* (10), where their Lordships say: "The Magistrate had jurisdiction to act under section 145, Criminal Procedure Code and *this Court has no jurisdiction to interfere.*"

Our attention has been drawn to a single case, in which interference has been exercised on other grounds—*Reid* v. *Richardson* (11). In that case, no doubt, the High Court found that the Magistrate had jurisdiction; but, nevertheless, went into the merits of the case, decided that an order under section 146, Criminal Procedure Code, was the proper order to be passed, and not that passed by the Magistrate under section 145, and disposed of the case accordingly. In so doing, they placed it on record that they were departing from the usual course and justified the departure on the unusual circumstances of the case. We cannot attach much importance to an isolated instance of this kind in the face of the otherwise uniform practice to the contrary; and we may say at once that we can discern no exceptional circumstances in the case before us which would justify departure from the usual course. In a later case of the same Court, *Hurbullubh Narain Singh* v. *Luchmeswar Prosad Singh* (1), the view taken was that, "although powers as a Court of Revision under the Code (Criminal Procedure Code) cannot be exercised, still, if an order challenged be without jurisdiction, that is to say, if it be outside those sections, the mere fact of the order purporting to be so passed would not bring it within those sections so as to debar the exercise of powers under section 15 of the Charter Act to set it aside as null and void and without jurisdiction." Precisely the same view is taken in *Mahadeo Kunwar* v. *Bisu* (12) and in *In re Pandurang Govind* (7).

We, therefore, propose, in dealing with the present case, to confine ourselves to considering whether the order of the Magistrate which we are asked to revise was passed without jurisdiction. The only ground on which the jurisdiction of the Magistrate in the present case is attacked is his failure to record in the preliminary order passed by him under the first clause of section 145, Criminal Precedure Code, the grounds on which he was satisfied that a dispute existed likely to cause a breach of the peace. The order itself runs as follows: "Whereas on information received from the Tahsildar of Chirakkal, and the Inspector of Police, Cannanore Division, I am satisfied that there is a dispute likely to cause a breach of the peace concerning the possession of * * *". Section 145 requires that the preliminary order shall be in writing and shall state the grounds of the Magistrate's being so satisfied. We do not think this requirement has been complied with in the present case. The contention of the learned Vakil for the petitioners is that failure to do so goes to the jurisdiction of the Magistrate and renders all subsequent proceedings null and void and without jurisdiction. His chief reliance is on the principle

(10) 31 M. 318; 18 M. L. J. 343; 8 Cr. L. J. 205; 4 M. L. T. 301.

(11) 14 C. 361.

(12) 25 A. 537; A. W. N. (1903) 102.

laid in a Privy Council case reported as *Nusserwanjee Pestonjee* v. *Meer Mynoodeen Khan* wallud *Meer Sudroodeen Khan Bahadoor* (13). This ruling cannot, in our opinion, be extended to the case before us. The judgment delivered so long ago as 1855 deals with the effect of the failure to specify in a deed of submission to arbitration the time within which the award was to be given. Bombay Regulation VII of 1827, section 3, requires that this should be specified in the deed of submission, and the Privy Council held that the omission constituted a fatal objection to the validity of the award given thereunder. They stated that, "Where jurisdiction was given to a Court by an Act of Parliament or by a Regulation in India and such jurisdiction is only given upon certain specified terms contained in the Regulation itself, it is a universal principle that these terms must be complied with in order to create and raise the jurisdiction, for if they be not complied with, the jurisdiction does not arise." In applying these observations, the important words are, "Where such jurisdiction is only given on certain specified terms". That means where jurisdiction is "founded" on compliance with certain preliminary conditions. The Regulation under consideration in that case ousts under certain specified conditions the jurisdiction of the ordinary tribunals constituted by law and gives jurisdiction to a private tribunal constituted *ad hoc* and having no existence apart from the particular purpose for which it was constituted. Their Lordships held that these specified conditions must be rigidly and exactly fulfilled. In the present case, the section gives to ordinary tribunals in the shape of certain classes of Magistrates the power to do certain things and we are clearly of opinion that the principles laid down in the above ruling have no application to the case before us. If the jurisdiction of a Magistrate to take action under the Criminal Procedure Code is destroyed by failure to comply with any provision of the Code as to his preliminary procedure, then it would have to be held, for example, that failure to sign the complainant's statement on oath as required by section 200, Criminal Procedure Code, rendered any subsequent trial and conviction null and vied and without jurisdiction. It may be suggested that such an irregularity would be covered by section 537, Criminal Procedure Code. But that section might, with equal propriety, be invoked to cover the omission with which we are concerned.

We need do no more than refer to *Subramania Aiyar* v. *King-Emperor* (14) which, has been cited on behalf of the petitioners That ruling simply deals with the effect of disobedience to an express provision of law as to the mode of trial and in no way touches on the effect of an error of procedure antecedent to the trial or the jurisdiction of the Court. Indeed, it shows that the case in Moore's Indian Appeals cannot be read as contended for by Mr. Seshagiri Aiyar, for, if it should be so read, then the Privy Council, in this later case, would have held that the whole trial was without jurisdiction owing to the illegality of the charge which is at the inception of the trial.

The applicability of both these rulings to a case like the present has been carefully considered by two learned Judges of the Calcutta High Court (Rampini and Mookerjee, JJ.) in their order of reference in the case of *Khosh Mahomed Sirkar* v. *Nazir Mahomed* (4) and they have arrived at the same conclusions as ourselves.

The exact effect of an omission to set forth in a preliminary order under section 145 the grounds of the Magistrate's opinion has been considered in several cases both in this and other High Courts, the conclusions arrived at being by no means uniform. In this Court, we have on the one side the ruling of Munro and Sankaran Nair, JJ., in *Posuka Kulla* v. *Chikka Hiria* (15), and on the other side the ruling of Subramania Iyer, J., in *Sayid Mahomed Ghouse Sahib* v. *Sayid Khadir Badshaw* (16) and *In the matter of Chinnappudayan* (17) and of Wallis, J., in *Posuka Kallu* v. *Chikka Hiria* (15), which was the subject of a Letters Patent Appeal in the case first quoted. Opinions might, therefore, appear to be equally divided: but a consideration of the judgments in the above cases tends, in our opinion, strongly against petitioner's contention. Subramania Iyer, J., was, undoubtedly, of opinion that the failure to

(13) 6 M. I. A. 134.

(14) 25 M. 61; 11 M. L. J. 233; 3 Bom. L. R. 540; 5 C. W. N. 866; 28 I. A. 257 (P. C.).

(15) 4 M. L. T. 213; 8 Cr. L. J. 399.

(16) 16 M. L. J. 148; 3 Cr. L. J. 487.

(17) 30 M. 548; 3 M. L. T. 18; 7 Cr. L. J. 28.

record reasons in the preliminary order did not affect the jurisdiction of the Magistrate. Wallis, J., was of the same opinion. He does not discuss the question but adopts the reasoning of the referring Bench in *Khosh Mahomed Sirkar* v. *Nazir Mahomed* (4), already referred to. Munro and Sankaran Nair, JJ., do not give reasons for differing from his view, beyond distinguishing the Calcutta case on the ground that in that order, a Police report was mentioned as the basis of the order. If this be a valid ground of distinction, we may point out that in the order in the present case, the Magistrate sets forth that he is satisfied "on information received from the Tahsildar of Chirakkal and the Inspector of Police, Cannanore Division." It is, therefore, by no means clear (to put it on the lowest ground) that the Bench would have held that the Magistrate's jurisdiction was defective in the present case.

But, apart from this, we may point out with great respect for the learned Judges composing the Bench that they do not appear to have considered the very weighty reasoning of Rampini and Mookerjee, JJ., in support of their views on their second point of reference. It is this reasoning which appears to have been relied on by Wallis, J., and in this reasoning we also concur. It appears to us to be so conclusive that we cannot usefully add anything to it.

It may, of course, be argued that the views of the referring Bench on this point have not been specifically endorsed by the Full Bench which confined itself to answering the 1st question propounded. But, as we have already stated, the arguments of the Bench are, to our mind, convincing even without other authority. The Full Bench has most certainly suggested no dissent therefrom; and we may add that having answered the 1st question in the negative, holding that the initial order was not substantially defective, they could not possibly have come to any other conclusion than one, that the omission to record grounds in the preliminary order did not affect the jurisdiction of the Magistrate.

This is the view which commends itself to us, although we are glad to fortify ourselves by the weighty authority and careful reasoning which we have quoted. The Full Bench of the Calcutta High Court having stated the law of that Court in *Khosh Mahomed Sirkar* v. *Nazir Mahomed* (4), it is not necessary to discuss the earlier Calcutta rulings relied on by the learned Vakil for petitioners. [*Mohesh Sowar* v. *Narain Bag* (18), *Nityanund Roy* v. *Paresh Nath Sen* (19), etc.] The essential requisite to give a Magistrate jurisdiction under section 145, Criminal Procedure Code, is that he must be satisfied from information of some sort that a dispute exists likely to cause a breach of the peace concerning land or water or the boundaries thereof in his jurisdiction. Once he is so satisfied, his jurisdiction is complete and his subsequent action must be considered in relation to procedure, not jurisdiction. For the above reasons, we decline to interfere with the Magistrate's order, and dismiss the petition.

It is none-the-less the duty of all Magistrates to comply strictly and fully with these and all other provisions of the Code and of District Magistrates, where necessary, to draw the attention of Subordinate Magistrates to this point.

Petition dismissed.

(18) 27 C. 981.
(19) 32 C. 771; 9 C. W. N. 621; 2 Cr. L. J. 342.

CALCUTTA HIGH COURT.
CRIMINAL REVISION PETITION No. 316 OF 1912.
April 12, 1912.
Present:—Mr. Justice Holmwood and Mr. Justice Imam.
JABBAR SHEIKH—COMPLAINANT—PETITIONER
versus
TOMIZ SHEIKH AND OTHERS—ACCUSED—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898) s. 263—Summary trial—Refusal by Magistrate to take evidence, if legal—Recording evidence not same as hearing evidence.

Section 263 of the Criminal Procedure Code does not excuse a Magistrate from *hearing* the evidence of all witnesses. It only excuses him from recording the evidence of any of the witnesses. Recording evidence is not the same as hearing evidence. In all criminal trials, if the accused denies the charge, the complainant and such witnesses as he may produce must be examined and the case must be decided upon the effect of their evidence.

JAI GOVIND *v.* EMPEROR.

Rule against the order of the Sub-Divisional Magistrate of Tangail, dated January 4th 1912, acquitting the accused under section 245, Criminal Procedure Code.

Babu *Atulya Charan Bose*, for the Petitioner.

JUDGMENT.—This Rule must be made absolute on the ground on which it was issued. We are surprised to find that the learned Sub-Divisional Officer should so misapprehend the provisions of the law under section 263, Criminal Procedure Code. That section does not excuse the Magistrate from hearing the evidence of all witnesses. It excuses him from recording the evidence of any of the witnesses. But it is an elementary point that recording evidence is not the same as hearing evidence. In all criminal cases, if the accused denies the charge, the complainant and such witnesses as he may produce must be examined and the case must be decided upon the effect of their evidence. The order of acquittal is, therefore, clearly without jurisdiction, having been made without evidence having been heard.

The order of the lower Court is set aside and there will be a re-trial before any Magistrate the District Magistrate may direct.

Rule made absolute.

OUDH JUDICIAL COMMISSIONER'S COURT.

CRIMINAL APPLICATION No 19 OF 1912.

March 26, 1912.

Present:—Mr. Lindsay, A. J. C.

JAI GOVIND—ACCUSED

versus

EMPEROR—PROSECUTOR.

Criminal Procedure Code (Act V of 1898), *ss.* 110, 122—*Joint trial of more persons than one—Evidence against each person—Persons of bad character seen with accused, effect of—Sureties not to be rejected merely on Police report.*

Where a number of persons are tried jointly upon a charge under section 110, Criminal Procedure Code, it is incumbent upon the Magistrate to exercise great care and caution in dealing with the evidence and to insist that definite evidence be given against each person who is charged.

Where the evidence amounted to nothing more than that some persons said to be of bad character had been seen on occasions at the *Kothar* where the accused did his work:

Held, (1) that it did not justify the Magistrate in holding that the accused was a dangerous dacoit and extortioner and habitual protector and harbourer of thieves;

(2) that Magistrates have no authority to reject sureties merely upon an unfavourable report of the Police.

Emperor v. *Parmeshur*, 7 O. C. 113; 1 Cr. L. J. 459 and *Ramanand Singh* v. *Emperor*, 8 Cr. L. J. 344; 11 O. C. 267, approved.

Appeal against an order of the District Magistrate, Kheri, dated 19th January 1912, upholding that of the Deputy Magistrate, Kheri, dated 30th November 1911.

Mr. *A. P. Sen*, for the Applicant.

The *Government Pleader*, for the Crown.

JUDGMENT.—This is an application for revision of an order passed in appeal by the District Magistrate of Kheri, upholding an order passed by a Deputy Magistrate, Abdul Latif Khan, by which he directed the applicant, Jai Govind, to furnish security for good behaviour for a period of one year. The grounds taken in revision are shortly that the evidence received by the Court of first instance was not of a character which was admissible to prove the facts charged against the applicant and that even if the order of the Magistrate can be justified on the merits, he has acted illegally in refusing to accept the security which was tendered in accordance with the order. In order to understand the nature of the case which was set up against Jai Govind, it is necessary to refer in the first instance to the order of the Court by which he was called on to show cause why he should not be bound over. It is stated in the order that the Magistrate had received information that Jai Govind was a very dangerous dacoit, that he was a habitual extortioner, that he was an associate of thieves and *badmashes* and gave them secret help. It is not quite clear from the language of this order under what particular clause of section 110 of the Code of Criminal Procedure it was intended to proceed against Jai Govind. The description of him as a dacoit would seem to show that one of the clauses under which he was supposed to be liable was clause (*a*); the reference to extortion would indicate that he was liable under clause (*d*) and the allegation that he was in league with thieves and *badmashes* and gave them secret help seems to show that he was considered also liable under clause (*c*). The description of him as dangerous

(*khaternak*) dacoit might also be taken as an indication that he was liable as well under clause (*f*). It is to be noted that 15 other persons as well as Jai Govind were called upon to show cause, and that all these persons were tried together jointly. While it may not be contrary to law to have a joint trial in this manner in all cases, it is perfectly obvious that in dealing with a large number of persons like this, it is incumbent upon the Magistrate to exercise great care and caution in dealing with the evidence and to insist that definite evidence be given against each person who is charged. It is quite clear from a perusal of the record in this case that these precautions were not observed. The Deputy Magistrate has written an incoherent and confusing order from which it is very difficult to extract what his findings really were; and in appeal, the District Magistrate has dealt with the case in a rather perfunctory fashion and has not considered the evidence with sufficient care in order to see how it affected each and every one of these accused persons. So far as I can gather from the confused order which the Magistrate has written, he seems to have come to the conclusion that Jai Govind, who is a Zilladar in a village called Korara, and Lalta Prasad, who is a Patwari of the village, were both in league with the other 14 accused who constituted a band of persons who were habitual dacoits and robbers. He seems to find that these two men got money from these dacoits and assisted them and protected them in order to enable them to carry on their criminal exploits. I have had to peruse all the evidence in this case which was tendered for the prosecution and the result of my examination is that, in my opinion, a great deal of it was altogether irrelevant and ought not to have been admitted. Taking it generally, what we find is this, that the witnesses deposed in the first place that all the accused persons were persons of bad character and bad reputation. After having made these vague and sweeping statements, they appear to have been asked in particular with regard to the Patwari and Jai Govind. With reference to these two persons, their statements were in most instances to the effect that they had seen various of the other accused associating at one time or another with Jai Govind and sitting at the *Kothar* or rent office where as a Zilladar he carried on his work. There is evidence to show that this *Kothar* is at the road-side and that the witnesses, who depose to having seen the other accused assembled there, merely saw them in a casual way as they passed along the road. One of the witnesses, indeed, went a good deal further than this. He is a man called Mata Din who was brought out of Jail to give evidence in the case. Mata Din admitted that he was a member of the gang of dacoit, along with the majority of the accused persons in this case. He stated that Lalta Prasad and Jai Govind were friends of the gang although they did not actually take part in any of the dacoities which had been committed. He stated that on one occasion, Jai Govind had supplied the dacoits with powder and shot. It is obvious that the statement of a criminal like Mata Din could not possibly be accepted without the most convincing corroboration of which there is really none in the record. It will not do, therefore, to rely upon the evidence of Mata Din in dealing with this case. I may refer now to some of the statements made by the other prosecution witnesses in the case. One of these, Ram Bharose is the headman of a neighbouring village. He stated that, with the exception of Lalta and Jai Govind, all the rest of the accused were thieves and dacoits. He stated that Lalta and Jai Govind were friends of these men and received from them a share of the property stolen in the course of robberies and dacoities. His own words are:—"They, that is, Lalta and Jai Govind, make profits from thieves and dacoits, so they call them into their houses and make them sit down." Obviously, this latter statement is a mere matter of inference, that is to say, the witness assumes that because these men associate with one or other of these dacoits, they must be making a profit out of them. When cross-examined, he said that Lalta and Jai Govind were heads of the gang because he had seen *badmashes* frequenting their houses (*waisa hi uthte baithte dekha*). Another witness Chhedi says that he knows Lalta and Jai Govind and that he knows that they are visited by men of bad character. In cross-examination, all he could say was that he had seen Lalta and Jai Govind in the bazar with two or three of these men on one occasion. He was unable

to say when this occasion was or who the men were he had seen with these persons. Hira Lal, another witness, says that Jai Govind receives visits from these bad characters who assemble at Jai Govind's house to smoke tobacco and *charas*. The evidence of one of the witnesses named Dina is instructive. After stating that the *badmashes* paid visits to Lalta and Jai Govind, he added that there must be some profit in this friendship for otherwise why should these two men allow bad characters to come to their houses. Here, again, we have the witness deposing not to actual facts but to his inference from facts he has seen. There was also some evidence to the effect that on one occasion, certain crops had been cut down by one or two persons who were described as being servants of Jai Govind. So far as this part of the case was concerned, the statements of the witnesses who depose to this incident are extremely vague and in fact it would appear that their evidence on this point is nothing more than mere hearsay. It is hardly necessary to analyze the evidence in greater detail, for taken as a whole it amounts to nothing more than vague statements that some of the accused who are said to be of bad character have been seen on occasions at the *Kothar* where Jai Govind does his work. Beyond this, the evidence does not really establish anything against Jai Govind and, this being so, I do not think that the Magistrate was justified in holding that it made out the charges, which were preferred against Jai Govind, namely, that he was a dangerous dacoit and extortioner and habitually protected and harboured thieves. The whole of the evidence against this accused person is of an extremely vague and flimsy description. I have a few remarks to add about the conduct of the Magistrate with respect to the securities which were tendered to him. It appears that two persons offered themselves as sureties for Jai Govind's good behaviour. One of these was a man called Lalji. His security bond after being filed was sent to the Tahsildar who reported that the security offered was adequate. After this, the Deputy Magistrate sent the bond to the Sub-Inspector of Pasgawan Police Station. That officer reported that Lalji was a man of exceptionally good character but that by reason of his extremely good character he did not think he was a person who was likely to be able to control Jai Govind and keep an eye over his behaviour. On this, the Deputy Magistrate at once rejected the security. This was a most improper proceeding on the part of the Deputy Magistrate. It is, I must confess, a new experience to me to find a Police officer reporting unfavourably upon a person who has offered his security merely on the ground of his excessive virtue. As a rule, where a Police officer has anything to say against such a person being accepted as surety, it is on the ground of his vices and not of his virtues. However, be that as it may, it has been repeatedly ruled that a Magistrate is not entitled to reject a surety merely on the report of a Tahsildar or Police officer. The law is well explained in the case reported as *Emperor* v. *Parmeshur* (1), which was followed in another case to be found in *Ramanand Singh* v. *Emperor*(2). At page 115 of the former report, it was laid down by a Bench of this Court that there was no objection to a Magistrate's making a reference to a Tahsildar both as to the means and the respectability of persons who offered themselves as sureties but if the Tahsildar's report is unfavourable or if the Police officer offers any objection to the sureties, then before the sureties are rejected, notice of the report or objection should be given to the person bound over and the Magistrate should give both him and the Police an opportunity of adducing evidence. It was laid down that Magistrates have no authority to reject sureties merely upon an unfavourable report of the Police and in the case which I am referring to, the order of the Magistrate rejecting the surety on a mere Police report was set aside as bad in law. So much for the security offered by Lalji. The second surety, who came forward to make himself responsible for Jai Govind's good behaviour, was his own father Bans Gopal. He filed the surety bond which was reported on by the Tahsildar on 1st December 1911, as being adequate. Inquiry was then made from the Police station at Gola. The Sub-Inspector reported that he knew nothing against Bans Gopal's character and suggested that if the Magistrate thought fit, he might make a reference to the Police officers of Lakhimpur and Phulbehar. Accordingly, a report was

(1) 7 O. C. 113; 1 Cr. L. J. 459.
(2) 11 O. C. 267; 8 Cr. L. J. 344.

called for from the officer-in-charge of the Lakhimpur Police station. That report was not unfavourable. Then a report was called for from the Phulbehar Police station on the 21st December 1911. After about a month, the Sub-Inspector of that Thana gave a satisfactory report about Bans Gopal. Sometime after this, the Magistrate seems to have thought that it was advisable to make further inquiry, so he sent for a report from the Police station of Pasgawan. On the 7th February, a report was sent from the latter Thana saying that there was no objection to Bans Gopal being accepted as surety. On the 13th February, that is, about 2½ months after Bans Gopal had filed the security, the Deputy Magistrate ordered it to be filed with the record until such time as the accused produced another surety in the place of Lalji who had been rejected. All this time, it will be remembered, Jai Govind was undergoing rigorous imprisonment in Jail. I consider that the conduct of the Deputy Magistrate in this case was most illegal and improper and I am surprised that some notice of it was not taken by the District Magistrate when the case came before him in appeal. Referring to the Civil List, I find that the Magistrate is a gentleman of between four and five years' service, who is in the sixth grade of Deputy Collectors. It might have been expected, therefore, that after a service extending over this period, he would havebeen able to deal with a case like this with some regard for the provisions of the law on the subject. But I am bound to say that from what I have seen of his proceedings in this case, I am of opinion that he is totally unfit to be entrusted with the investigation of cases under section 110 of the Code of Criminal Procedure.

I accept this application and set aside the order of the Court below. I direct that the order calling upon Jai Govind to furnish security be set aside and he be at once set at liberty.

Application accepted.

MADRAS HIGH COURT.

CRIMINAL APPEAL No. 88 OF 1909.

September 26, 1912.

Present:—MR. Justice Ayling and Mr. Justice Napier.

SRI SRI NADADURU RAJAGURU SATAGOPALA CHARLU—PLAINTIFF—APPELLANT

versus

SATRUGHNA BEHARA AND ANOTHER—DEFENDANTS—RESPONDENTS

Criminal Procedure Code (Act V of 1898), ss. 103, 165 (2) & (3)—Search—Failure to call witnesses—Illegality—"Conduct the search in person", meaning of.

Section 165 (2) does not mean that an officer-in-charge of a Police station or Investigating Officer personally conducting a search must himself make the search, *e. g.*, ransack boxes, examine the roof, dig up the floor, or otherwise seek for the property. Nor is it necessary that all these processes must take place under his eye. The meaning of the section is, that the officer should be present on the spot and exercise a general supervision over the search, in contradistinction to the cases where he is unable to go to the spot, and deputes a subordinate by a written order to conduct the search in his place.

The failure to call inhabitants of the locality as witnesses to a search, that is, failure to strictly comply with the provisions of section 103, does not make a search illegal.

Appeal from the decree of the District Court of Ganjam, in O. S. No. 1 of 1908.

Mr. *S. Srinivasa Aiyangar*, for the Appellant.

Mr. *T. R. Ramachandra Aiyar*, for the Respondents.

JUDGMENT.—The suit is brought to recover damages for the wrongful acts of denfendants (respondents) in maliciously searching plaintiff's (appellant's) house on 17th June 1907 in connection with a case of house-breaking and theft in 1st defendant's house. Second defendant is the Police Inspector who conducted the search.

It is not argued before us that there is any evidence of malice on the part of the 2nd defendant but is contended that the search was illegal in certain particulars and, therefore, wrongful such as to give rise to an action for damages.

On the evidence before us, we are unable to find any illegality in the search. The Inspector is said to have remained outside the house while the actual search was being made by two constables: and the learned Vakil for the appellant argues, relying on the ruling of Boddam, J., in *Venkatapp Naidu* v. *Emperor* (1), that this was L

(1) 17 M. L. J. 323; 6 Cr. L. J. 105.

conducting the search in person within the meaning of section 165 of the Criminal Procedure Code. With all respect to the learned Judge who decided that case, we feel bound to differ from his view. We do not understand the section to mean that an officer-in-charge of Police station or Investigating Officer personally conducting a search must himself make the search, *e. g.*, ransack boxes, examine the roof, dig up the floor, or otherwise seek for the property. Nor do we understand it to be necessary that all those processes must take place under his eye. What we do understand the section to mean is, that the officer should be present on the spot and exercise a general supervision over the search, in contradistinction to the cases where he is unable to go to the spot, and deputes a subordinate by a written order to conduct the search in his place.

It is next argued that the Inspector's failure to call inhabitants of the locality as witnesses to the search renders it illegal. For this, Inspector has given an explanation and the failure to strictly comply with the provisions of section 103, does not, in our opinion, make a search illegal [vide *Queen Empress* v. *Raman* (2).]

We find no illegality in the search.

As regards the 1st defendant, the search was admittedly made in consequence of information furnished not by him but by two *dandasis*. We can find nothing from which it could be inferred that these *dandasis* were instigated by 1st defendant nor can we infer malice from the fact that 1st defendant professed to identify a bag of money found in the search.

The appeal is dismissed with costs.

Appeal dismissed.

(2) 21 M. 83.

CALCUTTA HIGH COURT.

CRIMINAL REVISION PETITION No. 1488 OF 1911.

January 17, 1912.

Present:—Mr. Justice Holmwood and Mr. Justice Sharfuddin.

PRANKHANG AND OTHERS—ACCUSED—PETITIONERS

versus

EMPEROR—OPPOSITE PARTY.

Right of private defence—Penal Code (Act XLV of 1860), ss. 97, 99—Search of accused's house—Specific article—General search for stolen property, whether authorised by law—Further inquiry—Magistrate's power to direct further inquiry, whether absolute—Criminal Procedure Code (Act V of 1898), ss. 94, 165, 435, 437.

Every person has a right, subject to the restrictions contained in section 99 of the Indian Penal Code, to defend property, whether moveable or immoveable, of himself or of any other person, against any act which is an offence falling within the definition of criminal trespass.

The law does not empower a Police officer to search an accused's house for anything but the specific article which has been or can be made the subject of summons or warrant to produce. A general search for stolen property is not authorized, and the law cannot be got over by using such an expression as "stolen property relevant to the case."

A right of private defence exists against such an unauthorized search.

A Magistrate has not an absolute right to order further inquiry in any case under section 437 of the Criminal Procedure Code. If he finds no illegality, impropriety or irregularity and nothing incorrect in the proceeding of the Court below, he is not empowered to set aside an order of discharge upon other grounds, or upon no ground at all.

Rule against an order directing further inquiry in the case of the petitioners who were discharged, made by the Deputy Commissioner of Dibrugarh, on August 30th, 1911.

Mr. *Bardalai*, for the Petitioners.

Mr. *K N. Chaudhuri*, for the Crown.

JUDGMENT.—This was a Rule calling upon the Deputy Commissioner of Dibrugarh to show cause why the order directing further inquiry into this case should not be set aside on the ground that the order of discharge was correct in law and could not be impugned in view of the ruling in *Bajrangi Gope* v. *King-Emperor* (1).

The learned Counsel who appears to show cause does not attempt to support the order on the ground taken by the learned Magistrate, that the point of law laid down in that ruling should be reconsidered. He takes a new point that whatever right of private defence the petitioner Prankhang may have had, his neighbours could have had no right to assemble and attack the Police, and he bases his contention on some remarks in this very judgment in the case of *Bajrangi Gope* v. *The King-Emperor* (1). There we said: "The search was, therefore, not a legal search and two, at any rate, of the petitioners who were the part-owners and occupiers of the house had the right of private defence. The common object of the riot, therefore, failed and the

(1) 15 C. W. N. 343; 38 C. 304; 13 C. L. J. 630; 9 Ind. Cas. 64; 12 Cr. L. J, 8.

PRANKHANG v. EMPEROR.

conviction under section 147 was also bad. But we see no reason to disturb the conviction under section 323. There was no justification for calling in the neighbours to beat the Police after they had gone out of the hut, and we uphold that part of the conviction." These remarks are no warrant whatever for holding that the neighbours in this case had not a right of private defence as laid down in section 97. Every person has a right, subject to the restrictions contained in section 99, to defend property, whether moveable or immoveable, of himself or of any other person, against any act which is an offence falling within the definition of criminal trespass. Now, what was found in the evidence here is that Prankhang, in the exercise of his right of private defence, pushed the Sub-Inspector, thereupon the Sub-Inspector ordered two constables to climb on his roof and break into the house; whereupon the villagers assumed a threatening attitude and threatened to cut them to pieces if they entered the house. They were, therefore, engaged in defending the property of another from an act which amounted to criminal trespass. Of course, if they had executed their threat and had cut the constables to pieces, they would not have been able to plead that they were not exceeding that right. But, as a matter of fact, the empty threat appears to have been quite sufficient and no further damage was done. We, therefore, think, on the ground urged by the learned Counsel, which is, of course, a ground on the merits, that there is no case for further inquiry.

As regards the ground of law upon which further inquiry appears to have been ordered, we find that the learned Magistrate acted upon an erroneous opinion tendered to him by the Legal Remembrancer of the Eastern Province. That was the sole ground for ordering further proceedings except that he also claims absolute right to order further proceedings in any case under section 437, Criminal Procedure Code. The learned Legal Remembrancer apparently was of opinion that the ruling in *Bairangi Gope* v. *King-Emperor* (1), if it intended to lay down that a Police officer is not empowered to search an accused's house for stolen property relevant to the case, is not a correct statement of the law and the learned Magistrate in his explanation refers to the ruling in the well known case of *The Nizam of Hyderabad* v. *Jacob* (2), as supporting this contention. We need hardly point out, as the learned Counsel for the Crown has frankly admitted, that that case has nothing whatever to do with the question now before us, and we desire again to point out that the law does not empower a Police officer to search an accused's house for any thing but the specific article which has been or can be made the subject of summons or warrant to produce. A general search for stolen property is not authorized and the law cannot be got over by using such an expression as "stolen property relevant to the case." Such expressions are vague and misleading and the terms of the law are extremely specific. As long as that law is not amended, the Police cannot be said to be empowered to make any search not authorized by that law.

We further wish to point out, with reference to the Magistrate's opinion that it is open to him to order further proceedings in any case under section 437, that that section is limited by the words "on examining any record under section 435" and that section 435 lays down that a Court may call for and examine any record for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed and as to the regularity of any proceedings of such inferior Court. It cannot, therefore, be said that, if a Magistrate finds no illegality, or impropriety or irregularity and nothing incorrect in the proceeding, that he is empowered to set aside an order of discharge upon other grounds, or upon no ground at all.

The Rule is made absolute. The order of the lower Court must be discharged and further proceedings against the petitioners dropped.

Rule made absolute.

(2) 19 C. 52.

EMPEROR *v.* GULSHAH.

SIND JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REVISION PETITION No. 171 OF 1911.

March 21, 1912.

Present:—Mr. Pratt, J. C., and Mr. Crouch, A. J. C.

EMPEROR—PROSECUTOR

versus

GULSHAH *valad* BACHAL AND OTHERS—APPLICANTS.

Penal Code (Act XLV of 1860), s. 97—Private defence, right of—Defence of property and body—Reasonable force to defend possession.

No person can take the law into his own hands and forcibly recover possession.

But the law allows every person to use reasonable force to defend his possessions from a trespasser.

Where *A*, as owner of cattle, is in possession of the cattle and *B*. endeavours to dispossess him by trying to seize the cattle, the right of private defence exercised by *A*. in such a case is in reality a right of private defence of the body, though exercised with the object of defending property.

Mr. *Partabrai D. Punnawani*, for the Applicants.

The *Public Prosecutor*, for the Crown.

JUDGMENT.—The applicants have been convicted of the offence of rioting in that they used force to oppose the taking of their cattle to the pound by the complainant.

The Sessions Judge finds that the cattle were not in the possession of the complainant and that the complainant had no right to seize them. He has, nevertheless, convicted the accused because they used force and because they had no right of private defence of their property under section 97 (2). This section has, however, no application, for the right of private defence exercised by the accused in this case, though exercised with the object of defending property, is in reality a right of private defence of the body. No doubt, if the complainant had taken possession of the cattle of the accused, then, however wrongful that act may have been, the accused would not be entitled to take the law into their own hands and forcibly recover possession. But here the accused, as owners of the cattle, were still in possession of the cattle and it was the complainant who by trying to seize the cattle was endeavouring to dispossess them. And there is no doubt that the law allows every person to use reasonable force to defend his possessions from a trespasser. The

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subject has been discussed in para. 233 of Mayne's Commentaries on the Indian Penal Code, where it is pointed out that "in such circumstances, a justification of a battery in defence of possession, though it arose in defence of the possession, yet in the end it is a defence of the person."

It is said that the accused used more force than was necessary, but we do not find that the complainant was beaten or even seriously assaulted.

We, therefore, reverse the convictions and sentences.

Convictions and sentences reversed.

CALCUTTA HIGH COURT.

CRIMINAL REVISION PETITION No. 32 OF 1909.

May 5, 1909.

Present:—Mr. Justice Caspersz and Mr. Justice Ryves.

HEM CHANDRA KAR AND OTHERS—PETITIONERS

versus

MATHUR SANTHAL—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 526—Stay of proceedings—Rule issued by High Court—Telegram sent by High Court Vakil to Court below—Disregard of telegram—Bias against accused—Transfer of case.

A Rule for the transfer of a case was issued by the High Court upon the application of an accused person staying further proceedings before a Magistrate and the direction given by the High Court was intimated to the Magistrate by a telegram sent by the Vakil who obtained the Rule, but the Magistrate proceeded with the case disregarding the telegram;

Held, that the Magistrate acted injudiciously in going on with the case, that the conduct of the Magistrate indicated clearly the bent of his mind and his bias against the accused, and that the case ought to be transferred to another Court.

Rule upon the District Magistrate of Bankura to show cause why the case against the petitioner pending before the Deputy Magistrate of Bishnupur should not be transferred to another Court.

Babus *Dasarathi Sanyal* and *Suresh Chandra Mukherji*, for the Petitioner cited *Ratnessari Pershad* v. *Empress*, 2 C. W. N. 498, and *In re Surjaya Narayan Singh*, 5 C. W. N. 110, referred to in the judgment.

EMPEROR *v.* ISARDAS.

Babus *Srish Chandra Chowdhury* and *Jnanendra Nath Sarkar*, for the Opposite Party.

JUDGMENT.—A criminal case against the petitioners is pending on the file of the Sub-Deputy Magistrate of Bishnupur (Babu K. C. Haldar), who disposed of another case, apparently relating to the same dispute between the parties on the 21st December 1908. This Rule is for transfer of the said case. Cause is shown by Babu Srish Chandra Chowdhury, Junior Government Pleader, and by Babu Jnanendra Nath Sarkar, Vakil.

The Rule was issued for the transfer of the pending case on the ground that the Sub-Deputy Magistrate had arrived at findings adverse to the petitioners in the case disposed of by him on the 21st December 1908.

Babu Dasarathi Sanyal, who appears in support of this Rule, has informed us that the Sub-Deputy Magistrate did not pay any heed to the telegram which was sent by him intimating the direction given by this Court to stay further proceedings. A supplementary affidavit, with the original telegram, has been put in, and the learned Vakil has called our attention to two cases in the Law Reports in which the learned Judges commented somewhat severely on the action of the Magistrate in disregarding a similar intimation, and, in both these cases, this Court held that the conduct of the Magistrate indicated clearly the bent of his mind and his bias against the accused.

If the Sub-Deputy Magistrate had really any suspicion or doubt in the matter, he might have asked the *Muktear* who made the application to verify the telegram and to satisfy him as to whether the learned Vakil in this Court was acting under instructions in the case We think that the Sub-Deputy Magistrate acted injudiciously in going on with the case on his file without paying any attention to the direction of this Court to stay proceedings.

The facts of the case are somewhat complicated but we do not think it necessary to go into details. We have already expressed our opinion in regard to the action of the Sub-Deputy Magistrate, and that would certainly justify us in directing the transfer prayed for, but it also appears to us on the papers that the two cases are somehow or other connected, if not in fact, probably in principle. That being so, we think that the Rule should be made absolute in the following manner:—That the case be transferred for disposal by any competent Magistrate, other than the present Sub-Divisional Magistrate, to be nominated by the District Magistrate of Bankura, or, in the alternative, that the District Magistrate do arrange to send some stipendiary Magistrate (from head-quarters to Bishnupur) who will dispose of the case according to law.

We make the Rule absolute and direct the records to be sent down at once.

Rule made absolute.

SIND JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REVISION APPLICATION No. 13 OF 1912.

March 21, 1912.

Present:—Mr. Pratt, J. C., and Mr. Hayward, A. J. C.

EMPEROR—PROSECUTOR

versus

ISARDAS GHANSHAMDAS—APPLICANT.

Evidence Act (I of 1872), s. 114, illus. (b)—Accomplice—Evidence—Presumption—Corroboration—Rule of practice—Revision—Interference on the ground of want of corroboration.

Where the act of an accomplice imports no great moral delinquency, the presumption enacted in illustration (*b*) to section 114 of the Evidence Act does not apply. This is recognized as a consideration controlling or rebutting that presumption in the second explanatory illustration (*b*) to the section.

The rule as to corroboration being necessary to accomplice evidence is a rule of practice.

Even if this rule of practice has not been adhered to by the lower Court, the High Court will not interfere on revision unless the case presents exceptional circumstances.

Emperor v. *Sheikh Sahib*, 3 B. 197, followed.

Mr. *Harchandrai Vishindas*, for the Applicant.

The *Public Prosecutor*, for the Crown.

JUDGMENT.—The accused has been convicted of an offence under section 165, Indian Penal Code, by the District Magistrate, Upper Sind Frontier, and the conviction has been upheld on appeal by the Sessions Court of Sukkur.

The only point of law raised in this

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application for revision is that there is no evidence, but that of accomplices for the prosecution. The payer of the bribe, Gulsher, is, it is said, an accomplice and it is urged that the *Bania* Jeomal, who made the payment by a transfer in his books, is also an accomplice in that he thereby co-operated in the payment.

Now, in the first place, it is by no means clear that Jeomal is an accomplice. The mere transfer in his books does not show that he was assisting in the offence unless it is proved that he was aware of the purpose for which the money was being paid. Of this there is no evidence beyond the fact that Gulsher told him that the money was due for a *kabulyat*. This statement was consistent with the money being lawfully due.

But, even supposing that Jeomal did know the nature of the transaction, he is at least only a technical accomplice. He had nothing to gain himself by the transaction and he is not liable to the suspicion that he is giving false evidence in order to shift the blame on to another—for by his evidence he is virtually his own accuser. In cases where the act of the accomplice imports no great moral delinquency, the presumption enacted in illustration (*b*) to section 114, Indian Evidence Act, does not apply. This is recognized as a consideration controlling or rebutting that presumption in the second explanatory illustration (*b*) to that section.

Again, the Rule as to corroboration being necessary to accomplice evidence is only one of practice—and even if the rule of practice has not been adhered to by the lower Court in this case, we should not be justified in interfering in revision unless the case presented exceptional circumstances. *Emperor* v. *Seikh Saheb* (1). Here we are satisfied that justice has been done by the lower Courts.

We accordingly reject this application.

Application rejected.

(1) 3 B. 197.

SIND JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION PETITION No. 37 OF 1911.

February 2, 1912.

Present:—Mr. Pratt, J. C., and Mr. Hayward, A. J. C.

LALU *valad* KACHO—APPLICANT

versus

GURDASMAL LADHOMAL—OPPONENT.

Criminal Procedure Code (Act V of 1898), *s.* 195 (6) —*Sanction to prosecute—Revocation of sanction by Appellate Court—Power of High Court to grant sanction.*

Section 195 (6) does not limit the right of appeal to one superior Court only.

The higher Appellate Court has power not only to grant a sanction which has been refused but also to grant a sanction which has been revoked.

A sanction which has been revoked is in effect only a sanction which has been refused.

Muthuswami Mudaliar v. *Veeriar Chetti*, 30 M. 382; 2 M. L. T. 239; 17 M. L. J. 266 (F. B.); 6 Cr. L. J. 102, followed.

Application for revision against an order of the Additional Sessions Judge, Sukkur-Larkana.

Mr *Dayaram Dhanrajmal*, for the Applicant.

Mr. *Rupchand Billaram*, for the Opponent.

JUDGMENT.—This is an application for grant of sanction to prosecute the opponent for fraudulently making a false claim in the Court of the Sub-Judge of Shikarpur.

The sanction was granted by the Sub-Judge, but was revoked by the Joint Judge.

It is objected that the application cannot be entertained by this Court as section 195 (6), Criminal Procedure Code, contemplates one proceeding only in a superior Court. We find nothing in the terms of the section to justify this narrow construction. It is argued that the Appellate Court has power to grant a sanction which has been refused, but not to grant a sanction which has been revoked. But there is no substance in this distinction for a sanction which has been revoked is in effect a sanction which has been refused. The point is covered by the Full Bench decision in the case of *Muthuswami Mudaliar* v. *Veeri Chetti* (1), with which we concur.

Sanction granted.

(1) 30 M. 382; 2 M.L.T. 239; 17 M. L. J. 266 (F.B.); 6 Cr. L. J. 102.

HASAN RAZA *v.* BASTI BEGAM.

OUDH JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 1 OF 1912.

March 20, 1912.

Present:—Mr. Piggott, J. C.

Saiyad HASAN RAZA—PLAINTIFF—APPELLANT

versus

Nawab BASTI BEGAM—DEFENDANT—RESPONDENT.

Muhammadan Law—Widow's possession in lieu of dower—Right of husband's heirs to oust her.

Where the widow of a deceased Mahomedan is proved to have obtained possession of her husband's property after his death peacefully, quietly and without fraud in lieu of her unsatisfied dower-debt, his legal heirs are not entitled to oust her until that debt has been satisfied.

Ramzan Ali Khan v. *Asghari Begam*, 32 A. 563; 7 A. L. J. 614; 6 Ind. Cas. 405, *Mohammad Ali Naki* v. *Ahmad-un-Nisa*, 1 O. C. Supplementary Vol., p. 6, relied upon.

Appeal against the decree of the Additional Judge of the Court of Small Causes, Lucknow, exercising powers of a Subordinate Judge, dated 31st August 1911.

Mr. *Nabi-ullah*, for the Appellants.

Mr. *Wahajuddin Hyder* and Babu *Salig Ram*, for the Respondent.

JUDGMENT.—The essential facts of this case are that one Nawab Abid Husain Khan died childless, leaving a widow of the name of Basti Begam. He had no other surviving relatives nearer than Wazir Ali Khan and Saulat Bahadur, his sister's sons. The present suit relates to certain house property alleged to form part of the estate of late Nawab Abid Husain, now in the possesssion of his widow Nawab Basti Begam. The plaintiff is the transferee of the interest of the two nephews, and he sues for recovery of possession against the defendant, Basti Begam, on the allegation that the parties being Mahomedans subject to the law of the Shia sect, the defendant as a childless widow takes no interest in the immoveable property left by her husband. There was some question as to whether she would not in any case take some interest in the materials of the house in suit, but it is unnecessary to discuss this point in view of the decision arrived at by the Court below, in which I entirely concur. That Court has held that the defendant obtained possession of the property in suit on the death of her husband peacefully, quietly and without fraud, in lieu of her unsatisfied dower-debt, and that, consequently, the plaintiffs are not entitled to oust her until that debt has been satisfied. The latest authority on this point is *Ramzan Ali Khan* v. *Asghari Begam* (1), where the older cases are reviewed and the law is very clearly laid down. There can be no doubt whatever on the evidence in this case that *Musammat* Basti Begam obtained possession on the death of her husband "peacefully, quietly and without fraud," within the meaning of the above ruling. It has been contended on behalf of the appellant that this ruling should not be followed in Oudh in view of the decision of this Court in *Mohammad Ali Naki* v. *Ahmad-un-nisa* (2). This being a Bench case is binding upon me sitting as a single Judge of this Court, and the learned Subordinate Judge in the Court below seems to have felt some difficulty regarding it. He lays stress upon the fact that the late Sir William Burkitt, who is one of the Judges responsible for the decision of this Court, was subsequently a party to the decision in *Amani Begam* v. *Muhammad Karim ullah* (3), in which it is suggested that a different view was taken. It seems to me, however, that there is nothing whatever in the decision in *Mohammad Ali Naki* v. *Ahmad-un nisa* (2), which conflicts in any way with the two Allahabad cases already referred to. There were particular circumstances in that case on which the learned Judges who decided it found it necessary to lay stress, and it may be possible to quote isolated passages in the judgment which lend some support to the contention urged upon me on behalf of the appellant; but where the learned Judges of this Court proceed to lay down the law generally applicable to cases of this sort, they say that the heirs are not entitled to succeed in a suit like the present against the widow, "if she has lawfully and without force or fraud obtained possession." I am satisfied that they did not intend to lay down the law in any different sense from that accepted by the Allahabad High Court. It was further contended in support of this appeal that, as regards

(1) 32 A. 563; 7 A. L. J. 614; 6 Ind. Cas. 405.
(2) 1 O. C. Sup. Vol. p. 6.
(3) 16 A. 226; (1894) A. W. N. 52.

two of the items in suit (item No. 2, being three houses in *Mohalla* Naurbari, and item No. 4, being one house in *Mohalla* Mansurnagar), the defendant cannot contend that she obtained possession of the same in lieu of her dower-debt, inasmuch as she has set up a claim that they were really her own property and formed no part of the estate of her deceased husband. This is really a question of pleading, and it seems to me that the contention of the defendant to the effect that these houses, though purchased in her husband's name, had been acquired with her money and were really her own property, has been rightly regarded in the Court below as merely supplementary to her general contention that in any case the whole of the property in suit is in her hands subject to a charge on account of dower-debt exceeding the total value of property in suit.

On this last point, it was further contended before me that it is not proved that the amount of the defendant-respondent's dower-debt exceeds the value of the property in suit. It has, no doubt, not been proved because the question of the sum due to *Musammat* Basti Begam on account of her dower-debt was not put in issue or determined in the present suit, but was apparently left over by consent of parties, on the ground that it was in issue in a separate suit in which *Musammat* Basti Begam has come into Court as plaintiff. I think the learned Subordinate Judge might have been more careful to place on record exactly what the parties did agree to regarding this issue about the amount of the dower-debt, but it is certain that they tendered no evidence on the point in the present suit, and I think I am right in presuming that the Judge acted with the consent of parties when he said that this issue was to be determined in the other suit in which *Musammat* Basti Begam appeared as plaintiff. I notice that in that suit this lady, though stating the amount of her dower-debt at Rs. 50,000, contented herself with claiming Rs. 25,000, only and it has been urged upon me in argument that the total value of the property left by Nawab Abid Husain Khan in the possession of his widow can be shown from the plaint in the former suit to exceed the sum of Rs. 25,000. I do not myself think that the legal point sought to be raised by this objection is one which could in any case prevail; the widow's lien in respect of her dower-debt would seem on the authorities to extend to the whole of the property in her possession, and the husband's heirs could only recover possession of any part of the property in her hands after satisfying her claim for dower-debt. Apart from this consideration, however, I do not think that the fact that *Musammat* Basti Begam, when coming into Court as a plaintiff, limited her claim for dower debt to the sum of Rs. 25,000, can prevent her from pleading in this suit in which she is defendant that the real amount was Rs. 50,000. I have also referred to the file of another suit connected with the estate of the late Nawab Abid Husain Khan, which is referred to in the proceedings in the Court below and I have no doubt that the property of this deceased gentleman at present in the hands and under the control of his widow does not amount to Rs. 25,000.

It only remains to be considered, therefore, whether in any case the Court below was right in passing a final decree in the present suit before the issue regarding the amount of *Musammat* Basti Begam's dower-debt had been finally decided between the parties, either in the present or in some other suit, and also whether the decreee as passed, which is one dismissing the suit altogether, is just to the plaintiff. In the case of *Ramzan Ali Khan* v. *Asghari Begam* (1), a decree was passed in favour of the plaintiff subject to payment of the amount of the dower-debt found due. In the Privy Council case, upon which later decisions of the Indian Courts have been founded, *Musammat Bibi Bachun* v *Sheikh Hamid Hossein* (4), although the decree passed was one dismissing the suit against the widow, some stress was laid upon the fact that mesne profits had not been claimed, and the decree was so framed as to safeguard the right of the plaintiff to bring a fresh suit. I think the question of the sort of decree to be passed in a suit like the present must be decided largely on the frame of the suit itself and in view of the pleadings of the parties and the proceedings

(4) 14 M. I. A. 377; 10 B.L.R. 45; 17 W.R. (P.C.) 113.

in Court generally. In the present case, the suit as brought was one for ejectment against a trespasser, subject only to a plea that if the defendant as widow of the deceased were held to be entitled to a portion of the property in dispute or to its price, a decree might be passed in favour of the plaintiff for possession on payment of a specified sum. I have no doubt that the reference in this paragraph was to the question whether the defendant might not be found entitled to a share in the materials of the houses; the plaintiff never admitted any right on the part of the defendant to retain possession in lieu of dower-debt, and never moved the Court to grant him as an alternative relief a decree for possession subject to payment of the ascertained amount of such debt. I think also, as I have already stated, that the plaintiff was at least a consenting party to the course adopted by the learned Subordinate Judge in declining to determine in this suit the issue as to the amount of the dower-debt. Under all the circumstances, I am not disposed to remand this case, or to direct further inquiry, for the sake of giving the plaintiff relief in the form of a decree for possession subject to payment of a specified sum on account of dower-debt. I think, however, that it would not be unreasonable to hold that the defendant, having also herself been a consenting party to the arrangement by which the issue as to the amount of the dower bebt was to be determined in another suit, is bound by that arrangement and should not be permitted hereafter to plead the decree in this case as an absolute bar to any future suit for recovery of possession subject to payment of the ascertained amount of the dower-debt. While, therefore, in other respects affirming the decision of the Court below and dismissing this appeal, I direct that the decree of the lower Court be modified by adding to it a declaration similar to that made by their Lordships of the Privy Council in *Musammat Bibi Bachun* v *Sheikh Hamid Hossain* (4) to the effect that the plaintiff's suit is dismissed subject to his right to enforce hereafter any claim which he may have in law to recover possession of the whole or of any part of the property in dispute on payment of the ascertained amount of the dower-debt due to the defendant-respondent. This appeal has substantially failed, and I think it reasonable to order the appellant to pay all costs.

Appeal dismissed.

CALCUTTA HIGH COURT.
ORDINARY ORIGINAL CIVIL SUIT No. 533 OF 1910.
May 6, 1912.
Present:—Mr. Justice Chaudhri.
KHETTERMONI DASSI—PLAINTIFF
versus
KADAMBINI DASSI—DEFENDANT.

Hindu Law—Widow—Right to inherit—Disqualification—Physical unchastity—Malignant hostility—Refusal to live with husband and co-wife.

The only disqualification for a widow to inherit her husband's estate is one of physical unchastity.

Where a wife refused to live with her husband and her co-wife:

Held, (1) that, she was not disqualified, in the absence of any misconduct on her part, to inherit her husband's estate after his death;

(2) that the refusal to live was, under the circumstances, no evidence of hostility.

Suit for partition.

Messrs. *B. C. Mitter* and *N. Sircar* instructed by Messrs. *Fox* and *Mondal*, Solicitors for the Plaintiff.

Messrs. *B. Chakravarti*, *A. N. Chaudhri* and *M. N. Basu*, instructed by Messrs. *T. H. Wilson* and *K. L. Boral*, Solicitors, for the Defendant.

JUDGMENT.—This is a suit brought by a Hindu widow against her co-widow, for partition of the estate of her husband, Nilmoni Dey, who died on the 22nd May 1910. The plaintiff was married in January 1860 and the defendant in 1866. It is admitted that these are the only two heirs whom he left him surviving. The defendant, however, questioned the plaintiff's right to succeed on the ground that she bore "malignant hostility and bitterness towards her husband all through her life." It has been strenuously argued on behalf of the defendant that, under the Hindu Law, she is under the circumstances not entitled to succeed The contention, as I have understood it, is this. That the word *Patni* (* *) in the text of Yajnavalkya, II, 136-137, means lawfully wedded wife, one married according to one of the approved forms of marriage. The word etymologically

means a wife who is an indispensable associate of her husband in religious rites and observances. That being so, she must be a *sadhwi* (* *) which is defined in Manu thus:—

* * * *
* * * *

Manu V, 165.

The passage is rendered by Sir William Jones thus—"While she who slights not her lord, but keeps her mind, speech and body devoted to him attains her heavenly mansion and is called *sadhwi* by goodmen." I may mention that Haughton in his Institutes of Manu, Edition 1825, page 372, refers to this couplet and the next one as not found in the three copies of *Medhatithi* that he had the opportunity of consulting. These couplets, however, appear in Kulluk Bhatta's commentaries, and we may proceed upon the basis that they are not interpolations. His note is as follows:—

* * * *
* * * *

namely, that so far as *Vak* and *Manas*, speech and mind, are concerned, this verse contains the *Vidhan* (*) and that, so far as the body is concerned, the mention of it is an *Anuvad* (*) a repetition, superfluous or self-evident. It has to be remembered that the *Manava Dharma Shastra* (* *) is a book of mixed religion, morality and law, and in a great many instances contains appeals to one's moral side and it is impossible to accept the whole of it as a legal thesis. These couplets occur in a chapter of miscellaneous character, dealing with edibles, impurities, and methods of purification, and finally with rules relating to the duties of women (*stridharma*) and can hardly be looked upon as anything more than directions for regulating one's life, some of them in the way of precepts or moral injunctions. Verse 166 says that a woman by this course of life acquires high renown in this world, and in the next, the same abode with her husband. It is quite clear that the word *sadhwi* has not received the wider meaning that has been given to it in Manu Smriti in dealing with the question of inheritance. In Yajnavalkya the passage about the right of a widow to inherit is the subject of a long commentary. We find that Briddha Manu as there quoted says that "the widow succeeds keeping unsullied her husband's bed, and persevering in religious observances (* *)." Katyayana is also there quoted:—"Let the widow succeed to her husband's wealth, provided she be chaste," the word used being *abyabhicharini* (* *), which admits of no ambiguity. Then we find in the Vyavahara Mayukha, section 8, Part II, Katyayana is again quoted, followed by a quotation from "Harita" which has been thus translated:—

"If a woman, becoming a widow in her youth, be headstrong (suspected of incontinence), a maintenance must in that case be given to her, for the support of life," II Cole. Dig., 536, ccccix. The word used is (*) which has been translated as headstrong, (suspected of incontinence)—Sankitavyabhicharaya—See Viramitrodaya, Chapter III, Part I, section 10. In Vivadachintamani, Harita is again quoted. The passage has been thus translated:—"If a young widow is untractable," &c., II Cole. Dig., 538, ccccix. The commentator says that the chaste wife is entitled to the property. In the Vishwakosa, one of the meanings given to the word *Karkasa* is "unchaste" "*Vyabhicharini*." In Saraswati Vilash, § 528, Vishnu is quoted thus: "The share allotted to women who trangress their limits may be resumed"—"who trangress their limits" means "unchaste." Narada is quoted. The passage has been thus translated:—"His women if they keep their husbasd's bed inviolate shall be maintained till their death, but if they do not, they shall not be." Narada xiii, 26.

In the Dayabhaga, these passages from Briddha Manu and Katyayana are quoted, and also another from Vyasa which has been thus translated:—"After the death of her husband, let a virtuous woman observe strictly the duty of continence," Dayabhaga, Chapter XI, sec. 1, § 43, II Cole. Dig., 528, cccc. I do not think there is any doubt whatsoever that the only disqualification for a widow to inherit her husband's estate is that one of physical unchastity. To give it a more extended sense, that she forfeits her right or does not become entitled to inherit unless she has kept her mind, speech and body devoted to her husband is not justified by the interpretation which has been put upon the passages quoted. This is also the meaning put upon them by Srikrishna in his commentary. He says *sadhwi* (*) means "not adulterous." As regards the authority of Srikrishna, Mr. Justice Dwarka Nath

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Mitter says that "he is considered a greater authority as being superior even to the authority of Dayabhaga." I know that a later commentator of note does not consider Srikrishna of such high authority. But there is no question, it seems to me, upon a comparison of all the commentaries on these passages, that *sadhwi* (* *) means a chaste woman who keeps the bed of her husband inviolate. These passages were elaborately discussed in what is known as the "Chastity Case" by Justice Dwarka Nath Mitter. See *Kery Kolitany* v. *Moneram Kolita* (1). The question raised and decided in that case was that a Hindu widow who was unchaste was not entitled to succeed. On page 19 of the judgment, the following passage occurs: "It has been said that some of the texts quoted above refer to many other virtues besides chastity, and that the argument in favour of forfeiture would be equally strong in the case of the widow's derilictions in respect of those virtues, as in the case of her failure to preserve her chastity. But the answer to this objection is very plain. A chaste widow who has failed to perform her duties to-day may perform them on some future date. But a widow, who has once sullied the bed of her lord, not only causes her husband's soul to fall into a region of torment, but becomes from that time absolutely incompetent to do anything, for his spiritual welfare." He held that if a Hindu widow failed in her other duties, she might expiate and inherit the estate, but their non-performance was not a disqualification.

It has been further argued that, according to Narada XIII, § 21, an enemy to his father (* *) takes no share of the inheritance, that such disqualification extends to "enmity to the propositus"—(Golap Shastri's Hindu Law, 4th Edition, page 362) and as all grounds of disqualification which exclude males apply equally as against female heirs (Mitakshara II, 10 §, 8, Mayne: 7th Edition, page 811), the plaintiff in this case is not entitled to inherit. It was further argued that if disobedience and hostility were minor grounds for forfeiture, removeable by penance, the plaintiff could not inherit until she had performed the prescribed penance, and the case of *Bhola Nath* v. *Mt. Sabitra* (2) was cited in support of the contention, but what the nature of the penance is to be, has not been suggested, and need not be considered. Now, the expression * * is thus explained in Saraswati Vilash, § 152:—"Those who hate their father, *i.e.*, those who say, 'this is not my father, etc.'" For otherwise when the son hates his father because of the latter's partiality, a share is ordained for him. In the Dayakrama Sangraha, Chap III, section 3, "an enemy to his father" is interpreted as "one who ill-treats his father, during his life time, or one who is averse to performing his obsequies when dead." In Vivada Ratnakara, Chap. V, "He who hates his father" is thus interpreted: "He who hates his father is the enemy of his father. Such hatred terminates in compassing the death of the father when he is alive and in refusing to offer for the benefit of his soul libations of water, etc., when he is dead." In Vivada Chintamoni, the commentary is: "'Enemy of the father,' one who beats his father while alive and is averse to perform his *sradha*, etc., after his death." In Dayatatwa, "an enemy to his father" is said to mean "one who abuses him by beating and the like while he is alive, and who is unwilling to perform his funeral obsequies when he is dead."

Assuming that malignant hostility excludes, there is not a particle of evidence of such or any hostility against the plaintiff. The only witness was the defendant herself and most of her evidence was hearsay. She is also shown to be altogether unworthy of credit, as shown by the fact that she claimed properties in her deposition as gifts against her own written statement in this case. All that her evidence comes to is that the plaintiff refused to come to her husband when sent for. After the husband married a second time, the plaintiff found it impossible to live with him owing to the treatment she received. That is all that we have against her, which is no evidence of hostility The expression "*dwesh*" in Narad's text, according to the commentators, means physical violation coupled with a refusal to perform his *sradh*, etc, and one of them says that the hatred must be such as "terminates in compassing the death" of the propositus. I hold that the plaintiff is not disqualified because she did not live with her husband or even if she refused to

(1) 13 B. L. R. (F. B.) 1; 19 W. R. 367.
(2) 6 S. D. 62 at p. 71.

live with him and her co-wife. There is no evidence at all that she was guilty of any misconduct, in body, speech or mind.

I, therefore, declare that she is entitled to inherit the estate of her husband equally with her co-widow. The parties agreed that if I took the view that the plaintiff was entitled to share the inheritance with her co-widow, the estate to be divided amongst them consisted of Government promissory notes of the value of Rs. 1,09,000 and a house No. 25, Hidaram Banerji's Lane. I direct that the Government securities be divided between them in equal shares. The house is also to be divided into two equal shares in the usual way. The estate is to be held by them as Hindu widows.

Costs of the hearing of the issues raised will be treated as costs in a partition suit, that is to say, each party will bear her own costs before the decree for partition. All subsequent costs will be according to their respective shares. The defendant will bear her own costs of the commission and pay the plaintiff her costs thereof taxed for three sittings only. Costs of the inquiry as to maintenance will be taxed as costs in the cause. The amount due from the plaintiff on account of Kali Charan Dey is to be debited to her share. All other undisposed of costs will be costs in the cause.

Suit decreed.

BOMBAY HIGH COURT.

FIRST CIVIL APPEAL No. 196 OF 1911.

June 18, 1912

Present:—Sir N. G. Chandavarkar, Kt., Ag. Chief Justice, and Mr. Justice Batchelor.

BAI GULAB—APPELLANT

versus

THAKORLAL PRANJIVANDAS—RESPONDENT.

Majority Act (IX of 1875), s. 3—Hindu Law—Will—Power of minor Hindu to make Will—"Minor," meaning of.

A Hindu is not competent to make a Will, unless he has attained majority under the Majority Act.

The Majority Act has modified the Hindu Law on the question of minority except in respect of marriage and adoption.

First appeal from the decision of the District Judge of Broach, in Miscelloneous Application No. 19 of 1911.

Mr. *L. A. Shah*, for the Appellant.

Mr. *G. K. Parekh*, for the Respondent.

JUDGMENT.—The question in this appeal is whether a Hindu minor is competent to make a Will. The right of a Hindu to make a Will is based upon the principle that he is competent to make a disposition of his property, to take effect after his death, to the same extent to which he can make a disposition of it in his own life-time as a gift. It is clear law that a Hindu minor cannot make a gift of his property in his life-time. If that is so, it follows that he cannot make a Will in respect of that property.

But it is argued in the present case that though the testatrix, having been under eighteen years of age, was a minor according to the Indian Majority Act, she was more than fourteen years old and that, therefore, under the Hindu Law, she was not a minor.

On that ground, we are asked to hold that, according to that law, she was competent to make a Will.

But the Indian Majority Act has modified the Hindu Law on the question of minority except in respect of dower, divorce, marriage and adoption.

It is argued, however, by Mr. Shah for the appellant that the Indian Majority Act has not affected the rule of Hindu Law on the question of minority so far as the competency of a Hindu to make a gift *inter vivos* is concerned. That argument is clearly unsustainable. It is true the Legislature has not modified the Hindu Law so far as the competency of a Hindu to make a gift or a Will is concerned, but the Legislature has laid down what the age of majority shall be for the purposes of that competency. The Hindu law having been repealed to that extent, the law now is that no Hindu can make a Will who is less than eighteen years of age.

This is in accordance with the decision of the Allahabad High Court in *Harduari Lal* v. *Gomi* (1). We must confirm the order with costs.

Order confirmed.

(1) 8 A. L. J. 385; 33 A. 525; 9 Ind. Cas. 1017.

CALCUTTA HIGH COURT.

ORDINARY ORIGINAL CIVIL SUIT No. 697 OF 1911.

June 17, 1912.

Present:—Mr. Justice Fletcher.

KESRI CHAND KOTHORI—PLAINTIFF

versus

NATIONAL JUTE MILLS, CO. LD. AND ANOTHER—DEFENDANTS.

Civil Procedure Code (Act V of 1908), O. IX, r. 8—Plaintiff not giving evidence—Suit to be dismissed—Defendant not entitled to prove his case.

When the plaintiff offers no evidence, the Court has no jurisdiction except to dismiss the suit for want of prosecution. In such a case, the defendant is not entitled to prove his case.

But when the plaintiff has given evidence, in that case, notwithstanding that the Court has formed an opinion in favour of the defendant, the defendant can say that he is entitled to give evidence in proof of the case he has made in his own written statement, so that in the case of an appeal, there may be no remand, but the whole case may be disposed of.

Ex parte Jacobson, In re Pincoffs, (1882) 22 Ch. D. 312; 52 L. J. Ch. 561, 48 L. T. 197, 31 W. R. 554, referred to.

Messrs. *Norton*, *Pugh* and *Pearson*, for Defendant No. 1.

Messrs. *Jackson*, *Gregory* and *Langford James*, instructed by Messrs. *Leslie* and *Hinds*, Solicitors, for Defendant No. 2.

JUDGMENT.—There is nothing to say in this suit. The plaintiff does not appear and Mr. Jackson and Mr. Norton, on behalf of the defendant, say that they wish to open their case. That is a procedure which is not contemplated by the Code of Civil Procedure. The decision of Sir George Jessel in *Ex parte Jacobson, In re Pincoffs* (1) does not apply to this case at all. That case was that when the Master had heard the evidence given on behalf of the plaintiff, he said he was prepared to decide on the defendant's side without calling for any evidence to be given for or on behalf of the defendant. That, of course, is a position which the defendant is not bound to take up. Under our Code, notwithstanding that at the close of the plaintiff's case, the Judge has formed an opinion in favour of the defendant, the defendant can say that he is entitled to give evidence in proof of the case he has made in his own written statement; so that in the case of an appeal, there may be no remand but the whole case may be disposed of. That is not a case where the plaintiff offers no evidence. When the plaintiff offers no evidence, the Court has no jurisdiction except to dismiss the suit for want of prosecution. This case must be dealt with on that footing. The plaintiff must pay to the defendant the costs of this suit and of the commission to England on Scale No. 2.

(1) (1882) 22 Ch. D. 312; 52 L. J. Ch. 561; 48 L. T. 197; 31 W. R. 554.

Mr. Jackson.—Will your Lordship also include reserve cost, if any?

THE COURT.—Yes.

Suit dismissed.

Solicitors for the Plaintiff: Messrs. *Fox* and *Mondal*.

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL No. 408 OF 1911.

June 25, 1912.

Present:—Sir N. G. Chandavarkar, KT., Ag. Chief Justice, and Mr. Justice Batchelor.

EKNATH PANDOBA KOSTI—APPELLANT

versus

DAGDURAM SAMBHURAM—RESPONDENTS.

Limitation—Mortgage decree—Claim by second mortgagee for lien—Rejection of claim—Suit to establish mortgage—Parties—Mortgagor necessary party—Exclusion of time occupied by conciliation proceedings—Limitation Act (XV of 1877), Sch. II, Art. 11—Dekkhan Agriculturists Relief Act (XVII of 1879), ss. 47, 48—Transfer of Property Act (IV of 1882), s. 85.

A, an agriculturist under the Dekkhan Agriculturists Relief Act, mortgaged his property to *B*. Subsequently, he mortgaged the same property to *C*. *B*. obtained a decree on his mortgage against *A*. without impleading *C*. When *B*. sought to sell the property in execution of his decree, *C*. intervened claiming a lien on the property. *C*.'s claim petition was rejected on 19th June 1907. On the 15th July 1908, *C*. brought a suit against *A*. and *B*. to establish his mortgage and to get rid of the order made against *C*. in claim proceedings. Before filing the suit, *C*. had to obtain a conciliator's certificate as *A*. was an agriculturist. If the period taken up in conciliation proceedings were deducted, the suit was within time. *B*. contended that this period could not be deducted as *A*. was not a necessary party to the suit:—

Held: (1) that although *A*. was not a party to the order of 19th June 1907, he was, as a person interested in the mortgaged property, a necessary party to the suit to establish the mortgage;

(2) that the period occupied by conciliation proceedings should be deducted in computing the period of limitation prescribed for the suit;

(3) that the suit was, therefore, within time.

Second appeal from the decision of the District Judge of Ahmednagar, in Appeal No. 185 of 1909, confirming that passed by the Subordinate Judge at Rahuri, in Civil Suit No. 177 of 1908.

PANCH DUAR THAKUR *v.* MANI RAUT.

Mr. *P. P. Khare*, for the Appellants.

Mr. *Coyajee*, with him Mr. *C. A. Rele*, for the Respondents.

JUDGMENT.—It is contended in support of this second appeal that the presence of the mortgagor as a party-defendant was not necessary and that, therefore, the Conciliator's certificate does not avail the plaintiffs to bring the suit within the period of limitation under Article 11 of Schedule II to the Limitation Act.

This point is urged on the following facts: Defendants Nos. 1 and 2, the present appellants, obtained a decree upon their mortgage against their mortgagor, defendant No. 3. The present plaintiffs were not parties to that suit. Having obtained a decree upon the mortgage, the said defendants sought to sell the property in satisfaction of their decree. Thereupon, the plaintiffs intervened, claiming a lien upon the property in virtue of a mortgage in their favour subsequent to the mortgage of defendants Nos. 1 and 2. In the miscellaneous proceedings in which they intervened, the Court held their mortgage not proved and their application that the property should be sold in satisfaction of the mortgage decree of defendants Nos. 1 and 2 subject to their own mortgage was rejected. That was on the 19th of June 1907. The present is a suit to establish their right founded on that mortgage and its object is to get rid of the order passed against them in the miscellaneous proceedings. Ordinarily, the suit should have been brought under Article 11 of the Limitation Act on or before the 19th of June 1908. But it was filed on the 15th of July 1908. *Prima facie*, therefore, the suit was barred by limitation.

The plaintiffs, however, seek to bring the suit within the period of limitation under Article 11 on the ground that as their mortgagor, defendant No. 3, was an agriculturist, they had to apply for a certificate from the conciliator under the Dekkhan Agriculturists' Relief Act. They claim deduction of the period occupied in obtaining the certificate.

It is conceded by Mr. P. P. Khare for the appellants that, if the period occupied by the application for the Conciliator's certificate is excluded, the present suit is in time. But it is argued that that period should not be deducted, because, the defendant No. 3 was not a necessary party to the suit. Mr. Khare argues that the suit was merely to set aside the order passed on the 19th of June 1907 in the miscellaneous proceeding. To that order, it is true, the defendant No. 3 was not a party, but whether he was a party to that order or not, the present suit is one brought on the strength of a mortgage and the Transfer of Property Act directs that all persons interested in mortgaged property should be made parties to a suit on the mortgage. Therefore defendant No. 3 was a necessary party and the suit must be held to have been in time.

The decree is confirmed with costs.

Decree confirmed.

CALCUTTA HIGH COURT.

MISCELLANEOUS CIVIL APPEAL NO. 109 OF 1911.

April 23, 1912.

Present:—Sir Lawrence Jenkins, KT., Chief Justice, and Mr Justice Chapman.

PANCH DUAR THAKUR AND ANOTHER—JUDGMENT-DEBTORS—APPELLANTS

versus

MANI RAUT—DECREE-HOLDER—RESPONDENT.

Appeal—Order determining valuation of immoveable property to be entered in sale proclamation, if appealable—Civil Procedure Code (Act V of 1908), ss. 2, 47, O. XXI, r. 66.

An order determining the value of the immoveable properties, to be entered in the sale proclamation by the executing Court, under Order XXI, rule 66 of the Civil Procedure Code, is not appealable.

Deoki Nandan Singh v. *Bansi Singh*, 10 Ind. Cas. 371; 16 C. W. N. 124; 14 C. L. J. 35, followed.

Appeal from the order of the Sub-Judge of Darbhanga, dated January 20th, 1911.

FACTS.—The decree-holder attached certain immoveable properties of the judgment-debtor. She alleged that the value of the properties was about Rs. 11,000. The judgment-debtor said that their value would not be less than Rs. 65,000. The Court upon inquiry held the value to be Rs. 38,000. The judgment-debtor appealed.

Babus *Baldeo Narayan Singh* and *Jyotish Chandra Sarkar*, for the Appellants.

Babu *Shib Chandra Palit*, for the Respondent.

JUDGMENT.—This is an appeal from an order, and it is objected on the part of the respondent that no appeal lies. The point in dispute is one that arises under Order

XXI, rule 66, and the only point we have to consider is whether a determination of a matter under that rule is a decree and as such within section 47 and so appealable. There are a number of decisions on the old Code, which favour the view that an appeal lies. On the new Code, however, there is one decision which has been brought to our notice, that is, the decision of Mr. Justice Mookerjee in *Deoki Nandan Singh* v. *Bansi Singh* (1). I am in complete agreement with Mr. Justice Mookerjee's view of this matter, and, having regard to the new definition of the word 'decree' in section 2, sub-section (2) of the Code, I do not feel that it is necessary to go back to the earlier decisions which were based on a different definition.

The result is that, in my opinion, the preliminary objection must prevail, and the appeal must be dismissed with costs, hearing-fee three gold *mohurs*.

Appeal dismissed.

(1) 16 C. W. N. 124; 14 C. L. J. 35; 10 Ind. Cas. 371.

ALLAHABAD HIGH COURT.
SECOND CIVIL APPEAL No. 311 OF 1911.
July 2, 1912.
Present:—Mr. Justice Chamier and Mr. Justice Rafique.
ABDUL AZIZ—PLAINTIFF—APPELLANT
versus
BASDEO SINGH AND OTHERS—DEFENDANTS—RESPONDENTS.

Abatement of suit—Suit for recovery of rent against fixed-rate tenants—Death of one tenant during pendency of appeal—Joint and several liability.

The liability of fixed-rate tenants in respect of the rent of their holding is joint and several. Where a suit is brought against fixed-rate tenants for recovery of rent and one of them dies during the pendency of an appeal against them and no attempt is made to bring the legal representatives of the deceased on the record, the appeal abates only as far as the deceased respondent tenant is concerned and the liability of the others is not affected.

Joy Gobind Laha v. *Manmotha Nath Banerji*, 33 C. 580, followed.

Muhammad Askari v. *Radhe Ram Singh*, 22 A. 307, relied upon.

Second appeal from a decree of the District Judge of Jaunpur.

Mr. *W. K. Porter*, with him Messrs. *Surendra Nath Sen* and *Muhammad Ishaq*, for the Appellant.

Mr. *Hamilton*, with him Messrs. *A. E. Ryves*, *Satya Chandra Mukerji* and Dr. *Satish Chandra Banerji*, for the respondents.

JUDGMENT.—This appeal arises out of a suit brought against several persons for the rent of a fixed-rate holding. The suit was dismissed by the Court of first instance, and the plaintiff appealed to the District Judge. While the appeal was pending, one of the defendants-respondents died, and the plaintiff-appellant failed to apply to the Court within the prescribed time to make his heirs respondents in his place. The Court then held that the appeal was not maintainable against the remaining respondents, and, with reference to a prayer that the Court should consider the case under section 5 of the Limitation Act, the Court held that that section did not apply to the appeal. The result was that the appeal was dismissed. This is a second appeal by the plaintiff on whose behalf it is contended (1) that the liability of the defendants to the suit was joint and several and not joint only, and, therefore, the appeal should have been allowed to proceed against the surviving respondents; (2) that section 5 of the Limitation Act applied to the case. On the first point the case seems to be covered by the decision of the Calcutta High Court in *Joy Gobind Laha* v. *Manmotha Nath Banerji* (1). That was a suit against several persons for the recovery of the rent of a holding. After an appeal had been filed by the plaintiff, one of the defendants-respondents died, and no attempt was made by the appellant to get the legal representatives of the deceased respondent substituted on the record. The remaining respondents objected that the appeal could not proceed. The Court held that as the liability of the holders of the tenure was joint and several, the appeal could proceed against the surviving respondents, and that it abated only as far as the deceased respondent was concerned. There seems to be no reason for distinguishing between the liability of several holders of a fixed-rate tenure and the liability of several tenants of any other holding. The liability of fixed-rate tenants in respect of the rent of their holding appears to be joint and

(1) 33 C. 580.

several. The case is, therefore, on all fours with the case decided by the Calcutta High Court. In this connection, we may refer to the case of *Muhammad Askari* v. *Radhe Ram Singh* (2), where the Court held that the effect of section 43 of the Indian Contract Act was to exclude the right of a joint contractor to be sued along with his co-contractors. We allow this appeal, set aside the decree of the lower Appellate Court, and remand the case to that Court to be restored to the pending file and disposed of according to law. Costs in this Court will be costs in the cause.

Appeal decreed; cause remanded.

(2) 22 A. 307.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL No. 1304 OF 1910.

June 14, 1912.

Present:—Mr. Justice Stephen and Mr. Justice Richardson.

BATUK NATH MANDAL—PLAINTIFF—APPELLANT

versus

BEPIN BIHARI CHAUDHURI—DEFENDANT—RESPONDENT.

Contract Act (IX of 1872), s. 69—Decree for rent—Decree against recorded tenant—Sale of tenure of share of recorded tenant—Decretal amount paid by recorded tenant's co-sharer—Co-sharer's right to be reimbursed by recorded tenant—Provincial Small Cause Courts Act (IX of 1887), Sch. II, Art. 41—Civil Procedure Code (Act V of 1908), s. 102—Appeal, Second—Small Cause suit.

Plaintiff was the owner of three-sevenths and defendant No. 1 of two-sevenths of a *putni* tenure; but the name of the defendant No. 1 alone was recorded in the landlord's books as the holder of the tenure. In 1307, the defendant No. 1 sold his share to a stranger, and the share passed to the vendee with effect from the beginning of 1308. Subsequently, the landlord brought a suit for recovery of arrears of rent in respect of 1307 and 1308 against the defendant No. 1, the recorded tenant, and obtained a decree. In execution of the decree, the tenure was sold by auction, but the sale was set aside upon the plaintiff depositing the necessary amount which was less than Rs. 500. The plaintiff brought the present suit against defendant No. 1 for recovery of two-sevenths share of the sum so deposited. Plaintiff did not implead the vendee of defendant No. 1 as a defendant nor did he ask for any relief against him.

Held, (1) that although at the date of the institution of the suit, the defendant No. 1 had no interest in the tenure, yet the suit did not fall outside the scope of Article 41 of Schedule II of the Provincial Small Cause Courts Act;

(2) that as the suit was not a Small Cause suit, a second appeal was competent;

(3) that when a decree was made against defendant No. 1, the recorded tenant, he became "bound by law to pay" the decreed amount to the landlord in the terms of section 69 of the Contract Act;

(4) that the plaintiff was a person interested in the payment of this debt, and he was entitled to be "reimbursed" by the defendant No. 1, although the assignee of the latter was benefited by the payment.

Appeal from the decree of the Additional Sub-Judge of Rajshahye, dated May 17th, 1909, modifying that of the Munsif of Nattore, dated May 16th, 1908.

Babu *Jotindra Nath Lahiri*, for the Appellant.

Babu *Rama Kanta Bhattacharyya*, for the Respondent.

JUDGMENT.

STEPHEN, J.—The plaintiffs and others including the defendant No. 1 were co-sharers in a certain *putni* tenure, the share of the plaintiff being three-sevenths of the whole and that of the defendant No. 1 two-sevenths. It appears, however, that the name of the defendant No. 1 was alone recorded in the landlord's books as the holder of the tenure. The tenure, therefore, so far as the landlord was concerned, was represented by that defendant. In that state of things in the year 1307, the latter sold his share of the tenure to a stranger who is not a party to the suit, and the case has been argued on the footing that the share passed to the vendee with effect from the beginning of the year 1308. Subsequently, the landlord brought a suit for recovery of arrears of rent of the tenure in respect of the years 1307 and 1308, and no steps having been taken for the rectification of the landlord's books in which the name of the defendant No. 1 still stood as the holder of the tenure, the suit was brought and a decree was obtained against him alone. In execution of the decree, the tenure was sold by auction but the sale was set aside under the provisions of section 310A of the Code of 1882 upon the plaintiff depositing in Court the sum of Rs. 383-8-6 consisting of the amount (Rs. 358-8-6) due under the decree and the amount (Rs. 25) due as statutory compensation to the auction-purchaser. The plaintiff's claim in the present suit relates to the sum so deposited and may be stated as follows. Deducting three-sevenths of the whole as payable in respect of his own share of the *putni*, he seeks to recover two-

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sevenths from the defendant No. 1, liability for the balance being assigned in the plaint to other share-holders who have since paid what was due from them and with whom in this appeal we are not concerned. The defendant No. 1 by his written statement denied all liability on the ground that he had parted with his share of the tenure. The first Court found in the plaintiff's favour and gave him a decree for the whole amount of his claim against the defendant No. 1. On an appeal preferred by the latter, the Subordinate Judge in the Court below held that he was liable only in respect of so much of the claim as could be attributed to default in the payment of rent due for the year 1307 and that no liability rested upon him in respect of the year 1308. The Subordinate Judge accordingly modified the decree of the first Court and reduced the amount recoverable by the plaintiff thereunder by one-half. The plaintiff has appealed to this Court on the ground that no such reduction should have been made.

Two questions have been urged before us. The *first* arises upon a preliminary objection taken on the respondent's behalf to the admissibility of the appeal. It is contended that, inasmuch as at the date of the institution of the suit, the respondent had no interest in the tenure, the suit falls outside the scope of Article 41 of the second Schedule of the Provincial Small Cause Courts Act and being, therefore, a suit of the nature cognizable by a Court of Small Causes, no second appeal lies (section 102, Civil Procedure Code). The second question is as to the liability of the respondent in respect of the year 1308. He no longer disputes his liablity in respect of the year 1307.

Before dealing with these questions, it will be convenient to indicate the nature of respondent's position in the suit brought by the landlord.

As regards the year 1308, the appellant's claim against the respondent is based upon the fact that the decree obtained by the landlord was made against the respondent alone. Now it may be—and for the present purpose it must be assumed—that the landlord was entitled to sue the respondent alone. But it must be admitted that as between himself and the other share-holders in the tenure, during the period to which the landlord's suit related, the respondent occupied the position of defendant in that suit in a representative capacity. He represented the share-holders for the time being. As regards the year 1307, he represented himself and others. As regards the year 1308, he had then ceased to have any interest in the tenure, and under the cloak of his name the real defendants were his vendee, the appellant and others.

The fact then that as between himself and the other co-sharers for the time being, the respondent as defendant in the landlord's suit filled a representative capacity has to be borne in mind in dealing with the questions which were argued before us.

The first of these questions is decided by the frame of the suit as disclosed in the pleadings. From this, there can be no doubt that the plaintiff's claim was based on the assertion that he was a co-sharer with the defendant. The plaintiff has, indeed, sued on the assumption that defendant No. 1 was a co-sharer in 1308, an assumption which is incorrect in fact, and the purchaser is not included in the suit as, perhaps, he might have been : but this cannot alter the nature of the suit as it stands. The case of *Krishno Kamini* v. *Gopi Mohun* (1), cited by the respondent, has no bearing on the present case, as it was not a suit for contribution between co-sharers, and was decided with reference not to Article 41 of the second Schedule to Small Cause Courts Act, but to an earlier enactment. As regards the second question, the case is not so clear. In the suit brought by the landlord, the present respondent alone was sued because he was the registered tenant. In so far as other persons, including his own vendee in 1308, were interested in the property in respect of which he was sued, he was, therefore, as between him and them their representative, and whether he was a co-sharer as was the case in 1307 or was not, as was the case in 1308, his position as their representative would be the same. Had he paid anything which was in fact due from them he might, no doubt, have his remedy against them. But his remedies against others cannot affect his liability to the landlord when once a decree against him is passed. He then becomes "bound by law to pay" the decreed amount to the landlord, in the terms of

(1) 15 C. 652.

section 69 of the Contract Act. There is no doubt that the plaintiff was a person interested in the payment of this debt, and the consequence follows that he is liable to be "reimbursed" by the respondent. In terms, this seems to give the plaintiff a right to recover the whole of the money that he has paid to the landlord. It cannot, however, be supposed that he could compel the respondent to pay him money which the respondent became "bound by law" to pay as his representative. But is it necessary to read any further restrictions into the very general terms of section 69? No question arises here as to the respondent's liability to reimburse to the plaintiff the money which he paid, but which was really due from the other original co-sharers in respect of their shares; because those co-sharers have re-paid those sums to the plaintiff. But where the respondent has introduced a new co-sharer, whom he represents as much as he does the other co-sharers, is there any reason for saying that the reimbursement is to stop short of the money paid for the benefit of the assignee of the man bound by law to pay, who also represents him? No clear authority has been produced before us to show that this section should be considered not to apply to co-sharers; and if it does, the law seems to cast the burden of collection from defaulting co-sharers, whose common interests are affected by a decree, on the person bound by law to pay rather than on the person who in fact pays because he is interested in the payment, and this consideration applies with special force when such person is the assignor of one who may be taken to be a defaulting co-sharer. For these reasons, we consider that the appellant is entitled to recover from the respondent the amount he has paid in respect of the rent of the respondent's purchaser for 1308.

The appeal is, therefore, allowed. The decree of the lower Appellate Court is set aside, and that of the Munsif restored. The appellant is entitled to his costs in this appeal.

RICHARDSON, J.—I agree to the judgment proposed by my learned brother with some hesitation as to the liability of the defendant No. 1 in respect of the year 1308.

Appeal allowed.

ALLAHABAD HIGH COURT.

FIRST APPEAL FROM ORDER No. 60 OF 1912.

July 8, 1912.

Present:—Mr. Justice Chamier.

MUHAMMAD HUSAIN AND ANOTHER—APPELLANTS

versus

ILAHI BAKHSH—RESPONDENT.

Provincial Insolvency Act (III of 1907), s. 15 (1)—Grounds for dismissing application for insolvency—Petitioner trying to show his property as belonging to another.

A person, who petitions to be declared insolvent, not unfrequently at some stage or another of the proceedings, endeavours to keep back a portion of his property or pretends that property which belongs to him does not belong to him. An action of this kind on the part of a debtor or the suspicion or belief that such action is contemplated by a debtor is not a good ground for dismissing a debtor's petition in insolvency.

Such cases are distinguishable from cases in which the petitions are dismissed on the ground that they have been presented for inequitable or collateral purposes.

Kali Kumar Das v. *Gopi Krishna Rai*, 15 C. W. N. 990; 12 Ind. Cas. 48, followed.

Girwardhari v. *Jai Narain*, 32 A. 645; 7 A. L. J. 835; 7 Ind. Cas. 39, relied upon.

First appeal from an order of the District Judge of Gorakhpur.

Mr. *Girdhari Lal Agarwala*, for the Appellants.

Dr. *Tej Bahadur Sapru*, for the Repondent.

JUDGMENT.—This is an appeal against an order of the District Judge of Gorakhpur, rejecting the petition of the appellants to be declared insolvent. The ground given for the rejection of the petition is that it was not presented in good faith and that the appellants' object was not really to surrender their property and to be cleared of their debts, but to evade payment by setting up a title in their father to certain property against the Receiver and to avoid imprisonment for debt. In appeal, it is contended that the case is covered by a decision of two Judges of this Court in F. A. F. O., No. 33 of 1912, delivered on May 31st last. In that case, the same learned District Judge had dismissed the petition of a debtor to be declared an insolvent on the ground that he had falsely pleaded that he was separate in estate from his father and brothers and his object was to prevent his creditors from touching certain family property of which he was, in fact, the manager. The District Judge had dismissed the petition on the ground that it was an abuse of the process of a Court

and had relied on my decision in *Girwardhari* v. *Jai Narain* (1), in the course of which I said that an insolvency petition might be dismissed if it was presented not with the *bona fide* view of obtaining an adjudication but for an inequitable or collateral purpose. But this Court held that the petition ought not to have been dismissed. It seems to me impossible to distinguish the present case from that case. Here the District Judge thinks that the object of the debtors is to prevent their creditors from obtaining satisfaction of their claims out of family property. Indeed, the only possible distinction between the two cases is that the former case was the case of a Hindu family, and the present case is the case of a Mahomedan family. But as the members of this Mahomedan family are said to be carrying on a soap business jointly, there is really no distinction between the two cases. In the cases of *Kali Kumar Das* v. *Gopi Krishna Rai* (2), the petition of a debtor to be declared insolvent had been dismissed on the ground that the debtor had not produced the account-books of his business and had not satisfactorily explained the omission, and there were other grounds for doubting whether the petitioner had truly disclosed all the material facts. The District Judge said that he was not satisfied that the petitioner was unable to pay his debt. But the High Court set aside the order of the District Judge, observing that the fact that the Judge was unable to satisfy himself that the petitioner was unable to pay his debt, was not a ground for dismissing the petition. The case before me and the cases in this Court and the Calcutta High Court, to which I have referred, are cases of a very common type. A person, who petitions to be declared insolvent, not unfrequently, at some stage or another of the proceedings, endeavours to keep back a portion of his property or pretends that property which belongs to him does not belong to him. It appears to me that actions of this kind on the part of a debtor or the suspicion or belief that such action is contemplated by a debtor is not a good ground for dismissing a debtor's petition in insolvency. Such cases are easily distinguished from the cases referred to by me in *Girwardhari* v. *Jai Narain* (1), in which the petitions were dismissed because they had been presented for inequitable or collateral purposes. Moreover, on the evidence, I think, that it is not safe to hold on the evidence now on the record that the appellants in this case are interested in the soap business carried on by their father. Further evidence will, no doubt, be available hereafter, and what I say now must not be treated as a decision of the question. For the above reasons, I am of opinion that this petition ought not to have been dismissed. I allow this appeal, set aside the order of the District Judge and direct that the record be returned to him in order that the case be disposed of according to law.

Cause remanded.

(1) 32 A. 645; 7 A. L. J. 835; 7 Ind. Cas. 39.
(2) 15 C. W. N. 990; 12 Ind. Cas. 48.

MADRAS HIGH COURT.
REFERRED CASE No 1 OF 1912.
October 1, 1912.
Present:—Mr. Justice Sundara Aiyar and Mr. Justice Sadasiva Aiyar.

KRISHNA DOSS PARAMANANDA DOSS—PLAINTIFF

versus

FREDERICK WILLIAM EMERY AND ANOTHER—DEFENDANTS.

Presidency Small Cause Courts Act (XV of 1882), s. 69—Reference to High Court when permissible—Reasonable doubt by the referring Court.

Section 69 of the Presidency Small Cause Courts Act, permits a reference to the High Court only when the referring Court entertains a reasonable doubt on the point referred.

Messrs. *C. V. Anantakrishna Iyer* and *P. Gangadhara Aiyar*, for the Plaintiff.

Mr. *T. Narasimha Iyengar*, for the Defendants.

ORDER.—This is a Reference by the learned Chief Judge of the Presidency Court of Small Causes under section 69 of the Presidency Small Cause Courts Act, asking the opinion of this Court on certain points of law. According to section 69, as it now stands, a reference can be made only when the Court entertains a reasonable doubt. Under the section as it stood before, he was bound to make a reference, if either of the parties to the suit requested him to do so. We are inclined to think that this reference was made in forgetfulness of the change made in the section. We must, therefore,

HABIBULLAH KHAN v. LALTA PRASAD.

refuse to answer the question and we return the Reference. We make no order as to costs.

Reference returned.

ALLAHABAD HIGH COURT.

FIRST APPEAL FROM ORDER NO. 55 OF 1912.

July 12, 1912.

Present:—Mr. Justice Rafique and Mr. Justice Piggott.

HABIBULLAH KHAN AND ANOTHER—DEFENDANTS—APPELLANTS

versus

LALTA PRASAD AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XLI, r. 23—Decision on preliminary issue—Burden of proof wrongly placed—Ground for remand—Limitation Act (IX of 1908), Sch. I, Art. 142—Suit for alluvial land—Burden of proving title and possession within limitation—Nature of proof—Presumption—Settlment Records, entries in.

It is not a good ground for passing an order of remand under Order XLI, rule 23, to say that the preliminary issue has been decided by the Court of first instance on a wrong view of the burden of proof, unless the Appellate Court also finds that that decision was wrong.

Where in a suit for possession of certain land as having accreted to plaintiff's village by alluvion, the defendants deny plaintiff's title and also plead that the claim is barred by limitation, it lies on the plaintiff to prove both title and possession within limitation. To bring his claim within limitation, it is open to the plaintiff to prove that the land in suit had accrued by alluvion within limitation, or that although it had accreted more than 12 years before the institution of the suit, it had remained, within the limitation period, waste or jungle land, in respect of which the presumption would arise that possession went with title.

Maharaja Jagadindra Nath Roy v. *Rani Hemanta Kumari Debi*, 8 A. L. J. 1176; 15 C. W. N. 887; (1911) 2 M. W. N. 101; 10 M. L. T. 157; 13 Bom. L. R. 806; 14 C. L. J. 319, 11 Ind. Cas. 542, relied upon.

There is a presumption until the contrary is proved that the possession of the parties is correctly shown in the Settlement Records.

First appeal from an order of the Additional Judge of Bareilly.

Mr. *B. E. O'Conor*, for the Appellants

Mr. *J. M. Banerji* (for Dr. *Satish Chandra Banerji*), for the Respondents.

JUDGMENT.—The plaintiffs in this case are the proprietors of village Bakhshpur in the Pilibhit District, and the defendants are the holders of certain *muafi* lands situated within the same village. It appears that the *muafi* lands held by the defendants are on the boundary of the village, at a point where it is subject to fluvial action by the Khakhra river. The real dispute between the parties is whether certain land, accreted to village Bakhshpur by alluvion through the action of the Khakhra river at this point, accrues to the *muafi* lands of the defendants and becomes a part of their *muafi* holding, or accrues to the village of Bakhshpur as a whole and becomes a portion of the village lands of which the plaintiffs are proprietors. This was the first point raised by the pleadings The defendants further pleaded that the plaintiff's suit was barred by limitation, as they had never been in possession within 12 years of the institution of the suit of any portion of the land claimed. The Court of first instance held that the plaintiffs were bound to prove their possession within limitation in respect of this land and finding that they had failed to do this, dismissed the suit on the issue of limitation only. On appeal, the learned Additional Judge has neither held that the suit is barred by limitation nor that it is not so barred. He says that the Court of first instance has mislaid the burden of proof and that it was for the defendants to show that they had been in possession for more than 12 years before the institution of the suit. On this, he has decreed the plaintiff's appeal, and remanded the case under Order XLI, rule 23, Code of Civil Procedure, for disposal on the merits. The effect of his order is to put the parties in a difficulty as it is open to question whether the learned Munsif, accepting the directions of the lower Appellate Court regarding the burden of proof, could still find that the suit is barred by limitation. In any case, it is not a good ground for passing an order of remand under Order XLI, rule 23, to say that the preliminary issue has been decided by the Court of first instance on a wrong view of the burden of proof unless the Appellate Court, also, finds that that decision was wrong. Regarding this question of the burden of proof, we have heard both parties, and we think it desirable to make one or two remarks. The suit as framed was, undoubtedly, one to which Article 142 of the 1st Schedule of the Indian Limitation Act (IX of 1908), would apply, and the learned Munsif was right in saying that on the suit thus

framed, it lies on the plaintiffs to prove both title and possession within limitation. We think, however, that the first Court did not fully realise the sort of evidence which might, perhaps, have been sufficient to discharge the burden of proof laid on the plaintiffs in this matter. If the suit is to be disposed of on the limitation issue alone without any finding on the question of title (and we are not sure that this is, in fact, a suitable way of disposing of the present case), that issue will have to be disposed of on the assumption that the plaintiffs are right and the defendants are wrong on the issue of title. Looking at the case in this way, it could be open to the plaintiffs to prove that the land in suit had accrued by alluvion within limitation, or that, although it had accreted more than 12 years before the institution of the suit, it had remained, within the limitation period, waste or *jungle* land, in respect of which the presumption would arise that possession went with title. The law on this point is laid down in *Maharaja Jagadindra Nath Roy* v. *Rani Hemanta Kumari Debi* (1). We may remark on this point that the evidence of the Settlement papers as to actual possession does not seem to have been considered at all by the lower Appellate Court; there is a presumption that the possession of the parties was correctly shown in those records until the contrary is proved.

We set aside the order of the Additional Judge and direct that Court to re-admit the appeal to its file of pending cases and dispose of it according to law, with due regard to the remarks made in this order. If the lower Appellate Court is of opinion that the case cannot be disposed of on the question of limitation without a finding on some other issue, it will, of course, be open to it to exercise its powers under Order XLI, rule 25, Code of Civil Procedure But the case should not be remanded under rule 23 of that Order unless the finding on the question of limitation is definitely reversed. Costs here and hitherto will abide the event.

Appeal allowed; Cause remanded.

(1) 8 A. L. J. 1176; 15 C. W. N. 837; (1911) 2 M. W. N. 101; 10 M. L. T. 157; 13 Bom. L. R. 803; 14 C. L. J. 319; 11 Ind. Cas. 542.

BOMBAY HIGH COURT.

CIVIL APPEAL No. 1 OF 1912.

July 1, 1912.

Present:—Sir N. G. Chandavarkar, Kt., Ag. Chief Justice, and Mr. Justice Batchelor.

BAI RAMKORE—APPELLANT

versus

JAMNADAS MULCHAND—RESPONDENT.

Hindu Law—Marriage—Right to give girl in marriage—Paternal uncle—Mother—Will—Construction—Right conferred by Will.

Under Hindu Law, the paternal uncle of a girl cannot betroth her or give her in marriage without the consent and concurrence of her mother.

The mother is, after the death of the father, the legal guardian of the girl and she has the right to be consulted as to the choice of a husband for her daughter.

S. Ramasevayam Pillay v. *Annammai Ammal*, 4 M. H. C. R. 339 and *Shridhar* v. *Hiralal Vithal*, 12 B. 480, relied upon.

A Will provided that the testator's brother, to whom the testator devised his property, should get the testator's girl married by expending money out of the testator's property with due regard to his *status*:

Held, that the right of giving the girl in marriage conferred by the Will was no more than the right under the Hindu Law and was, therefore, subject to the same limitations.

Appeal from order, passed by the Joint Subordinate Judge at Surat, in Appeal No. 111 of 1909, reversing that passed by, and remanding the suit to, the Joint Subordinate Judge at Surat, in Civil Suit No. 150 of 1907

Mr. *P. B. Shingne*, for the Appellant.

Mr. *L. A. Shah*, for the Respondent.

JUDGMENT.—The suit which has led to this appeal, was brought by the respondent to recover from the three appellants damages incurred by him on account of the giving away in marriage of his niece, Mangli, a minor, by appellants Nos. 1 and 2 to appellant No. 3, in contravention of the betrothal of the girl to one Hiralal, settled by the respondent, as her lawful guardian.

The respondent is the paternal uncle of the girl. By a Will of her father, he and a brother of his were authorised to get the girl married. Accordingly, the respondent (the other brother having died) betrothed the girl to one Hiralal. But appellants Nos. 1 and 2, who are respectively mother and maternal uncle of the girl, gave her in marriage to appellant No. 3.

The respondent complains that, in consequence of that marriage, he was unable to perform the contract of betrothal into which he had entered with Hiralal; that Hiralal

demanded Rs. 2,000 as damages for the breach, and that the dispute was finally settled by an award of arbitrators under which he had to pay Rs. 1,000 to Hiralal as damages.

This sum he claims in his plaint from the appellants.

The respondent bases his claim upon his right to give the girl in marriage, (1) under the Hindu law, (2) under the Will of the girl's father, and (3) in virtue of a custom of the caste to which the parties belong.

The right claimed under the Hindu Law arises out of a text of Yajnyavalkya adopted by Vijnaneshvara in the *Mitakshara* and by Nilakantha, author of the Vyavahara Mayukha, in his Samskara Mayukha. According to that text, the persons entitled to give a girl in marriage are, "the father, paternal grandfather, brother, kinsman (*sakulya*), and mother," in the order stated. It follows from this text that the paternal uncle of the girl (who in this case is the respondent) had the right to give her in marriage before the mother. But to entitle the respondent to damages from the mother for having given the girl in marriage so as to exclude his right, regard must be had to the nature of the right itself and it must be established that the right is absolute and exclusive. The text only deals with the bare right to give a girl in marriage. Under the Hindu law, when her father dies, leaving her mother, the mother becomes the legal guardian of the girl. The text cited above does not deprive the mother of this right of guardianship but only specifies who can make a gift of her in marriage. The paternal male relations of the girl are placed above the mother for the purposes of that gift, because women are dependent and, moreover, they cannot perform certain ceremonies essential to or usual in a marriage. Even when, in default of paternal male relations, the mother makes the gift, she has to employ some one of her caste to act on her behalf at the marriage and perform the ceremony of giving which is called *kanyadana*. This is well-explained in the *Dharma Sindhu*: "Where the mother has to give her daughter in marriage, she herself must perform the ceremony of *nandi shraddha*. All other ceremonies she must get performed by a Brahmin:" See also to the same effect Sir Gooroo Das Banerjee's Hindu Law of Marriage and Stridhan, 2nd Edition, page 45. The text of Yajnyavalkya does not say that the mother is to have no voice at all and may be altogether set at naught where there are paternal male relations of the girl, competent to give her in marriage. Had that been the intention of the Hindu law, there would have been express texts to that effect. We cannot infer such intention by mere implication, because that would lead to very undesirable results, especially in the present state of Hindu society. In that case, any distant male relation of the girl on the father's side might give her in marriage, whether he be interested in her and whether he be really anxious for her welfare or not, without consulting, and, having regard to the wishes of the person most interested, that is, the mother, who is the natural guardian of the girl. In the absence of the authority of express texts binding on us, the Hindu law-givers should not be held to have contemplated the total exclusion of the mother from her right as guardian to be consulted as to the choice of a husband for her daughter. This view is substantially supported by the judgment of the Madras High Court in *S. Namasevayam Pillay* v. *Annammai Ummal* (1); and it is a conclusion which fits in with the principle of the judgment of this Court in *Shridhar* v. *Hiralal Vithal* (2). Any other conclusion would be highly prejudicial to the best interests of Hindu family life and to the welfare of minor girls, whose marriages are made in many cases the source of profit by greedy relations.

The respondent also claims his right under the Will of the girl's father. The provision in the Will giving the right, is merely to the effect that the respondent and his brother, to whom the testator devised his property, should get the girl married (*parnave*) by expending money out of the testator's property with due regard to his *status*. The right under the Will is no more than the right under the Hindu Law and is, therefore, subject to the same limitations. Whether, if the testator had enlarged that right and removed the limitations by his Will, it would have been a valid provision legally enforceable is a question which does not arise in the present case; and, therefore, we refrain from expressing any opinion on it.

The respondent further asserts his right under a custom of his caste. But that right

(1) 4 M. H. C. R. 339.
(2) 12 B. 480.

also, according to the allegation, is the same as that under the Hindu Law and is, therefore, governed by the same considerations.

The nature of the right claimed by the appellant being not absolute but of a qualified character, and there being no allegation in the plaint that before betrothing the girl to Hiralal, he had consulted her natural guardian, *i. e*, her mother, and chosen the bridegroom with due regard to the interests of the girl and the mother's wishes, it follows that he had no right to enter into the contract and, consequently, he has no cause of action as against any of the appellants.

On these grounds, the order of remand of the lower Appellate Court must be reversed and the decree of the Court of first instance, dismissing the suit with costs, must be restored with the costs of this appeal and of the appeal to the District Court on the respondent.

Order reversed.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL NOS. 1388 AND 1485 OF 1911.

October 4, 1912.

Present:—Mr. Justice Sundara Aiyar and Mr. Justice Sadasiva Aiyar.

IN No. 1388.

A. RAGHAVA AIYAR AND ANOTHER—APPELLANTS

versus

MURUGESA MUDALI AND OTHERS—RESPONDENTS.

IN No. 1485.

GANAPATHI MUDALI AND OTHERS—APPELLANTS

versus

RAGAVA AIYAR AND OTHERS—RESPONDENTS.

Misjoinder of parties—Objection taken for first time in appeal—Inadmissible.

An objection as to misjoinder of parties cannot be taken for the first time in appeal, especially when the suit is decided upon the merits in the first Court.

Second appeal against the decree of the Subordinate Judge of North Arcot in A. S. No. 183 of 1910, presented against that of the District Munsif of Arni in O. S. No. 133 of 1908.

FACTS.—The facts of the case are sufficiently clear from the following judgment of the lower Appellate Court:—

"Suit for specific performance of a contract of sale, made by defendants Nos. 1 and 2, the present reversionary heirs, entitled to the plaint lands, in favour of plaintiffs. Plaintiffs also seek for possession of the lands, from the other defendants alleging that they were in possession under defendants Nos. 1 and 2.

"2. The District Munsif found the plaint contract for plaintiffs, but refused specific performance of it holding that some of the lands had been alienated by the last female owner herself in favour of defendants Nos. 7 and 11 and have been in the enjoyment of the alienee defendants and that those alienations were binding on the reversioners, and that, as the contract could not be enforced in respect of those lands, it could not be enforced in regard to the remaining portion of the lands only. He, however, gave a decree for plaintiffs against defendants Nos. 1 and 2 for recovery of the money said to have been paid to them under the contract *viz* Rs. 400.

"3 The plaintiffs appeal.

"4 The contesting respondent's Vakil raised a preliminary objection to the suit that it was bad for misjoinder of parties and causes of action but I disallowed it as it was not taken in the lower Court before the argument according to his own case. All objections as to misjoinder of parties and causes of action should be taken at or before settlement of issues, unless the ground of objection has subsequently arisen which is not the case here and as the objection was not so taken here at or before issues, it must be held to have been waived (*vide* Order I rule 13 and Order II rule 7, Code of Civil Procedure). Therefore, it is not open to the respondents to raise that objection now in appeal although it would be a good objection in my opinion, if taken at the proper stage.

"5. The above respondents then took another objection also to the effect that the plaint contract of sale was only a nominal one and could not be enforced for that reason but it is not open to them to take this objection either. Defendants Nos. 1 and 2 are the persons who made the agreement and they have allowed the suit to go *ex parte* without disputing the *bona fides* of the agree-

ment and third parties in the position of contesting respondents have no right to take any objection in that respect.

"6. The points for decision in this appeal, therefore, now are,—

(*i*) Whether the plaintiffs are entitled to specific performance of the plaint contract of sale, if so to what extent?

(*ii*) On what terms are the plaintiffs entitled to the specific performance?

(*iii*) Are the plaintiffs entitled to sue for the possession of the lands in the possession of defendants Nos. 7 and 11, *i.e.* respondents Nos. 7 and 11 in this suit?

(*iv*) Are the alienations under which respondents Nos. 7 and 11 (defendants Nos. 7 and 11) claim the properties under them binding on defendants Nos. 1 and 2 and, therefore, on plaintiffs?

(*v*) To what relief are plaintiffs entitled?

"7. *Point* 3:—The respondents Nos. 7 and 11 have been in possession of the lands under them not under any title created by the plaintiffs vendors (defendants Nos. 1 and 2) subsequent to plaintiff's contract of sale but under titles created by Nos. 1 and 2 defendants' predecessors-in-title years before defendants Nos. 1 and 2 came to acquire any title to the same. The plaintiffs have no right to sue for recovery of those properties from defendants Nos. 7 and 11 before they acquire a completed title in themselves to the same and they had no such title to the said properties when they filed the suit. In fact they have not got any such title even now. Therefore, I think the plaintiffs had no cause of action at all when they instituted their present suit to sue defendants Nos. 7 and 11 for the recovery of the land under them. They must bring a separate suit against the said defendants after they have acquired a completed title to the properties in this suit. I accordingly find this issue in the negative.

"8. *Point* 4.—On my finding on the 3rd point, it is unnecessary to record any finding on this point. Were it, however, necessary to do so, I would hold that the alienation in favour of the 7th defendant evidenced by Exhibit II, is binding on plaintiff's vendors and plaintiffs but that the 11th defendant's alienation (Exhibit III and not Exhibit II) was executed in discharge of the prior mortgage land, Exhibit II (*a*), to which the then next reversioner was also a party himself and for other sums paid from time to time to female heir, Meenakshi, towards her cultivation and family maintenance expenses and there are also purposes justifying the alienation. As it is unnecessary to give a definite finding on this point, I refrain from discussing the matter any further.

"9. *Points* 1, 2 *and* 5. The plaintiffs alleged in their plaint that they paid Rs. 400 to defendants Nos. 1 and 2 under the plaint contract and defendants Nos. 1 and 2 did not deny the plaintiff's above allegation. The contract was formerly proved and it must be held, in the circumstances, that only Rs. 100 are due to defendants Nos. 1 and 2 under the contract. The plaintiffs are entitled to specific performance, therefore, on payment of the above Rs. 100 by execution of a proper deed of sale in the terms of the plaint agreement, without the question of the validity of the alienations set up by defendants Nos. 7 and 11 being determined in this suit [*vide Kasuri Ramaraju* v. *Ivalury Ramalingam* (1) and *Srinivasa Reddy* v. *Sivarama Reddy* (2)]. The plaintiffs are also entitled to possession of the lands to which claims are not set up except under the defendants Nos. 1 and 2.

"10. I accordingly modify the decree of the lower Court and give a decree for plaintiffs, without determining the question of the validity of the alienations set up by defendants Nos. 7 and 11, directing specific performance of the plaint contract of sale against defendants Nos. 1 and 2 by their execution of a proper deed of sale for all the plaint lands on the plaintiffs paying into Court for payment to them of the balance of sale money, *viz.*, Rs. 100 within three months from this date and further order that on their getting such a title-deed duly executed to them by defendants Nos. 1 and 2 or by the Court on their behalf, they do recover possession of the plaint properties other than those claimed by respondents Nos. 7 and 11 (defendants Nos. 7 and 11) under Exhibits II and III. Defendants Nos 7 and 11 will recover thier costs both in this and in the lower Court from plaintiffs while the other defendants and the plaintiffs will bear their respective costs in both Courts in the circumstances of the case. I have not allowed the plaintiffs their costs, because their

(1) 26 M. 74; 12 M. L. J. 400.
(2) 32 M. 320.

coming into Court was not due to any default on 1st and 2nd defendants' part to execute their sale in terms of the plaint contract or improper refusal of the other defendants to give up the lands under them but to a compact between plaintiffs and defendants Nos. 1 and 2 for recovering possession of the lands in the enjoyment of third parties who were entitled to hold the lands against the plaintiffs until they had acquired as completed title to them themselves."

The plaintiffs and defendants Nos. 4, 16, 17, and 19 separately appealed.

Mr. *C. V. Ananthakrishna Aiyar*, for the Appellants (in No. 1388).

Mr. *K. Srinivasa Aiyangar*, for the Respondents (in No. 1388).

Mr. *K. Srinivasa Aiyangar*, for the Appellant (in No. 1485).

Mr, *C. V. Ananthakrishna Iyer*, for 1st Respondent (in No. 1485).

JUDGMENT.—The 7th and 11th defendants did not object to the suit on the ground that the plaintiff had no cause of action against them. The Court of first instance tried the question of the validity of the alienations in favour of those defendants and recorded a finding on the question. Assuming that, strictly speaking, the suit for specific performance would not be maintainable against the alienees from the widow, we do not think that, when no objection was taken on that ground, and after the question between them and the plaintiff had been decided on the merits, the Appellate Court should have entertanied the objection in appeal. It was open to the plaintiff to ask for a declaration that the alienation in favour of defendants Nos. 7 and 11 was invalid, and the only objection to his doing so would be misjoinder of parties and causes of action. By making them defendants, the plaintiff substantially wanted the Court to hold that defendants Nos. 7 and 11 had no valid right to hold the properties under the alienations in their favour. In this view, it is unnecessary to decide whether defendants Nos. 7 and 11 would be within the purview of clause (*c*) of section 27 of the Specific Relief Act, as persons claiming under a title which, though prior to the contract in plaintiff's favour, might have been displaced by the 1st and 2nd defendants. The Subordinate Judge did not deal with the question as between the plaintiff and these defendants as well as defendants Nos. 4, 16 and 17, as it was unnecessary to do so in the view he took of the case. These other defendants also did not raise any objection to the question between them and the plaintiff being tried in the suit We reverse the decree of the lower Appellate Court so far as defendants Nos. 7, 11, 4, 16, 17 and 19 are concerned, and remand the appeal for fresh disposal according to law. Costs in this Court in both the second appeals will abide the result.

It is said by Mr. Anantakrishna Aiyar on behalf of the plaintiff, that he is prepared to accept a conveyance of whatever lands the 1st and 2nd defendants had a valid title to convey for the whole price agreed upon.

Appeal allwed.

CALCUTTA HIGH COURT.

REGULAR CIVIL APPEAL NO. 359 OF 1899.

June 25, 1901.

Present:—Sir Francis Maclean, Chief Justice, and Mr. Justice Banerjee.

HEM CHANDRA BAKSHI—PETITIONER—APPELLANT

versus

JADUB CHANDRA BAKSHI—OPPOSITE PARTY—RESPONDENT.

Appeal—Memorandum of appeal not accompanied by copy of decree appealed against, though decree in existence when appeal was filed—Mis-statement at foot of memorandum of appeal—Civil Procedure Code (Act XIV of 1882), *ss.* 541, 590—*Probate and Administration Act* (*V of* 1881), *s.* 86—*Limitation Act* (*XV of* 1877), *s.* 5.

A decree was made in a Probate case by a District Judge on August 9th, 1899. On August 14th, the decree was drawn up. On November 30th, a memorandum of appeal, without a copy of the decree, was filed in the High Court but there was a note by the appellant's Vakil that no decree had been prepared. The appeal was admitted by the High Court in consequence of the statement of the Vakil:

Held, that the memorandum of appeal was bad as the provisions of section 541, read with section 590 of the Civil Procedure Code and section 86 of the Probate and Administration Act, 1881, had not been complied with, because a copy of the decree appealed against was not filed with the memorandum of appeal, and that there was no appeal which could be properly entertained by the High Court; and as no sufficient cause was shown for extending the time for appealing under section 5 of the Limitation Act, the appeal was dismissed.

HEM CHANDRA BAKSHI *v.* JADUB CHANDRA BAKSHI.

Appeal from the decree of the District Judge of Hugli, dated the 9th August 1899.

Babu *Manmotho Nath Mitter*, for the Appellant

Babus *Sarada Charan Mitter*, *Bepin Bihari Ghose* and *Khetter Mohan Sen*, for the Respondent.

JUDGMENT.

MACLEAN, C. J.—A preliminary objection has been taken to the hearing of this appeal on the ground that the appeal was improperly admitted. The facts lie within a very narrow compass and they may be stated thus. The present appellant filed a petition for the revocation of the Probate of the Will of his father granted to his brother who is the respondent in the appeal, and a petition of objection was put in by the respondent to the appellant's petition. Eventually, the two brothers agreed to refer, and they did refer, the whole matter to arbitration. The arbitrators made an award on the 24th July 1899, and, shortly afterwards, the matter came before the District Judge of Hughli on the 9th of August 1899 for final disposal in the presence of the Pleaders on both sides, and it was ordered "that the Will of the late Radha Nath Bakshi, dated the 23rd *Chait* 1297, be declared to be genuine, and that the revocation case of the plaintiff be dismissed." No objection was then raised by the present appellant to the passing of that decree. That decree was signed on the 14th of August 1899. On the 30th of November 1899, the present appellant, who was dissatisfied with the award because the arbitrators had decided against him, filed a memorandum of appeal in this Court, and set forth various grounds upon which he alleged that the order of the District Judge was wrong, and there is this note at the foot of this memorandum of appeal: "I understand that no decree has been drawn up in this case and that the only final judgment is the order herewith affixed." That was a statement not based upon fact, as a decree had been drawn up on the 14th of August 1899, and the slightest inquiry would have elicited this fact. The appeal then was admitted by this Court under a misapprehension, and in consequence of the mis-statement at the foot of the memorandum of appeal.

An objection is now taken that, having regard to the provisions of section 541 of the Code of Civil Procedure, read with section 590, the appellant has not filed his memorandum of appeal in compliance with the provisions of the Code. Section 541 of the Code, which is made applicable to orders by section 590 read with section 86 of the Probate and Administration Act, directs that, "the appeal shall be made in the form of a memorandum in writing presented by the appellant and shall be accompanied by a copy of the decree appealed against, and (unless the Appellate Court dispenses therewith) of the judgment on which it is founded." In this connection, I may refer to the cases of *Chamela Kuar* v. *Amir Khan* (1) and *Bhawani Prasad* v. *Kallu* (2). But the language of the Code is sufficiently clear and precise on the point. The provisions of the Code, to which I have referred, have not been complied with by the appellant and, that being so, it seems to me that the preliminary objection must prevail. As I have pointed out, the appellant could have easily ascertained, if he had made any inquiry before filing the memorandum of appeal, that a decree had been drawn up. Under these circumstances, I think that the memorandum of appeal is bad, and it ought not to have been accepted by this Court, and that, consequently, there is no appeal which can be properly entertained by us. No valid memorandum of appeal then has been presented in time. If sufficient cause had been shown, we could have extended the time for appealing under section 5 of the Limitation Act, but no cause sufficient or otherwise has been suggested. Again, the points which it is now sought to urge on appeal before us were never raised or even suggested before the Court below, for no objection was taken to the decree of the 9th August 1899. Under these circumstances, we do not think that this is a case in which we ought to exercise the judicial discretion, which is vested in us, by granting further time to appeal. Furthermore, on the merits, the appellant's case does not look very hopeful.

The appeal is accordingly dismissed with costs. We assess the hearing fee at seven gold *mohurs*.

BANERJEE J.—I concur.

Appeal dismissed.

(1) 16 A. 77; A. W. N. (1893), 223.
(2) 17 A. 537 at p. 553; A. W. N. (1895), 212.

RAM DIN *v.* RAJ RANI.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

MISCELLANEOUS CIVIL APPEAL No. 27 OF 1911.

May 14, 1912.

Present:—Mr. Stanyon, A. J. C. and Mr. Hallifax, A. J. C.

RAMDIN—APPELLANT

versus

RAJ RANI—RESPONDENT.

*Civil Procedure Code (Act V of 1908), O. XXII, r. 1 —"Legal representative"—Heir—Survival of right to sue —Substitution of sons for father—Hindu Law—*Mitakshara*—Suit for protecting reversionary estate from waste and rendition of accounts.*

In every case, under Order XXII, rule 1, Civil Procedure Code, the first point to be decided is whether the right to sue survives, and that must be decided with reference to the nature of the suit.

The continuance of a suit depends, not on the qualifications of the representative of the deceased plaintiff but on the nature of the suit. The survival of a right to sue does not depend on the presence, or even the existence, of an heir. The words "legal representative" in Order XXII have a very wide signification, and are not synonymous with the term "heir" or with the limited class governed by section 11 of the Civil Procedure Code for the purpose of the law of *res judicata*.

Dinamoni Chowdhurani v. *Elahudad Khan*, 8 C. W. N. 843; *Amar Chandra* v. *Sebak Chand*, 34 C. 642 at p. 652; 11 C. W. N. 593; 5 C. L. J. 491; 2 M. L. T. 207 (F. B.), relied upon.

A suit to declare an alienation invalid beyond the life-time of a widow, is a representative suit for the benefit of the eventual reversioner.

Under the terms of an award, a trust estate was managed by a Hindu widow. She was prevented thereby from alienating it. It was declared that on her death, the estate should devolve on the reversionary heirs, who were also given an authority to obtain rendition of accounts. The presumptive representative, asserting malversation and mismanagement of the trust estate in the hands of the widow, sued for the removal of the widow from the office of trustee and the substitution of the plaintiff for her, and further prayed for rendition of accounts and delivery of the balance of income to the newly appointed trustee. Plaintiff died during the pendency of the suit and his sons applied to be substituted in his place as his legal representatives:—

Held, (1) that the right to sue survived, as the right was appurtenant to the reversionary estate;

(2) that the sons of the plaintiff, as being the immediate reversioners charged with the duty of protecting the reversion, were proper legal representatives of the plaintiff for the purposes of Order XXII, rule 1;

(3) that the plaintiff was primarily acting for the benefit of the reversionary estate.

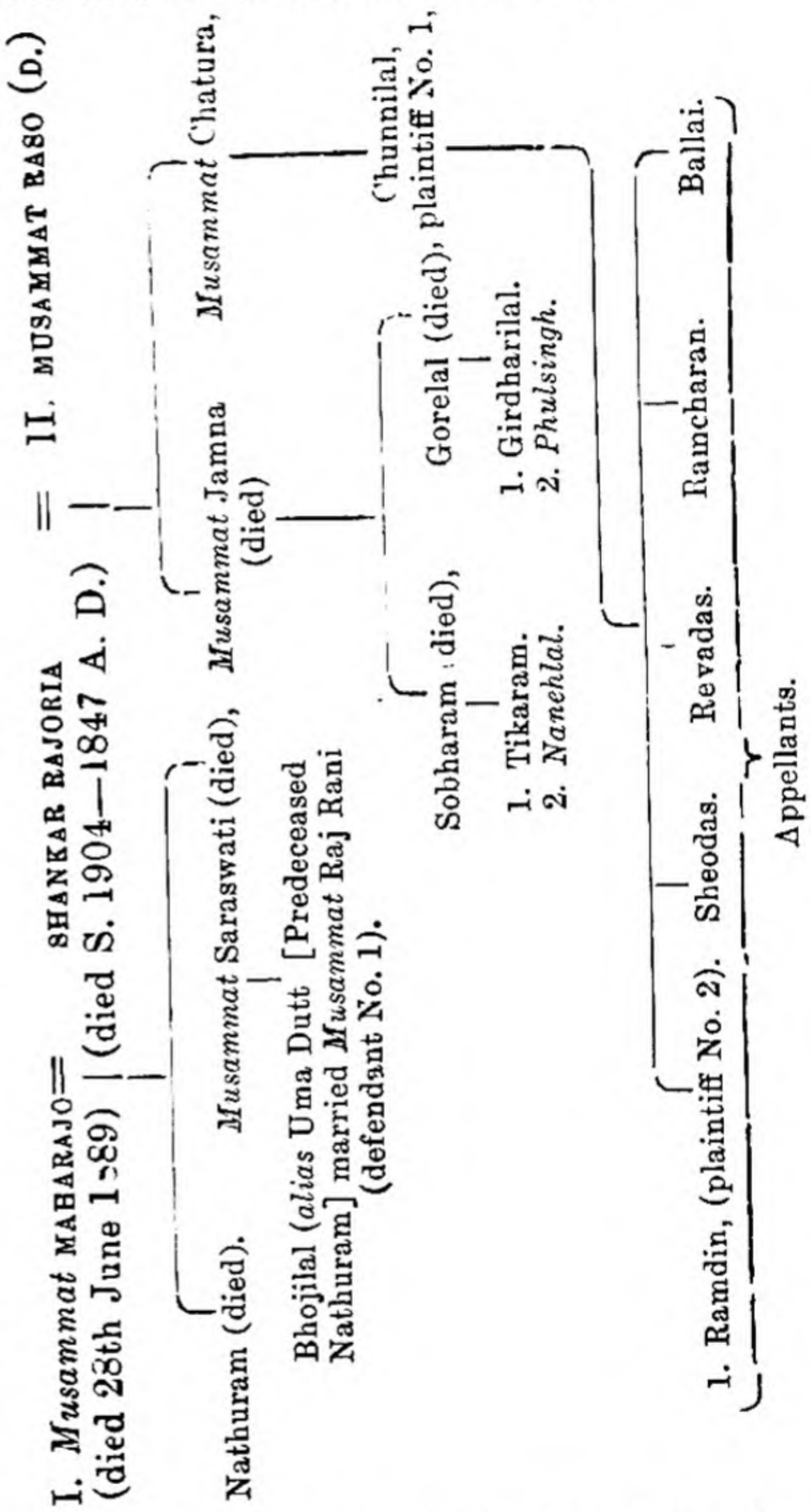
Chiruvolu Punnamma v. *Chirurolu Perraju*, 29 M. 390; 1 M. L. T. 183; 16 M. L. J. 307 (F. B.), followed.

Miscellaneous appeal, against the order of the District Judge, Narsinghpur, dated the 5th July 1911.

Dr. *H. S. Gour*, for the Appellant.

Sir *B. K. Bose*, for the Respondent.

JUDGMENT.—It is expedient to set out the material facts of this case, and the following genealogical tree will facilitate the statement and comprehension of them:—



Shanker Rajoria died possessed of considerable property, and was succeeded by Nathuram, his only son. For the purpose of applying the Hindu Law to this case, Nathuram was the *propositus* of the estate in dispute. After Nathuram's death and that of his sister Saraswati, *Musammat* Maharajo became the undisputed owner of the whole estate. She died on the 28th June 1889, and then disputes arose as to the succession between *Musammat* Raj Rani (who set up a Will in favour of her deceased husband) of the one part, and Sobharam, Gorelal and Chunnilal,

the sons of Nathuram's step sister, of the other part. These disputes were wisely referred to a private arbitration, and an award was delivered on the 13th December 1889. It is Exhibit D-I in this suit. The award allotted the estate of Nathuram thus:—

Chunnilal	...	2-annas share.
Sobharam and Gorelal	...	2-annas share.
Musammat Raj Rani	...	2-annas share.
Charities	...	10-annas share.
		16-annas.

The charities to be benefited by the income from the 10-annas share set apart for them were not specified. The award contains a general direction that this income shall be applied to charitable purposes and invokes Divine displeasure upon any holder of the estate who shall fail to maintain this endowment. *Musammat* Raj Rani was appointed the first *shebait* or manager of this trust property, and it seems clear that she was intended to hold that office with rights and limitations analogous to those of a Hindu widow holding an estate of inheritance from her husband. She was directed to employ agents to carry on the management of the trust property and she was prevented from alienating it. She was given power to adopt one of the children of the other parties to the award if she so desired—so far as the arbitrators and parties could give such power: and it was decided that in the event of her death without making any adoption, the estate allotted to her, both personally and in trust, should devolve according to law, the endowment as such remaining unimpaired. The award also contained a clause which, translated, reads thus:—

"Chunnilal and Sobharam and Gorelal will have authority to obtain rendition of accounts from the agent so that the agent may be unable to cause injury to the estate."

On the 3rd March 1908, Sobharam and Gorelal being then dead, Chunnilal and his eldest son Ramdin lodged the suit out of which this appeal has arisen. The plaint recited most of the above circumstances, including the award; it asserted mismanagement and malversation of the trust estate in the hands of Raj Rani, giving numerous alleged instances thereof; and contained two distinct prayers for relief, namely:—

(*i*) that defendant Raj Rani should be removed from the office of trustee, and the plaintiffs, or either of them, should be substituted for her; and

(*ii*) that the defendants should render accounts for the period between the 13th December 1889, (the date of the award) and the date of the institution of the suit, and deliver to the newly appointed trustee the balance of income which should be in existence after allowing for proper expenditure.

This last relief was not valued, and the Court below accepted a plaint on a stamp of Rs. 20 only. The defendants impleaded were *Musammat* Raj Rani and two of her *karindas* employed in carrying on the management of the trust estate. The value of that estate was declared to be Rs. 70,000.

The defendants filed a long written statement, containing various pleas to only one of which it is necessary to advert for the purposes of this appeal. It was objected that Ramdin could not be a plaintiff during the life-time of his father. This objection was obviously sound, whether the suit was based on the award of 13th December 1889, or on the general right, under Hindu law, of Chunnilal, as the presumptive reversioner, to protect the estate against unauthorised alienation or waste by Raj Rani. Being a plea of misjoinder, it should have had immediate attention, and ought to have been disposed of before anything else was done. Unfortunately, it was ignored by the lower Court, not being included for consideration even among the preliminary issues framed as to the maintainability of the suit. The case proceeded to trial with both father and son as plaintiffs, and a considerable part of the trial had been completed when, on the 16th April 1911, Chunnilal died. On the 18th April 1911, the District Judge made the following order:—

"Plaintiff Chunnilal is dead. For bringing on heirs, case for 13th May 1911."

Thereafter, objection was taken on behalf of the defendants that the right to sue held by Chunnilal did not survive after him, and this ended in an order made on the 5th July 1911, that the power to call for accounts given by the award of 13th December 1889 to Chunnilal was a purely personal right, which

could not be enforced by his sons after his death. The learned Judge, therefore, ruled that the suit had abated, and threw out the application of the four younger brothers of Ramdin to be brought on the record in substitution for their father. Ramdin was disposed of by the same order. The proceedings and order were confused, but it seems to us that we must treat the order as one made under Order XXII, rule 9 of the Code of Civil Procedure, and, as such, appealable under Order XLIII, rule 1 (*k*).

At the hearing of the appeal, the case was very fully and instructively argued before us, and the contention for the appellants, who are the five sons of Chunnilal, was that they were entitled to continue the suit—

(*a*) because the right conferred on Chunnilal and his co-reversioners by the award was given to them as representatives for the time being of the reversionary estate; and

(*b*) because, assuming that so far as the award went, it recognized only a right in the persons named to supervise the management of the trust estate nevertheless, Chunnilal, and after him, and in his place, the appellants, were and are entitled, under the general Hindu Law, to maintain this suit.

On behalf of the respondents, it was urged—

(*a*) that so far as the award went, it dealt only with the rights of the persons upon whose reference it was made, and gave Chunnilal, *personally*, a right to demand accounts from Raj Rani's agents from time to time;

(*b*) that, over and above this, Chunnilal, as presumptive reversioner, had a right under Hindu Law to bring the present suit, but that right died with him, since appellants, though his sons, are not his legal representatives for the purposes of the reversion, but are reversioners under a direct title of their own from the *propositus*, independently of their father.

This subtle argument involving, as it does, a question of law of considerable complexity, was sustained by citation of the following authorities:—*Sakhyahari Ingle Rao* v. *Bhavani Roy* (1); *Kommeneni Chinna Veerayya* v. *Kommeneni Lakshminarasamma* (2); *Bilak Puri* v. *Durga* (3); and *Rup Narain* v. *Gopal Devi* (4). Reference was also made to Caspersz on Estoppel, 3rd Edition, page 166.

We are of opinion that this appeal must succeed whether the right claimed by the appellants to continue the suit of their father be placed upon the award or upon the Hindu Law. We will deal with the case from each stand-point.

* * * *

First, as to the award. [*The learned Judges found that under the terms of the award the sons of Chunnilal were entitled to continue the suit.*]

* * * *

Next, as to the Hindu Law. The last of the cases cited by the learned Advocate for the respondents does not afford any assistance, but the first three are clear authorities for the proposition that a reversioner's suit for a declaration that an alienation by a widow is invalid, abates on the plaintiff's death, and cannot be continued by the next reversioner. But it seems to us that the Madras High Court, which is cheifly responsible for the above view, has not been altogether consistent with itself. In *Ayyadorai Pillai* v. *Solai Ammal* (5), it was held that immediate reversioners represent the inheritance and that, on their failure to set aside an adoption by the widow within the six years prescribed by law, such adoption will be binding on more remote reversioners. This *dictum* obtained the express approval of a Full Bench of the same High Court in *Chiruvolu Punnamma* v. *Chiruvolu Perraju* (6), in which the learned Judges laboured to draw a distinction between a suit by the presumptive reversioner to set aside an alienation, and a suit by such reversioner to set aside an adoption by a Hindu widow. The following extracts from the opinion

(1) 27 M. 588.

(2) 22 M. L. J. 375; 11 M. L. T. 184; (1912) 1 M. W. N. 442; 15 Ind. Cas. 213.

(3) 30 A. 49; A. W. N. (1908) 6; 4 A. L. J. 783; 3 M. L. T. 181.

(4) 36 C. 780; 13 C. W. N. 920; 6 A. L. J. 567; 11 Bom. L. R. 833; 10 C. L. J. 58; 19 M. L. J. 548; 36 I. A. 103 (P. C.); 5 M. L. T. 423; 3 Ind. Cas. 382; 93 P. R. 1909; 68 P. L. R. 1910.

(5) 24 M. 405.

(6) 29 M. 390; 1 M. L. T. 183; 16 M. L. J. 307 (F.B.)

delivered by the Full Bench will be instructive:—

"Mr. Krishnaswami Aiyar's contention was that the right of a reversioner to impeach an alienation of property by a qualified Hindu female owner and his right to impeach an adoption by a Hindu widow rest in assence on identical grounds, and that logically, as well as according to the preponderance of authority, the right should be held to be no more than personal to each individual reversioner presumptive for otherwise.

The argument of Mr. Rangachariar on the other side was that in spite of the view generally adopted in recent decisions by this High Court and by the Allahabad and Calcutta High Courts in cases connected with alienations of property by qualified female owners, the view which best accords with principle is that the presumptive reversioner does occupy a representative position. * *

The question raised is by no means easy to answer, but on full consideration, we think that the view contended for by Mr. Rangachariar ought to prevail.

* * * * *

The result of the view that we take is that, though in suits relating to alienations by a qualified owner, the *dicta* of the Privy Council preclude our holding that the presumptive reversioner represents remote reversioners, yet in suits to set aside an adoption, the presumptive reversioner ought, on principle, to be held to represent the remote reversioner, provided the matter is decided after a fair trial. * * * * A further conclusion to which we have been led is that an unauthorized alienation by a qualified owner gives rise to a cause of action for a declaratory suit from the date of the alienation to all the reversioners."

We are unable, with due respect, to appreciate as logical the difference here made between two suits of the same character involving different forms of relief. In the course of their said opinion, the learned Judges referred to the *dictum* of the Judicial Committee in *Rani Anund Kunwar* v. *The Court of Wards* (7) that though all existing reversioners, presumptive and contingent, are entitled to sue to avoid an alienation by a Hindu widow, yet, ordinarily, only the presumptive reversioner should be allowed to bring the suit: and they went on to remark—

"The rule thus laid down furnishes, as Mr. Rangachariar urged, practically conclusive proof that the correct view of the law on the point is that a reversioner allowed to maintain such a suit does thereby act, not only for himself, but also on behalf of all the rest, for the selection of one out of a body of persons possessing a common or similar interest as the individual empowered to carry on legal proceedings for the vindication of such interest necessarily involves the concession to him of a representative capacity in the matter."

Confirmation was found for this view in certain remarks by Sir Barnes Peacock in *Brojo Kishoree* v. *Sreenath Bose* (8). In an earlier passage of their opinion, the Madras Full Bench argued thus as to declaratory suits by reversioners:—

"It is needless to add that the true purpose of the concession of a right of suit in all these cases is the protection of the interest of the person or persons who may eventually turn out to be the heir or heirs, and the object of the legal proceeding is really the perpetuation of testimony which, owing to lapse of time, might not be available for the heir when the succession actually opens. Now, as it is not possible either to determine beforehand who will be the actual successor or to predicate the existence of any substantial distinction between the right of one reversioner and that of another, in theory, it would seem that the right to take legal proceedings for perpetuation of testimony should be conceded to each and all of such persons."

It is clear from these remarks that the learned Judges regarded all reversioners, immediate and remote, as a class who hold the estate of reversion, and on whose behalf the presumptive reversioner is permitted to bring declaratory suits. This being the *ratio decidendi*, it seems to us that a suit to declare an alienation invalid beyond the widow's life-time, is as much a representative suit for the benefit of the eventual reversioner, as one to avoid an adoption, which, after all, is only a mode of alienating the estate in defeasance of the reversion. In

(7) 8 I. A. 14 at p. 22; 6 C. 764; 8 C. L. R. 381.

(8) 9 W. R. 463 at p. 465.

the very recent case of *Muthusami Mudaliar* v. *Masilamani* (9), the same High Court laid down that "a declaratory suit by a reversioner brought not only on his own behalf but on behalf of the body of reversioners does not abate on the death of the plaintiff." In this case, the suit was one to avoid an alienation made by the widow of the last male holder.

The Allahabad case—*Balak Puri* v. *Durga* (3)—relied on by the learned Advocate for the respondents, was one possessed of special features which make it distinguishable. A person died after mortgaging his estate, leaving him surviving three daughters, of whom two were married and one unmarried. Subsequently, one of the married daughters died leaving children. The unmarried daughter claimed to be sole heir to the equity of redemption left by her father, and she sued to redeem the estate for her sole benefit, making her surviving sister, and her dead sister's children, co-defendants with the mortgagee. Pending the suit, the plaintiff died, and the surviving sister claimed to be substituted for her. The Court held that the suit had abated. It is clear that, *as the suit was framed*, the plaintiff not only did not represent her married sister, but set up a title adverse to her. Nevertheless, it must be conceded that, indirectly, the decision involves the *dictum* that the unmarried sister was only redeeming the estate for herself, though, if she had redeemed it and died unmarried, it must have gone to her sister. In *Bhagwanti* v. *Sukhi* (10), a Full Bench held that no reversioner under the Hindu Law, presumptive or otherwise, represents another reversioner for the purposes of limitation with reference to declaratory suit, and this view was adopted in *Govindi Pillai* v. *Thayammal* (11) and *Abinash Chandra* v. *Hari Nath* (12); but was practically, if not expressly, dissented from in the Madras Full Bench case already cited.

Upon a careful consideration of the subject, it seems to us that much of the difficulty which has arisen proceeds from the assumption that the only person who can continue a suit already begun by a plaintiff since deceased, is one who would have been bound by the decree if the original plaintiff had lived to complete the litigation. It is also assumed that the legal representative of a deceased plaintiff, entitled to continue the suit, is necessarily the *heir* of the latter. We consider such assumptions to be fallacious. The continuance of a suit depends, not on the qualifications of the representative of the deceased plaintiff but on the nature of the suit. A man may die leaving an heir to his estate who may yet have no right to continue a pending suit—*e. g.*, the case of a plaintiff who leaves a son and a pending suit for damages for defamation. On the other hand, the legal representative of a deceased person entitled to carry on a pending suit may not be his heir, *e. g.*, the case of an executor or a creditor who has obtained Letters of Administration. In every case under Order XXII, rule 1 of the Civil Procedure Code, the first point to be decided is whether the right to sue survives, and that must be decided with reference to the nature of the suit. Now a suit by the presumptive reversioner to obtain a declaration, in protection of the reversionary estate, against an alienation by the widow, is governed by Article 125 of the Limitation Schedule, and time begins to run from the date of alienation. Suppose *A.*, being the presumptive reversioner, brings such a suit within a few months of an alienation by the widow, and dies a year later, leaving the suit pending. *B.* thereupon becomes presumptive reversioner. He only obtains the right to bring the particular suit covered by Article 125 when he succeeds to that status. Is he not clearly the successor of *A.* for the purpose of enforcing that right? The right is one for a declaration that the widow's death or re-marriage puts an end to the alienation for the benefit of whoever may then be the reversionary heir—not necessarily the plaintiff. Why should *B.*'s right to sue be regarded as something fresh? The nature of the suit is such that the right to sue survives though the suitor is dead. Therefore, we have to find a legal representative of the deceased suitor to carry on the suit, and he is found in the person who steps into the position by virtue of which alone the suit can be maintained. Any other view would mean that, if *A* died more than twelve years after the alienation, *B.*, though presumptive

(9) 33 M. 342; 7 M. L. T. 17; 20 M. L. J. 49; 5 Ind. Cas. 42.
(10) 22 A. 33.
(11) 28 M. 57; 14 M. L. J. 209.
(12) 32 C. 62 at p. 72; 9 C. W. N. 25.

reversioner, would have no right of suit remaining: and this would be an unreasonable interpretation of the law. It is misleading to refer to the law of *res judicata* in dealing with the question whether or not a right to sue survives. The words 'legal representative' have a very wide signification, and are not synonymous with the limited class governed by section 11 of the Civil Procedure Code, in which these words find no place. As already explained, the survival of a right to sue does not depend on the presence, or even the existence, of an heir. A person may die leaving no known heir-at-law, and his estate may lapse to the Crown, or be taken possession of by some authority empowered to administer unclaimed estates. Nevertheless, if at the date of his death, the deceased was carrying on a suit, say, for possession of land, the right to sue would survive, and the legal representative for the time being would carry on the proceeding. For the wide significance which we give to the phrase 'legal representative,' as used in Order XXII, Code of Civil Procedure, ample authority will be found in *Dinamoni Chowdhrani* v. *Elahudad Khan* (13) and *Amar Chandra* v. *Sebak Chand* (14). The right to sue for rendition of accounts, so as to check or restrain waste of the trust estate in the present case, is a right appurtenant to the reversionary estate; and it will remain exercisable for the benefit of that estate, so long as that estate exists—that is, so long as the reversion does not fall in. The present suit is one to enforce that right, and, in bringing it, Chunnilal was acting primarily for the benefit of the reversionary estate: that he acted also for his own benefit was a contingency when he brought the suit, and that contingency has failed. But, in our opinion, the right to sue survives, and the proper legal representatives to carry on the suit are those persons, or any one or more of them, who, by the death of Chunnilal, have become the immediate reversioners charged with the duty of protecting the reversion. We are not called upon to decide, and we do not decide, the question whether the decree in this case, if obtained by Chunnilal, would have bound his sons or other remote reversioners. As we have already stated, the survival of a right to sue, and the substitution of a legal representative to enforce that right, are not limited to cases where the successor is a person claiming under the deceased within the purview of section 11 of the Civil Procedure Code, 1908.

For the above reasons, we allow this appeal, and, reversing the order appealed against, we direct the lower Court to substitute the appellants as plaintiffs for Chunnilal deceased, and, after satisfying itself as to Court-fees, and recovering any deficiency, to proceed with the suit from the point where it was stayed by the death of Chunnilal. The respondent, Raj Rani, must pay the costs of this appeal. Costs in the lower Court will abide the result. We allow Rs. 100 as Pleader's fees in this Court.

Appeal allowed.

(13) 8 C. W. N. 843.

(14) 34 C. 642 at p. 652; 11 C. W. N. 593; 5 C. L. J. 491; 2 M. L. T. 207 (F. B.).

MADRAS HIGH COURT.

ORIGINAL SIDE APPEAL No. 19 OF 1910.

September 10, 1912.

Present:—Sir Ralph Benson Kt., Offg., Chief Justice, and Mr. Justice Sankaran Nair.

IMMUDIPATTAM VIJAYA GANDIPA NACHIMUTHU OVALA KONDAMA NAICKER—APPELLANT

versus

S. ANNASAWMY AIYAR—RESPONDENT.

Contract—Sale of immoveable property—Agreement for payment of commission to person negotiating sale—Completion of contract, payment of commission on—Payment after realization of purchase-money—Document, construction of—Absence of alternative claim for decree—Quantum meruit, *effect of.*

A contract between plaintiff and defendant, providing for payment to the former of a certain commission on his effecting a sale of the latter's property, was in the following terms:—"We are by this bound to pay you a commission of Rs. . . . as remuneration for the trouble you take, out of the amount that may be realized by means of sale of . . . . our Rettiambadi Mitta for 4½ lakhs within the limited time of two months mentioned in the power-of-attorney executed by us in your favour this day . . . . The aforesaid commission amount shall be paid out of the amount which you may obtain and give for us."

Held, (1) that, under the said agreement, the commission was payable to plaintiff not when he concluded the contract of sale of the property, but when the defendant actually obtained the purchase-money

or, at any rate, not before he had removed all the obstacles to the defendant receiving the amount:

Beringfield v. *Kynaston*, (1876) 3 T. L. R. 279, *Geeen* v. *Mules*, (1861) 30 L. J. C. P. 343, referred to.

(2) that it was not competent to the Court to decree any sum for plaintiff *quantum meruit* as there was no alternative claim in that behalf.

Krishan Prasad Sinha v. *Purendas Narain Sinha*, 15 C. L. J. 40; 16 C. W. N. 753; 11 Ind. Cas. 820 and *Lott* v. *Duthwaite*, (1893) 10 L. T. R. 76, referred to.

Appeal from the judgment of the Hon'ble Mr. Justice Wallis, dated 3rd March 1910, in C. S. No 112 of 1908 in the exercise of the Ordinary Original Civil Jurisdiction of the High Court.

Messrs. *S. Srinivasa Aiyangar* and *C. V. Ananthakrishna Iyer*, for the Appellant.

Messrs *M. O. Parthasarathy Aiyangar* and *M. A. Tirunachariyar*, instructed by Messrs. *Short* and *Bemes*, for the Respondent.

JUDGMENT.—Plaintiff sues to recover a sum of Rs. 37,500 with interest which he claims as commission due to him under a contract with the defendant by which the latter authorised him to sell a *mitta*. He cliams to have perf rmed his part of the contract. Wallis, J., who tried the case, found that the plaintiff brought about a contract of sale between the Court of Wards and the defendant which the latter could have enforced against the Court of Wards, but the defendant wilfully made default in complying with certain requisitions made by the Court of Wards and made them a pretext for withdrawing from the contract, and afterwards sold the property to one Veerappa Chetty for the amount for which the Court of Wards had agreed to purchase the property. He was of opinion that when the plaintiff brought about the contract of sale, he had performed his promise and become entitled to recover his commission, and accordingly passed a decree in his favour for the amount claimed.

In appeal, it is contended before us—

(1) that under the agreement, if any, between the plaintiff and the defendant, the former was only entitled to recover any commission on his obtaining the purchase-money for the *zemindar*; and that his right to commission did not arise on his concluding the contract of sale;

(2) that there was no concluded contract of sale as the Court of Wards imposed certain conditions with which the defendant was unable to comply;

(3) that the plaintiff was bound to have effected a sale before the 31st December 1906 and that as he did not carry out his promise before the stipulated period, he was not entitled to any commission.

We have, therefore, first of all to determine what the contract was between the parties. The question depends upon the construction of the documents (Exhibits A, B and E).

The defendant is the *zemindar* of Ayakudi. Under a decree of the High Court, confirmed by the Privy Council, he was entitled to redeem his *zemindari* which was under mortgage on payment of certain sum of money before the 31st December 1906. He had been making various unsuccessful attempts to raise the necessary sum for the payment of the mortgage-debt. The plaintiff was also one of the agents employed by him to raise the money. In August 1906, the defendant executed a power-of-attorney in favour of the plaintiff authorising him to raise a loan of $4\frac{1}{2}$ *lakhs* of rupees on the security of the *zemindari*, or to sell the Rettiambadi Mitta which is a portion of that *zemindari* for that amount. The reasons for giving this power-of-attorney are set out in paragraph 10 of Exhibit A. The chief reasons are stated to be:—(1) "The non-payment of money due to the usufructuary mortgage of the aforesaid *zemin*, the time limited for the payment of the amount of the said debts approaching very fast." (2) The non-payment of the debts incurred for our household expenses, the creditors giving trouble on that account and there being "no means for the present household expenses. The creditors giving trouble on that account and there being no means for the present household expenses." The loan was to be raised within a period of two months. On the same day, Exhibit B was executed in favour of the plaintiff fixing the amount of the commission at Rs. 50, 000. The following is the material part of the instrument:—"We are by this bound to pay you a commission of Rs. 50,000 as remuneration for the trouble you take, out of the amount that may be realized either by means of sale of by debt which you may effect, either by obtaining a loan of $4\frac{1}{2}$ *lakhs* against our *zemindari* or by effecting a sale of our Rettiambadi Mitta for $4\frac{1}{2}$ *lakhs* within the limited time of two months mentioned in the power-of-attorney executed

by us in your favour on this day, in pursuance of conditions therein. The aforesaid commission amount shall be paid out of the amount which you may obtain and give for us." This contract is modified later by Exhibit E, in which the amount to be raised was settled at not less than Rs. $3\frac{1}{2}$ *lakhs* in accordance with the above conditions, and the commission was fixed at 10 per cent on the amount.

The question that has been argued at length before us is, whether under this agreement, the plaintiff became entitled to get his commission when, as he alleges, he concluded the contract or whether he was to get his commission only after the defendant received the purchase-money.

Exhibits B and E, of course, must be read together. The plaintiff proceeded to take steps to effect the sale immediately after the agreement. The 1st petition which he presented on behalf of the defendant was on the 24th August 1906. Within the period of two months, the time fixed by the original agreement B, he was not able to raise the money. It was for that reason that the time to raise the loan was extended by the Exhibit E, up to 31st December 1906. The *zemindar*, according to the decree, had to redeem his property before that time. It appears, however, that nothing was finally settled up to that date. The proposals made by the *zemindar* were then under the consideration of the Court of Wards. The Court accordingly asked the *zemindar* on the 4th January to obtain an order from the High Court for the extension of time for the redemption of the estate. An application was accordingly made by the *zemindar* to the High Court, and on the 25th April 1907, the time for redemption was extended to December 1907. According to the original agreement, Exhibit A, if the matter was not settled within the time limited the time might be "extended by letter" at the discretion of the *zemindar*. So on the 29th and 30th December 1906, plaintiff submitted to the defendant two draft letters (Exhibits IV and V) to extend the time for the completion of the agreement. There was no reply. On the 17th January, the plaintiff again wrote a letter Exhibit VI, in which he complained of the *zemindar's* delay in not replying to his previous letters and requesting him to sign those letters. To this also there was no reply. Though there was thus no extension of time in writing, there can be no doubt but that the plaintiff did a great deal of work in January and February for the defendant to bring about a sale. See Exhibits K. L and M. The evidence is fully discussed in the judgment of the learned Judge and it is not necessary to refer to it in detail as we agree with his conclusions that the plaintiff continued his efforts to effect a sale with the consent of the defendant, the *zemindar*. Finally, on the 25th February, the Court of Wards declared its willingness to purchase the Rettiambadi Mitta from the defendant for Rs. 3,75,000 "on condition that he furnishes at his own cost a certificate from the Registration Department to the effect that there are no encumbrances on the property prior to the decree now under execution and that he obtains a certificate from the High Court under section 305, Civil Procedure Code, authorising him to sell the *mitta* to the Court of Wards." In reply, the defendant declared his willingness to part with his *mitta* for the amount named, and said that he would duly apply to the High Court for the required permission and to the Registration Department for the certificate of encumbrance. But he pointed out to the Board that the expenses incurred in connection with a sale are usually borne by the vendee and requested the Board, therefore, to defray the costs themselves, (Exhibit P). In reply, the Court of Wards offered to pay the fee for the drawing up of the conveyance, and stamp under the Registration Act, but informed the *zemindar* that "he should pay the sundry charges, if any, connected with the transaction, such as the cost of having release deeds by the previous mortgagees drawn up, executed and registered if the Court is advised that such a deed is necessary to secure a complete title for the purchaser." The certificate required from the High Court was obtained and produced and no question arises upon that. The certificate from the Sub-Registrar was also produced but it is not filed in this case.

There is no doubt that it was the plaintiff who took steps in order to obtain the encumbrance certificate. Then on the 29th March 1907, in reply to a letter from the plaintiff, in which he styled himself the agent of the *zemindar*, the latter in Exhibit Y repudiated the plaintiff's agency. He said:—"You are already well aware of the fact

that you yourself being unable to complete the loan in accordance with the power letter written and given to you only in respect of settling the loan to us before, the aforesaid power letter has become cancelled (see Exhibit Y)."

The plaintiff did not accept the repudiation and he replied to the *zemindar* to inform him, "that if the business be not completed, I request you will take notice hereby I was not in the least responsible therefor." The plaintiff swears that even after this repudiation, the *zemindar* and his sister requested him to go on with the business; and though we have only the plaintiff's own evidence on the point, and it may not be safe to rely upon his uncorroborated testimony, there is very little doubt that he must have been again working in the interest of the *zemindar* and at his request because we find that, on the 15th May, in Exhibit AA, a communication from the *zemindar* to the Court of Wards, forwarding High Court order and the encumbrance certificate, there is a postscript in the handwriting of the plaintiff. Further, he wrote to the Court of Wards on the 26th May, on the 8th June and on the 23rd June, requesting the Court to complete the contract as soon as possible. According to his own evidence, in July he became ill, and he continued in that state for six months and did not know what passed afterwards. There were various communications between the *zemindar* and the Court of Wards (See Exhibits GG, HH, JJ, and LL) and, finally, on the 8th November, the Court of Wards informed him that he must furnish the Government Solicitor with registration copies of certain documents, and also with certain release-deeds giving up all claims against the *mitta* from certain persons whose names appear in the encumbrance certificate and that he must also agree to the Court of Wards paying off or retaining the amount sufficient to pay off all the encumbrances, subsequent to the decree, in their hands. To this last condition, the *zemindar* had no objection; but he said that it was not possible to comply with the other conditions stated in that letter and the contract thus came to an end. Neither the Court of Wards nor the defendant apparently cared to enforce it.

The question arises whether, on these facts, the plaintiff became entitled to the commission, when, according to him, the contract was concluded on the 25th and 26th February by the letters Exhibits O and P. We have already pointed out that it is impossible to believe that all that he did up to the 29th June was done without the knowledge of the *zemindar* and against his will. We agree on this point with Wallis, J., in holding that though the time limited had expired, the defendant certainly allowed the plaintiff and probably requested him to continue to negotiate for him and to bring about the sale, while, at the same time, there can be no doubt the *zemindar* continued deliberately to refuse to give the plaintiff any letter similar to Exhibits B and E. The plaintiff is entitled to his commission if he did carry out what he contracted to do. If, under the contract, he was bound to effect only the sale of the property he became entitled to his commission as soon as he had completed his portion of the bargain by bringing about a contract of sale between the Court of Wards and the defendant, which it was in the power of the defendant to enforce against the Court of Wards irrespective of anything that might take place subsequently between the defendant and the Court. But, if the contract was that the plaintiff should obtain the money for the defendant from the intending purchaser and that he was to get his commission only after he obtained such money, then it cannot be said that the plaintiff became entitled to his commission before the defendant obtained the money or, at any rate, before the plaintiff had removed all the obstacles to the defendant receiving the amount.

It is necessary to consider in this case the circumstances under which the contract between the plaintiff and the defendant was entered into.

As we have already pointed out, the agreement was entered into with the plaintiff on the 30th August 1906 to enable the *zemindar* to redeem the mortgage before the 31st December 1906. What the *zemindar* required was, not either a sale of his *mitta* or mortgage of his *zemindari*, but the required sum of money to redeem the mortgage before that date. The sale or mortgage after the expiration of the period would be absolutely useless to him. That there were two alternative courses allowed, *i.e.*, either to sell a portion or to mortgage the whole *zemindari*, is also significant. The essence of the contract thus being the obtaining of the money before a

certain date, it would seem to follow that a mere contract of sale before that date, even if it could have been enforced against the Court of Wards, would be of no avail to the *zemindar*. The other reasons given in Exhibit A, to which we have referred, *i.e.*, the pressure of the creditors for payment of the debts incurred for household expenses, would also seem to suggest that what the *zemindar* mainly looked to was obtaining the money by some means or other to satisfy his immediate wants. Considered in relation to these circumstances, the words in Exhibit B. that "the commission is to be paid '*out of the amount*' that may be *realized* either by means of sale or by debt which you may effect.....within the time of two months" and the words that subsequently follow that the commission amount shall be paid "out of the amount which you may obtain and give for us" indicate strongly that the commission is to be paid out of the loan or purchase-money which may be received by the *zemindar*. The words "you (plaintiff) may obtain and give for us" seem to show strongly that it was the plaintiff's duty to receive the loan or the purchase-money. The words in *Bringfield* v. *Kynaston* (1) were very similar. The auctioner in that case was to get his commission "out of the purchase-money." He found a person who agreed to purchase and paid the deposit. He, however, failed to complete it and the estate was sold to somebody else. It was held that, as the commission was payable out of the purchase-money, as in the case before us, the agent was not entitled to commission upon the amount agreed to be paid. Similarly, in *Green* v. *Mules* (2), the agreement was that, if the plaintiffs could induce one Newman to make an *advance* of money to the defendant, the latter would pay them £100 commission. It was held that the *employment* was to be at an end if Newman did not advance the money, and if he did, the plaintiffs were to have £ 100.

These cases show that, where the intention of the parties was that the commission should be paid only after the defendant obtained his money, then effect must be given to that intention. The plaintiff was not entitled to his commission until the defendant had obtained his money, or the plaintiff had put the defendant in a position in which there was no impediment in the way of his getting the money.

The facts of this case also strongly support the construction. The *zemindar* was then practically a man of no means. And the parties would have scarcely contemplated the payment of the commission to the plaintiff before he received the purchase-money himself. In this view, the plaintiff was bound not only to effect a sale but to do everything that was necessary to enable the defendant to receive the money.

Such seems also to have been the opinion entertained by the plaintiff himself. For, agreeing with Wallis, J., we find it is proved that, after the offer by the Court and acceptance by the defendant of the terms of the sale (Exhibits O and P), the plaintiff sent to to the *zemindar* from Madras a sum of Rs. 25 for obtaining the encumbrance certificates. He was also bound to see that the information asked for by the Government Solicitor and by the Court of Wards was supplied to them and that release-deeds were obtained from the persons indicated and given to the Court. Or, if he considered it unnecessary to give the Court the information and these release deeds for any reason whatever, he should have removed their objections by litigation or otherwise and enabled the *zemindar* to receive the money at any rate before the time for redemption expired. It was not for the *zemindar* to remove the difficulties himself. The plaintiff admits that from July till December, he was ill and was not able to do anything. If the defendant had neglected or refused to receive the purchase-money due to him, that would have raised a different question. It is not a case of the defendant preventing the plaintiff from earning his commission, nor is it a case of the principal taking the matter out of the agent's hands; because though there was a repudiation at one time it is clear from the documentary evidence in the case that the plaintiff continued to work for the defendant even after that, and we have already stated our agreement with the finding of the learned Judge that he must have so continued to work at the request of the defendant. We have considered whether any sum *quantum meruit* should be decreed to the plaintiff in return for the work which he did for the defendant, but we are of opinion that nothing can be decreed to the

(1) (1887) 3 T. L. R. 279.
(2) (1861) 30 L. J. C. P. 343.

plaintiff on that account in this suit. The suit is based on the special contract, and there is no alternative claim for remuneration for work *quantum meruit*. In such a case, there can be no decree on the latter basis, *Krishna Prosad Singha* v. *Purnendu Narain Sinha* (3) and *Lott* v. *Duthwaite* (4), nor, indeed, is there material before us on which we could determine the proper remuneration. A question as to the jurisdiction of the Court was raised, but we agree with the learned Judge that the High Court has jurisdiction for the reason stated by him in the last paragraph of his judgment. In the result, the plaintiff's suit must be dismissed with cost throughout.

Appeal allowed.

(3) 15 C. L. J. 40; 16 C. W. N. 753; 11 Ind. Cas. 820.
(4) (1893) 10 L. T. R. 76.

CALCUTTA HIGH COURT.
SECOND CIVIL APPEAL No. 2093 OF 1899.
February 25, 1902.
Present:—Mr. Justice Brett and Mr. Justice Mitra.

Sri Maharani BENI PERSHAD KOERI—PLAINTIFF—APPELLANT

versus

RAJ KUMAR CHOWBEY AND ANOTHER—DEFENDANTS—RESPONDENTS.

Res judicata—*Rent suit—Presumption—Considerations for determination—Bengal Tenancy Act (VIII of* 1885), *s.* 51.

A prior decision in a rent suit may be taken to determine the rent claimed in that suit, and to give rise, under section 51 of the Bengal Tenancy Act, to the presumption that the rents for subsequent years remained the same.

Bukshi v. *Nizamuddi*, 20 C. 505, *Nil Madhab Sarkar* v. *Brojo Nath Singha*, 21 C. 236 and *Jotindra Mohan Tagore* v. *Shumbhu Chundar*, 4 C. W. N. 43, relied upon.

The weight to be attached to the presumption thus raised must depend first on the conditions under which that decision was arrived at, that is to say, whether it was after an adjudication of the question of the amount of rent or the rate of rent or not. If in the prior suit there had been such an adjudication, it would be only open to the Judge in a subsequent suit for rent to look to subsequent circumstances and events to enable him to determine whether there had been any change in the relations between the parties since. If there was no adjudication of the question, it would be for him to consider the circumstances and events both prior and subsequent to that former suit in order to enable him to determine the relations existing between the parties and the rentals rightly due for the lands for the years in suit.

Appeal from the decree of the District Judge of Shahabad, dated the 29th June 1899, reversing that of the Munsif of Buxar, dated the 24th January 1899.

Babus *Raghu Nundan Pershad* and *Jogendra Chandra Ghose*, for the Appellant.

Babu *Karuna Sindhu Mukherjee*, for the Respondents.

JUDGMENT.—In this appeal, the plaintiff is the appellant. In the Court of first instance she sued to recover from the defendants arrears of rent for the years 1303 to 1305 on the allegation that the yearly *jama* payable by the defendants was Rs. 53-4-0.

The defendants contended that the yearly rent was Rs. 42-12. In support of her claim, the plaintiff relied on a judgment and decree dated the 20th January 1887, in which in a suit brought by her predecessor against the same defendants, the claim was decreed at the rental of Rs. 53 4-0 per annum. The defendants, on the other hand, relied on a judgment and decree dated the 21st December 1896 in which in a similar case, the plaintiff obtained a decree at the rental of Rs. 42-12-0. Before the Munsif, it was argued on behalf of the defendants that the plaintiff in this case was barred by the doctrine of *res judicata* from recovering rent at a higher rate than Rs. 42-12 which was decided to be the rental in the judgment of the 21st of December 1896. On the other hand, it was contended on behalf of the plaintiff that, having regard to the circumstances of the case and the previous judgment of 1887, that judgment could not be held to operate as *res judicata*. The Munsif did not accept the contention put forward by the defendants and, holding that the rental was Rs. 53-4-0 as claimed by the plaintiff, gave her a decree for the full amount claimed with costs and interest.

On appeal to the District Judge, that officer reversed the finding of the Munsif holding that the judgment and decree in the case decided on the 21st December 1896 operated as *res judicata* between the parties and was a bar to the plaintiff recovering rental at a higher rate than Rs. 42-12-0.

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The plaintiff appeals to this Court. In support of the appeal, it has been argued that the judgment and decree of the 21st December 1896 cannot be regarded as finally deciding the question of rental as between the two parties, because, in that case, there was no actual adjudication on evidence as to the rent and the cases of *Hurry Behari Bhagat* v. *Pargun Ahir* (1); *Bukshi* v. *Nizamuddi* (2) and *Neikajee Sheikh Nazir* v. *Nanda Dulal Bamkeja* (3), have been relied on. For the defendants it is contended that the question of the rental was, in fact, adjudicated by the Court in the case which was decided on the 21st December 1896 and that, under the ruling, *Kishore Lal Dey* v. *The Administrator-General of Bengal* (4), that judgment would operate as a bar to the present claim. We are unable to find that the District Judge in this case really took into consideration the question whether, in the case which was decided on the 21st December 1896, there was an adjudication as to the rental for years other than those which were in contest in that suit. We think that, so far as the rents of the year which were in contest in that suit were concerned, the decision, no doubt, is an absolute bar under the doctrine of *res judicata* to any suit for the rents of those years. But so far as the rents or rates of rent of subsequent years are concerned, we do not think that that judgment can be held to be an absolute bar, so far as to prevent the parties from raising the question in a subsequent suit. In our opinion, the prior decision may be taken to determine the rent claimed in that suit, and to give rise under section 51 of the Bengal Tenancy Act to the presumption that the rents for subsequent years remained the same; that appears to be the view which was taken by the learned Judges in the case of *Bakshi* v. *Nizamuddi* (2) and that ruling was not dissented from in the judgment in the case reported in *Neikajee Sheikh Nazir* v. *Nanda Dulal Bamkeja* (3). It seems also to have been followed in the cases of *Nil Madhub Sarkar* v. *Brojo Nath Singha* (5) and *Maharaja Jotindra Mohun Tagore* v. *Shumbhu Chunder Bhattachrriee* (6). We think that the weight to be attached to the presumption thus raised must depend first on the conditions under which that decision was arrived at; that is to say, whether it was after an adjudication of the question of the amount of rent or the rate of rent or not. If in the prior suit there had been such an adjudication, it would be only open to the Judge in the subsequent suit to look to subsequent circumstances and events to enable him to determine whether there had been any change in the relations between the parties since. If there was no adjudication of the question, it would be for him to consider the circumstances and events both prior and subsequent to that former suit in order to enable him to determine the relations existing between the parties and the rentals rightly due for the lands for the year in suit. In the present case, the District Judge has not done this and has arrived at his decision acting on the assumption that the judgment of 1896 was absolutely binding. We do not consider that this is correct and we, therefore, set aside the judgment and decree of the District Judge and direct that the case be sent back to him for re-trial having regard to the remarks made above.

The costs of this appeal will abide the result.

Case remanded.

(1) 19 C. 656.
(2) 20 C. 505.
(3) 1 C. W. N. 711.
(4) 2 C. W. N. 303.
(5) 21 C. 236.
(6) 4 C. W. N. 43.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1461 OF 1910.

August 30, 1912.

Present:—Mr. Justice Sundara Aiyar and Mr. Justice Sadasiva Aiyar.

KONDA REDDI—APPELLANT

versus

RAMASAWMI REDDI AND OTHERS—RESPONDENTS.

Easements Act (V of 1882), s. 15—Claim for title over land in possession of another—Evidence of ownership—Right negatived by evidence—Right to easement—Whether can be declared on proof thereof.

The words 'as an easement' in section 15 of the Indian Easements Act do not mean that the enjoyment should be in the assertion of claim of an easement. Illustration (*b*) to that section shows that the expression 'as an easement' was introduced

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in order to show that unity of title or possession during the period of 20 years, or a portion thereof, makes the possession useless to create a right of easement.

The claimant of a right of easement need not necessarily prove that he asserted, during his enjoyment, only a limited right of easement as opposed to ownership. He need only prove that the user was for the beneficial enjoyment of another land. The mere claim of the higher right of ownership would not, on failure to prove the same, prevent a person from acquiring the lesser right of easement, provided he can show that he asserted certain rights of enjoyment over the land in question for the benefit of another land belonging to him.

Narendra Nath Baruri v. *Abbay Charan Chattopadhya*, 34 C. 51; 4 C. L. J. 437; 11 C. W. N. 20; 1 M. T. 364 (F. B.), referred to.

Chuni Lal Fulchand v. *Mangaldas Govardandass*, 16 B. 592, not approved.

Second appeal against the decree of the District Court of South Arcot, in A. S. No. 344 of 1909, preferred against that of the District Munsif of Tindivanam, in O. S. No. 622 of 1908.

Mr. *T. R. Vencatrama Sastri*, for the Appellants.

The Hon'ble Mr. *L. A. Govindaragava Iyer* and Mr. *D. V. Nilamegachariar*, for the Respondents.

JUDGMENT.—The suit in this case was to establish the plaintiff's right to an easement of way over certain land belonging to the defendants, to remove the wall constructed by the defendants which, the plaintiff alleged, obstructed his right of way, and to restrain the defendants from interfering with his right of way. The defendants denied the right alleged by the plaintiff. The District Munsif found it established by the evidence adduced in the case. The plaintiff had instituted a previous suit, Original Suit No. 651 of 1899, in which he claimed the site, along which he now asserted a right of way, as belonging to him in proprietary right. That suit failed. The Court that tried that suit expressed an opinion in its judgment that the evidence showed that the plaintiff was entitled not to the ownership of the land but to an easement of right of way. As the plaintiff did not claim any relief with respect to an easement, that suit was dismissed. The District Judge has reversed the District Munsif's judgment. He says: "The evidence of plaintiff in the present case shows that he has not been enjoying the right of way as an easement", and he refers to the deposition of the plaintiff in which he said that he still asserted that he had been long walking along the way in the assertion of a right of ownership. Then, the District Judge, says: "A man cannot acquire a right of way over his own land as an easement. Evidence of immemorial user adduced in support of a right founded on ownership does not, when the right is negatived, tend to establish an easement." The plaintiff, who has preferred the second appeal, contends that this proposition of law is wrong.

We took time to consider our judgment, and we have arrived at the conclusion that the appellant's contention must be upheld. By adverse enjoyment, *i e.*, by enjoyment without a lawful right, a person may acquire either an estate or property belonging to another or an incorporeal right of certain kinds. In the former case, it may be either an absolute estate or a limited estate. If the adverse enjoyment amounts to exclusive possession of the land of the true owner, then, in the absence of evidence to the contrary, the trespasser would acquire the absolute ownership of the property. It would be open to the real owner to show that he did not, while in adverse enjoyment, assert the right to hold the lands as absolute owner, but asserted only a lesser right such as that of lessee or a mortgagee or a life-tenant. In that case, the *animus possidendi* of the adverse enjoyer would determine the title which he would acquire by prescription. It might also be open to the real owner to say that only an easement right was asserted by the person in adverse enjoyment; and, in that case, the right acquired would be only an easement. It is the adverse enjoyment, or enjoyment without a lawful right, that gives right to a title by prescription. No doubt, if the enjoyment was not adverse but by license of the real owner, then no right would be acquired. Now, if a person walks along the land of another for the beneficial enjoyment of another land, and if the enjoyment of the other's land does not amount to exclusive possession, there seems to be no reason why his walking along the land without the permission of the true owner, and in the assertion of a right to walk, should not create in favour of the enjoyer a prescriptive right of easement, simply because he mistakenly supposed that he is the owner of the land or

asserts that his act of enjoyment is insufficient to give him the ownership by prescription. Reliance is placed for the respondent on the language of section 15 of the Easements Act. It lays down that, for acquiring a right of easement, the right of way must be enjoyed by a person claiming title thereto, as an easement, and as of right and without interruption for the statutory period. Now, the punctuation shows that title need not be claimed as an easement. The enjoyment is required to possess two properties, *viz.*, that it must be as of right without interruption, and it must be as an easement. The first quality is intended to show that enjoyment by license or under a contract which would not amount to a grant of an easement, would be ineffectual to create a right by prescription. Then, the other quality is, that the enjoyment should be as an easement. The section does not say that the enjoyment should be in the assertion of a claim of an easement. Illustration (*b*) to the section explains what is meant by "as an easement." It is as follows:—" . . . . . the plaintiff shows that the right was peaceably and openly enjoyed by him for twenty years. The defendant proves that for a year of that time the plaintiff was entitled to possession of the servient heritage as lessee thereof and enjoyed the right as such lessee. The suit shall be dismissed, for the right of way has not been enjoyed 'as an easement' for twenty years". The illustration shows that the expression 'as an easement' is put in to show that unity of title or possession during the period of the 20 years or a portion thereof makes the possession useless to create a right of easement. The appellant has referred us to a case reported as *Narendra Nath Baruri* v. *Abhay Charan Chattopadhya* (1). There, the plaintiff claimed a right of ownership of a certain land and if the facts he would prove would not amount to that, he claimed to be entitled to a right of easement. Geidt, J., observes: "In a case like the present, the plaintiff may very well allege *bona fide*:—'I believe the land to be mine, but I may be unable to prove it, if I should fail to prove it, I can, at any rate, prove that I have been using the right of way as an easement uninterruptedly and as of right for over 20 years'. There appears to me no reason in principle why a claim like this in the alternative should not be tried or why the plaintiff should be forced first to bring a suit to establish his right of ownership, and, if that fails, then to bring a suit to establish the right of easement". It is, of course, impossible to prove an *animus* to hold the land as owner and at the same time in virtue of a right of easement. The judgment of the Calcutta High Court is inconsistent with the view that the claimant of a right of easement should prove that he asserted, during his enjoyment, a limited right of easement as opposed to ownership. The Court held in that case that the claim in the alternative was sustainable.

The District Judge refers in his judgment to the decision of the Bombay High Court in *Chunilal Fulchand* v. *Mangaldas Govardandoss* (2), where the observation is to be found that "evidence of immemorial user adduced in support of a right founded on ownership, does not, when that right is negatived, tend to establish an easement." It is not quite easy to understand what exactly the learned Judges who were parties to that judgment meant. It is, of course, true that evidence of immemorial user in support of a right founded on ownership will not, by itself, tend to establish an easement. In order that an easement may be acquired, it must be shown that the user was for the beneficial enjoyment of another land. If the learned Judges meant to say that the assertion of ownership during the period of user would make the acquisition of an easement right impossible, then with all deference to them, we are unable to agree with that view. The mere claim of the higher right of ownership would not prevent a person from acquiring the lesser right of easement provided he could show that he asserted certain rights of enjoyment over the land in question for the benefit of another land, belonging to him. We do not think the District Judge has really decided the question whether the plaintiff exercised the right to pass over the defendant's land as of right and without interruption for twenty years for the beneficial enjoyment of other land belonging to him as required by section 15 of the Easements Act. We shall, therefore, reverse the decree and remand the appeal for fresh

(1) 34 C. 51; 4 C. L. J. 437; 11 C. W. N. 20; 1 M. L. T. 364 (F. B.).

(2) 16 B. 592.

disposal according to law. The costs of this second appeal will abide the result.

Appeal allowed.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL No. 60 OF 1904.

June 30, 1905.

Present:—Mr. Justice Ghosh and Mr. Justice Pratt.

GOBINDA CHANDRA BASU—PLAINTIFF—APPELLANT

versus

KAMIJUDDI SOYAL—DEFENDANT—RESPONDENT.

Improvement—Excavation of tank—Burden of proof—Tenant to show purpose of excavating tank—Supply of good drinking water to tenant and his people, if sufficient—Co-sharer landlord, if entitled to bring suit to compel tenant to fill up tank wrongfully excavated—Bengal Tenancy Act (VIII of 1885), ss. 76, 188.

In order to make section 76 of the Bengal Tenancy Act applicable, it must be shown by the tenant in the first instance that the tank in question was excavated for the purpose of agriculture, or for the use of men and cattle employed in agriculture. It is not enough for the purpose of the section if the object of digging the tank was to supply good drinking water to the tenant and his people.

A suit for the purpose of compelling a tenant to fill up a tank which he has wrongfully excavated in one part of his holding and in the alternative for damages, may be instituted by a co-sharer landlord, for the suit is not one which the whole body of the landlords is required or authorised to bring under the Bengal Tenancy Act and consequently section 188 of the Act is not applicable to it.

Appeal from the decree of the Sub-Judge of Tipperah, dated December 9th, 1903, reversing that of the Munsif of Chandpur, dated July 22nd, 1902.

Babus *Baikuntha Nath Das* and *Trailokya Nath Chakrabarti*, for the Appellant.

Babu *Jnanendra Nath Bose*, for the Respondent.

JUDGMENT.—This appeal arises out of a suit instituted by a co-sharer landlord against a *raiyat* for the purpose of compelling him to fill up a tank which the *raiyat* had excavated in one part of his holding. It appears that, at the time when the said excavation was made by the defendant, there was already a tank in the holding in question. Notwithstanding this, the defendant dug some of the *mal* lands appertaining to his holding and after raising the level of the ground by earth of the said tank, planted certain trees on the same. The Court of first instance gave the plaintiff a decree, being of opinion that the digging of the tank in question was not consistent with the purposes for which the holding had been let out, and that it was not really an improvement within the meaning of section 76 of the Bengal Tenancy Act. The lower Appellate Court, however, has set aside that judgment and dismissed the plaintiff's suit upon the grounds that the tank was dug for the purpose of providing good drinking water to the defendant and his people, that this was in no way inconsistent with the purpose for which the land was let out, and that the act of the defendant was an improvement within the meaning of section 76 of the Bengal Tenancy Act. Referring to the matter of the other tank which existed at the time of the excavation of the tank in question, the Subordinate Judge makes the following observations: "Though before constructing the tank, there was another old tank near the defendant's house, there is nothing to show that it contained clear water fit for the purpose of drinking without any injury to health. Had it been so, the defendant would not spend a large sum of money in digging another new tank." Then, the Subordinate Judge goes into the question, whether the plaintiff being, one of the landlords, could alone maintain the action, and, having regard to the provisions of section 188 of the Bengal Tenancy Act, he has expressed the opinion that the suit could not lie at his instance alone without joining the other co-sharers. Another question was raised by the defendant and that was one of limitation. The Subordinate Judge has held that, inasmuch as the suit was not brought within two years from the date of the construction of the tank, it is barred by the two years' law of limitation as provided by Article 32 of the Indian Limitation Act.

Now, referring in the first instance to the question whether the tank dug by the defendant is an improvement within the meaning of section 76 of the Act, it will be observed upon clause (2) of the said section that the construction of wells, tanks, water-channels and other works for the storage, supply

or distribution of water for the purpose of agriculture or for the use of men and cattle employed in agriculture are improvements within the meaning of the section until the contrary is shown. Now, in order to make that section applicable, it must, in the first instance, be shown that the tank in question was excavated for the purpose of agriculture, or for the use of men and cattle employed in agriculture. The Subordinate Judge has apparently not addressed himself to this matter. He seems to have considered that if the purpose for digging the tank was to supply good drinking water, it would be enough for the purpose of the section in question. Irrespective of this, we are informed by the learned Vakil for the appellant, and the learned Vakil for the respondent has not contradicted the statement so made, that there is absolutely no evidence upon the record that the tank in question was excavated for the purpose of providing the defendant and his people with good drinking water. If that is so, it is obvious that the requirements of section 76 to which we have referred have not been complied with. Moreover, as we have already mentioned, at the time of the excavation of the tank in question, there was an old tank near the defendant's house. The Subordinate Judge seems to think that it was for the landlord to show that it contained clean water, fit for the purpose of drinking without any injury to health, and because he, the landlord, did not prove this, it must be taken that the tank in question was required for the purpose of providing good drinking water to the defendant and also for the purpose of agriculture; for, otherwise, as the Subordinate Judge says, the defendant would not have spent a large sum of money in digging the tank. We are unable to affirm this proposition as correct. If there was a tank near the defendant's homestead, the defendant might have improved that tank and made it fit for the purpose of providing himself with good drinking water. However that may be, it was, in the first instance, necesssary for the defendant to show that this tank was required for the purpose of providing drinking water and for the purpose of agriculture. There is no evidence to that effect; and we think that the judgment of the Subordinate Judge, so far as this matter is concerned, cannot be supported.

So far as the second point is concerned, the learned Vakil for the respondent has very candidly admittted that the suit which the co-sharer landlord, the appellant before us, has brought is not an act which falls within the scope of section 188 of the Bengal Tenancy Act. The suit was, as already mentioned, for the purpose of compelling the defendant to fill up a tank which he had wrongfully excavated in one part of his holding and, in the alternative, for damages. The suit in question was not one which the whole body of the landlords is required or authorised to bring under the Bengal Tenancy Act. That being so, we hold that the Subordinate Judge is wrong in the view that he has expressed in regard to the applicability of section 188 to this case.

Lastly, as regards limitation, Article 32 of the Indian Limitation Act provides for a suit against one who, having a right to use property for specific purposes, perverts it to other purpose, the limitation provided being two years from the time when the perversion first becomes known to the person injured thereby. All that the Subordinate Judge has found upon this matter is, that the suit has been instituted more than two years after the date of the construction of the tank. But that is not enough for the purpose of the Article in question. It must be found that the plaintiff landlord became aware of the excavation more than two years antecedent to the institution of the suit. The learned Vakil for the respondent, on the matter being put to him, admits that there is no evidence on the record showing that the plaintiff was cognizant of the excavation of the tank in question at any time more than two years antecedent to the suit. No doubt, it does appear that he is a resident of the same village where the holding of the defendant is situated. But it does not necessarily follow that he was aware of the excavation of the tank before the time when he says he became aware of it. Upon these grounds, we think that the judgment of the lower Appellate Court must be set aside and that of the Court of first instance restored with costs.

Appeal allowed: Suit decreed.

MADRAS HIGH COURT.

CIVIL APPEAL No. 94 OF 1910.

September 16, 1912.

Present:—Mr. Justice Ayling and Mr. Justice Napier.

GILES SEDDON—APPELLANT

versus

THE DEPUTY COLLECTOR OF MADRAS —RESPONDENT.

Land Acquisition Act (I of 1894), ss. 49, 54—"Award or any part thereof"—Decision of Court under section 49, whether an award—Appeal.

The words "award or any part of the award" in section 54 of the Land Acquisition Act, 1894, do not include the decision of the Court on a reference under section 49.

The decision of the Court on a reference under section 49 of the Land Acquisition Act, 1894, is not appealable.

Vencataratnam Naidu v. *Collector of Godaveri*, 27 M. 350; *Nita Ram* v. *Secretary of State for India in Council*, 30 A. 176; (1908) A. W. N. 63; 5 A. L. J. 166; *Sarat Chandra Bose* v. *Secretary of State for India in Council*, 10 C. W. N. 250, considered.

Balaram Bharamaratar Roy v. *Sham Sunder Narendra*, 23 C. 526; *Sheo Rattan Rai* v. *Mohri*, 21 A. 351 and *Shiva Rao* v. *Nagappa*, 29 M. 117, referred to.

Obiter: -A decision by the Court under section 49, would not prevent a claimant obtaining compensation for severance under section 23, sub-section (1) clause (3).

Appeal against the judgment of the Chief Judge of the Court of Small Causes, Madras, dated 7th March 1910, in Land Acquisition Suit No. 2 of 1910.

Messrs. *Branson* and *Branson*, for the Appellant.

Mr. *David*, Government Solicitor, for the Respondent.

JUDGMENT.—This appeal arises out of a reference by the Deputy Collector of Madras to the Chief Judge of the Court of Small Causes under section 49 of the Land Acquisition, Act, I of 1894. The Chief Judge decided that the plot of ground referred to did not form " part of the house, manufactory or building" within the meaning of the section. Against that decision, the claimant appeals and the preliminary objection is taken on behalf of the Government that no appeal lies. The question turns on the construction of section 54 of the Act, and to make out a case for appeal, it must be shown that the decision of the Court under section 49 is " the award or any part of the award of the Court in any proceedings under this Act." Before disposing of the question whether this is an award, it is well to dispose of the argument on the words "any part of the award." It was suggested that these words would include any proceeding prior to the final award; but it is obvious that this language is used in exactly the same sense as it is used in the Civil Procedure Code of 1882, section 540, where the language is "an appeal shall lie from the decrees, or from any part of the decrees of the Courts, etc." It could not, of course, be suggested that under the Civil Procedure Code these words meant any thing but a part of the actual decree drawn up and the words in the Land Acquisition Act can have no wider meaning. The word "award" is not defined in the Act and its meaning must, therefore, be ascertained from the sections in which it is used and from an examination of the whole Act. It is applied to the adjudication of the Collector as well as that of the Court; but, in this section, it is confined to the adjudication of the Court. It has to be noted that the language of the section is not the decision of the Court, but the 'award' and, therefore, applying the analogy of the Civil Procedure Code, it would presumably be confined to the result of the decision as embodied in a formal document and would not include the judgment on which it is based. The first section to be considered is section 23, which has reference to the proceedings of the Court on a reference by the Collector under section 18 at the application of any person interested who has not accepted the award of the Collector. The language is:—"In determining the amount of compensation to be awarded for land acquired under this Act, the Court shall take into consideration etc." And sections 26 and 27 provide that "every award under this part shall be in writing signed by the Judge and shall specify the amount awarded" (under the various clauses of section 23) as also the amount of costs and the proportions in which they are to be paid. These are the only proceedings of the Court which are specifically called an award by the Act. There are, however, other proceedings. Under section 30, where the amount of compensation has been settled by the Collector but a dispute arises as to the apportionment or as to the persons to whom the same is payable, the Collector may refer such dispute to the decision of the Court. Under sections 31 and 32, where the Collector has tendered payment of the compensation awarded by him to the

persons he considers entitled and they do not consent to receive it or where there is no person competent to alienate the land or where there is a dispute as to the title to receive the compensation or as to the apportionment of it, the Collector is required to deposit the amount of compensation in Court and then, if it appears to the Court that the land belongs to a person who has no power to alienate it, the Court is required to order the money to be invested in the purchase of other land to be held under the like title. Again, under section 35, where land is required for temporary occupation, if the persons interested do not agree as to the sufficiency of the compensation or apportionment thereof, the Collector is required to refer such difference to the decision of the Court, and, lastly, under section 48, where Government withdraws from the acquisition of any land, the Collector is required to determine the amount of compensation due to the owner for damage suffered by him and the provisions of part III which embody the reference to the Court are made applicable to such proceedings. There are, therefore, several matters on which the Court has to pass orders which are not styled 'awards' in the Act other than this decision by the Court under section 49. The language of section 49 is—:"In deciding on such a reference." Section 30 only uses the language, "the Collector may refer such dispute to the decision of the Court." Section 32 says:—"The Court shall order the money to be invested" and "direct the payment of the interest;" and section 35 says:—"The Collector shall refer such difference to the decision of the Court." It is important to consider at what stage these various decisions to be given by the Court arise and it is obvious that the decisions in the case now being considered must properly be given before the Collector can make his award. The first question that arises in land acquisition is what Government is to pay, for section 49 provides that "the provisions of this Act shall not be put in force for the purpose of acquiring a part only of any house, manufactory or other building." It is, therefore, necessary to ascertain what area must be acquired by Government at any particular place where Government wishes to take up land. Section 8 requires the Collector to cause the land declared to be needed for a public purpose to be marked out, measured and a plan to be made and section 9 provides for public notice to be given requiring all persons interested in the land to appear before the Collector to make any objections to the measurement and state the nature of their interests and the particulars of their claim to compensation. Such notice has also to be served on all persons known or believed to be interested in the land. On the date fixed for hearing, the Collector proceeds to inquire into the objections and the interests and to determine the compensation; and, in his award, he has to set out the true area of the land, the compensation and the apportionment. It is obvious that this cannot be done until the question has beed decided whether Government is seeking to acquire a part only of a house, manufactory or other building contrary to the wishes of the owner. That being so, the decision of the Court on a reference for this purpose must be a proceeding prior to the Collector's award, and it follows from this that it cannot be an award of the Court, as the award of the Court only comes into existence after the Collector's award.

The decisions of the Court under the other sections stands on a different footing. The decision on a reference under section 30 is after the Collector has made his award. So is the order for the purchase of other lands where the owner has no power to alienate. The decision of the Court as to the amount of compensation payable for temporary occupation of land is a proceeding analogous to the ordinary award of the Court under section 23. These matters stand, therefore, on an entirely different footing to the decision of the Court under section 49. The apportionment of the amount of compensation or the persons to whom the same is payable must form part of the actual award just as such decisions would form part of the decree of a Court and would be covered by the words in the appeal section, section 54, "award or any part of the award." The same will apply to the order of the Court for the investment of the compensation money in the purchase of other land under section 32. All these decisions being either parts of the award or awards in particular circumstances would appear to be appealable under section 54. It was expressly decided in *Balaram Bharamaratar Roy* v. *Sham Sunder*

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Narendra (1) that a decision on an apportionment under section 30 was an award and appealable and the same view was taken by the Allahabad High Court in *Sheo Kattan Rai* v. *Mohri* (2) and it has been decided by this Court in *Shiva Rao* v. *Nagappa* (3) that an appeal lies from an order for investment under section 32. It is urged by the appellant that appeals from decisions of the Court made on a reference under section 49 have been heard by the various High Courts of this country and our attention is drawn to a case in *Vencataratanam Naidu* v. *The Collector of Godaveri* (4), where such an appeal was heard. In that, case, however, the Collector had given his award under section 11 and the claimant, in refusing to accept the same, filed a petition asking for the whole house to be taken. The Collector, therefore, referred the whole question under sections 18 and 49. We express no opinion whether the question could be taken up at this stage but in the present case, the reference was before any award by the Collector. The point that no appeal lay on this question was not taken. The case of *Nita Ram* v. *Secretary of State for India in Council* (5), relied on, was certainly a reference under section 49 only, but the point was not taken that no appeal lay and the same remark applies to the decision in *Sarat Chandra Bose* v. *The Secretary of State for India in Council* (6). It is contended before us that it is unlikely that the Legislature would have intended that no appeal should lie on an important question of this sort; but it is by no means clear that a decision by the Court on this point would prevent a claimant getting compensation for severance under section 23 sub-section (1) clause (3). We are inclined to the view that it would be open to the Appellate Court, at all events, to re-open this question and as far as the claimant is concerned, it would not matter to him whether he received the compensation for the land on the footing that Government was compelled to acquire it under section 49 or on the footing of severance under section 23. Whether this be so or not, we are unable, on the construction of the Act, to hold that the words "award or any part of the award" in section 54 include the decision of the Court on a reference under section 49. We, therefore, uphold the preliminary objection and dismiss the appeal with costs.

Appeal dismissed.

(1) 23 C. 526.
(2) 21 A. 354.
(3) 29 M. 117.
(4) 27 M. 350.
(5) 30 A. 176; A. W. N. (1908) 63; 5 A. L. J. 166.
(6) 10 C. W. N. 250.

CALCUTTA HIGH COURT.
REGULAR CIVIL APPEAL No. 216 OF 1910.
June 18, 1912.

Present:—Sir Ashutosh Mookerjee, KT., Judge, and Mr. Justice Beachcroft.

BINAPANI DEBI—PETITIONER—APPELLANT
versus
SASHIBHUSHAN SINHA—OPPOSITE PARTY—RESPONDENT.

Appeal—Memorandum of appeal not accompanied by copy of decree appealed against, though decree was in existence when appeal was filed—Mis-statement in memorandum of appeal—Civil Procedure Code (Act V of 1908), O. XLI, r. 1 (1).

Where a copy of the decree appealed against was not attached to the memorandum of appeal as required by Order XLI, rule 1 (1) and the Vakil for the appellant stated that the decree had not been drawn up, although, as a matter of fact, the decree was in existence when the appeal was filed:

Held, that the memorandum of appeal must be rejected.

Kamala Dasi v. *Tarapada*, 14 Ind. Cas. 1006; 15 C. L. J. 498 and *Hem Chandra Bakshi* v. *Jadub Chandra Bakshi*, 17 Ind. Cas. 99; 16 C. L. J. 116, relied upon.

Appeal from the decree of the District Judge of Bankura, dated the 11th January 1910.

Babu *Sarat Kumar Mitra*, for the Appellant.

Babu *Samatul Chandra Dutt*, for the Respondent.

JUDGMENT.—This appeal plainly does not comply with the provisions of the Civil Procedure Code. A copy of the decree was not attached to the memorandum of appeal as required by Order XLI, rule 1 (1); and when objection was taken by the Deputy Registrar, the learned Vakil for the appellant was instructed to state that the decree had not been drawn up. The appeal was accordingly registered. As a matter of fact, it now transpires, the judgment was

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delivered on the 11th January 1910 and the decree was drawn up on the 15th January 1910. The appellant applied to the Court below for a copy of the judgment on the 1st February 1910. That copy was ready for delivery to her on the 5th February 1910. At that time, the decree was in existence. Consequently, there is no reason why an application should not have been made for a copy of the decree as well. The memorandum of appeal is thus not in conformity with the provisions of the statute which, it will be observed, authorises the Court to dispense with the production of a copy of the judgment alone and not of the decree also. That the production of a copy of the decree is essential has not been and cannot be disputed: *Kamala Dasi* v. *Tarapada* (1). The memorandum of appeal must, consequently, be rejected. The course we adopt is in accordance with that followed in *Hem Chandra Bakshi* v. *Jadub Chandra Bakshi* (2), mentioned in *Khirode Sundari Debi v. Jnanendra Nath Pal* (3).

We may add that the appellant has not offered to produce a copy of the decree; but even if such an offer had been made, the memorandum when perfected would obviously be out of time, and could not be entertained without an order for its reception under section 5 of the Limitation Act; there are, however, no materials before the Court, at present, to justify an order under that section.

The appeal will stand dismissed, but without costs.

Appeal dismissed.

(1) 15 C. L. J. 498; 14 Ind. Cas. 1006.
(2) 16 C. L. J. 116; 17 Ind. Cas. 99.
(3) 6 C. W. N. 283.

MADRAS HIGH COURT.
SECOND CIVIL APPEAL No. 1218 OF 1911.
October 2, 1912.
Present:—Mr. Justice Sundara Aiyar and Mr. Justice Sadasiva Aiyar
SIVINI APPALANARASIMHULU AND ANOTHER—APPELLANTS
versus
MURADA SANYASI AND OTHERS—RESPONDENTS.

Madras Estates Land Act (Mad. Act I of 1908), s. 3, clauses (3) & (5), s. 189 and Sch. A. No. 8—Rent, meaning of—Inamdar *of certain lands in village, whether a land-holder—Suit for rent by* Inamdar—*Jurisdictian of Revenue Court.*

An *Inamdar*, to whom a grant only of some lands in his estate has been made by the *zemindar*, is a 'land-holder' within the meaning of section 3, clause (5) of the Madras Estates Land Act, 1908, and a suit by him for rent against a *ryot* is cognizable by the Revenue Court.

Civil Revision Petition No. 895 of 1910, followed.

Second appeal against the decree and judgment of the District Court of Vizagapatam, in A. S. No. 272 of 1910, presented against that of the Court of the Sub-Collector of Parvatipur District, No. 67 of 1910.

Mr. *B. Narasimheswara Sarma*, for the Appellants.

Mr. *P. Narayanamurti*, for the Respondents.

JUDGMENT.—The question for decision in this case is, whether the Sub-Collector was right in holding that the Revenue Court had no jurisdiction to entertain the suit which was one for rent against a *ryot* by the proprietor of certain *Inam* lands in a village in the Sangam Vilasa *zemindary*. The *Inam* was admittedly one granted by the *zemindar* subsequent to the Permanent Settlement. The view taken by the Sub-Collector and the District Judge on appeal is that the plaintiffs are not land-holders within the definition of that word in section 3, clause (5) of the Estates Land Act, and a suit for rent by them is, therefore, not one coming within the purview of section 189 and No. 8 of Schedule A of the Act. The reason given by the lower Courts is that the land in question is a minor *Inam* and, therefore, not an 'estate' as defined by clause (2) of section 3. It has evidently been assumed by them that the plaintiffs cannot be land-holders if the land is not an estate. The definition of an 'estate' includes specifically two classes of *Inams* by sub-clauses (*d*) and (*e*). Sub-clause (*d*) refers to a village of which the land revenue alone has been granted in *Inam* to a person not owning the *Kudivaram* thereof, provided the grant has been made, confirmed or recognized by the British Government, or any separated part of such village. Sub-clause (*e*) relates to any portion consisting of one or more villages (of an estate) which is held on a permanent under-tenure. The *Inam* in question consists only of some lands in a village and not of a village or one or more

villages of the 'estate' of Sangam Vilasa and is clearly, therefore, not an estate within the definition of that word. The fact that the *Inam* was granted subsequently would not necessarily show that it is not an estate if it consisted of one or more villages, as sub-clause (*e*) would include an *Inam* granted by the *zemindar* provided it consists of one or more villages, for it would then be a portion of the *zemindar's* estate held on a permanent under-tenure. Sub-clause (*d*) relates to a village which has ceased to be part of a *zemindari* and sub-clause (*e*) relates to an *Inam* which, being granted by the proprietor of the *zemindari* and held under him, has not ceased to be a portion of the *zemindari*. Although it is clear that the land in question is not an estate, that is not sufficient to show that the suit is not cognizable by the Revenue Court. For the test, which is decisive on the question of jurisdiction, is, whether the plaintiffs are land-holders. That word is defined as follows :— in clause (5) of section 3, 'landholder' means a person holding an estate or part thereof and includes every person entitled to collect the rents of the whole or any portion of the estate by virtue of a transfer from the owner or his predecessor-in-title, or of any order of a competent Court, or of any provision of law. The plaintiff is, undoubtedly, a person entitled to collect rent of a portion of the estate of Sangam Vilasa. There is no reason why the holder of an under-tenure should not be held to be a person entitled to collect rent of a portion of the estate out of which the under tenure is carved. The under-tenure holder, if he is liable to pay *Kattubadi* to the *zemindar*, is such a person holding under him and entitled to collect the rents of a portion of the *zemindari* as a lessee or usufructuary mortgagee of the whole or a portion of the *zemindari*. If the tenure-holder is not bound to make any payment to the *zemindar* for his tenure, he will then be a person owning a part of the estate and, as such, would come within the meaning of 'land-holder.' It is clear that the term 'land-holder' is wider than the owner of an estate.

No doubt, the word 'rent' is defined as 'whatever is lawfully payable in money, in kind or both, to a land-holder for the use or occupation of land in his estate for the purpose of agriculture,' but the expression 'his estate' cannot be taken to involve that only what is payable to the owner of the estate can be regarded as rent, for the definition would then exclude what is payable to a lessee or a usufructuary mortgagee. The definition of a 'land-holder' clearly includes every person entitled to collect the rents of any portion of an estate by virtue of any transfer. The plaintiffs, by reason of the transfer of the lands in question from the *zemindar* as an under-tenure, are persons entitled to collect the rent of the land. They must, therefore, be held to be land-holders and the suit for rent by them against the defendants is one cognizable by the Sub-Collector. This view is in accordance with the judgment of Abdur Rahim, J., in Civil Revision Petition No. 895 of 1910, who upheld the view taken by the Subordinate Court of Cocanada, although no reasons are stated in the judgment.

The decrees of the lower Court must, therefore, be reversed and the suit remanded to the Court of first instance for disposal according to law. No objection to jurisdiction was raised by the defendants. In the circumstances, all costs up to date must abide the result of the trial.

Appeal allowed.

CALCUTTA HIGH COURT.

MISCELLANEOUS CIVIL APPEAL No. 562 OF 1911.

June 11, 1912.

Present:—Sir Ashutosh Mookerjee, KT., Judge, and Mr. Justice Beachcroft.

RAGHU SINGH—DEFENDANT—APPELLANT

versus

SHEW PROSAD RAI—PLAINTIFF—RESPONDENT.

Restitution—Suit for possession decreed in first Court—Forcible possession taken by plaintiff—Subsequent reversal of decree—Application by defendant for restitution and mesne profits, if may be entertained—Civil Procedure Code (Act V of 1908), s. 144.

Section 144 of the Civil Procedure Code was enacted with a view to shorten litigation and afford speedy relief A narrow construction of the section so as to restrict its application should not be adopted.

Where a successful plaintiff in a suit for possession took possession of the property in suit by force and not by execution of the decree, and the decree was set aside on appeal;

RAGHU SINGH *v.* SHEW PROSAD RAI.

Held, that an application by the defendant for restitution of the property to him with the mesne profits enjoyed by the plaintiff in the interval by virtue of his possession was maintainable under section 144 of the Civil Procedure Code.

Section 144 is not limited to restitution of what may be technically described as mesne profits; if an appropriate order of restitution is made under the section no question of limitation arises.

The Court will not, in the interests of justice, be astute to force the parties to a separate suit, merely to allow the question of limitation to be raised.

Appeal from the order of the Subordinate Judge of Bhagalpur, dated the 13th September 1911, affirming that of the Munsif of Beguserai, dated the 4th Jully 1911.

Babus *Biraj Mohan Majumdar* and *Surendra Nath Ghosal*, for the Appellant.

Babu *Karunamoy Bose*, for the Respondent.

JUDGMENT.—This appeal is directed against an order by which the Court of Appeal below, in concurrence with the Court of first instance, has refused an application for restitution under section 144 of the Code of Civil Procedure of 1908. The circumstances under which that application was made may be briefly stated. The respondents commenced an action against the appellants on the 9th February 1903 for declaration of title to immoveable property, for confirmation of possession, and, in the alternative, for recovery of possession. The suit was decreed on the 31st August 1903 by the primary Court, in these terms: "The plaintiffs do get confirmation of possession, and, in the alternative, *khas* possession." Upon appeal, this decree was confirmed by the District Judge on the 19th February 1904. On appeal to this Court, the decree of the District Judge was set aside on the 2nd March 1906 and the case was remanded for re-consideration. The District Judge, on the 18th August 1906, again affirmed the decree of the original Court. On appeal to this Court, this decree was set aside on the 6th April 1910 and the case was again remanded. On the 10th June 1910, the District Judge re-heard the appeal and discharged the decree of the Court of first instance. The decree of the District Judge has been this day affirmed by this Court. The position, therefore, is that the erroneous decree of the Court of first instance was in full operation from the 31st August 1903 to the 10th June 1910. The case for the appellants is, that, on the 2nd September 1903, the successful plaintiffs by force obtained possession of the disputed property; they pray, accordingly, that under section 144 of the Civil Procedure Code, the plaintiffs-respondents be directed to deliver up the property together with the profits enjoyed in the interval by virtue of their possession. The Courts below have dismissed the application on the ground that it is not maintainable under section 144, inasmuch as, according to the case of the applicants, the respondents did not obtain delivery of possession by execution of the decree. The Courts have held in substance that the only remedy of the appellants is by way of a suit for ejectment and mesne profits. In our opinion, this view cannot be supported.

Section 144 provides that where and in so far as a decree is varied or reversed, the Court of first instance shall, on the application of any party entitled to any benefit by way of restitution or otherwise, cause such restitution to be made, as will, so far as may be, place the parties in the position which they would have occupied but for such decree or such part thereof as has been varied or reversed: and for this purpose, the Court may make any orders, including orders for the refund of costs and for the payment of interest, damages, compensation and mesne profits which are properly consequential on such variation or reversal. Sub-section (2) of the section further provides that no suit shall be instituted for the purpose of obtaining any restitution or other relief which could be obtained by application under sub section (1). It is worthy of note that the section does not expressly state that the successful party becomes entitled to the benefit by way of restitution, only when he has been deprived of the property in execution of a decree which is ultimately set aside; and we ought not to adopt a narrow construction so as to restrict the application of this salutary provision of the law, which was enacted with a view to shorten litigation and afford speedy relief. In the case before us, on the 31st August 1903, the plaintiffs were declared to be the rightful proprietors of the property. If, as the appellants allege, the successful party subsequently obtained possession, that possession must be attributed to the decree in their favour. Indeed,

it has not been suggested to us that after the date of the decree, the respondents could have taken possession of this property under any independent claim of right; and as they held the decree in their favour, their possession, at that stage at least, could not be deemed wrongful. No doubt, it has ultimately transpired that the decree was erroneously made and, therefore, the plaintiffs are liable to restore the property to the appellants. In so far as restitution of the property itself is concerned, it has not been seriously contended that a separate suit should be brought; in fact, it is conceded that the institution of a separate suit for the purpose would be an idle formality, as there could obviously be no pretence of an answer to the claim. But if, for the purpose of restitution of possession, section 144 is applicable, it is difficult to appreciate why, in so far as restitution of profits is concerned, the section should be differently interpreted. It may be conceded, as observed in *Safaradti* v. *Durga Prosad* (1), that section 144 does not create a new substantive right, but merely affords a convenient procedure. Here, however, no question can possibly arise as to the liability of the respondents to restore the profits received by them. What was said by Lord Cairns in *President and Governors of Magdalen Hospital* v. *Knotts* (2), namely, that when a voidable grant has been made, as the grant is valid till avoided, the right to mesne profits does not exist, is plainly of no assistance to the respondents. When the erroneous decree of the original Court was ultimately reversed, the only possible justification for their possession disappeared, and we cannot discover any conceivable principle of justice, equity and good conscience under cover whereof they may claim to retain the profits. Their learned Vakil has fully realised this position, and has, as a last resort, argued that the appellants should be driven to a new suit to recover the profits. He has frankly confessed that if the plaintiffs are thus driven to institute a new suit, they may be met by the plea that they are entitled to recover profits only in respect of three years antecedent to the suit, although, as a matter of fact, they have been kept out of possession of the property for nearly seven years. Whether a plea of limitation can be successfully taken under such circumstances, is at least open to serious doubt in view of the decisions in *Surno Moyee* v. *Shooshee Mokhee Burmonia* (3); *Dhunput Singh* v. *Saraswati Misrain* (4); *Rangayya Appa Rao* v. *Bobba Sriramulu* (5) and *Holloway* v. *Guneshwar Singh* (6). But, even if it be assumed that the plea of limitation may be urged with some plausibility in a suit for recovery of the profits, that is all the greater reason why relief should be afforded under section 144. That section, it may be observed, is not limited to restitution of what may be technically described as mesne profits, and if an appropriate order for restitution is made thereunder, no question of limitation arises. The Court will not, in the interests of justice, be astute to force the parties to a separate suit, merely to allow the question of limitation to be raised in a case of this description. The appellants were not in a position to institute a suit against the plaintiffs-respondents before the 10th June 1910, when the suit was ultimately dismissed; and they cannot now be justly driven to another suit to be restored to the position they would have occupied but for the erroneous decree. We may further point out that the principle embodied in section 144 is of much wider application than the section itself, as is clear from the decision in *Beni Madho Singh* v. *Pran Singh* (7), where the doctrine of restitution was applied to a case in which an auction-purchaser had taken possession of the property, and after the reversal of the sale, was held liable to make restitution to the judgment-debtor.

The result is, that this appeal is allowed, the orders of the Court below set aside, and the case remanded to the Court of first instance in order that the facts may be investigated. The appellants are entitled to their costs in this Court as well as in the Court of the District Judge. We assess the hearing fee in this Court at three gold *mohurs*. The costs in the Court of first instance will abide the result. All the papers which have been produced in this Court will be made part of

(1) 16 C. L. J. 83; 16 Ind. Cas. 966.
(2) (1879) 4 App. Cas. 324 at p. 334; 48 L. J. Ch. 579; 40 L. T. 466; 27 W. R. 602
(3) 12 M. I. A. 244; 11 W. R. (P. C.) 5; 2 B. L. R. (P. C.) 10.
(4) 19 C. 267.
(5) 27 M. 143.
(6) 3 C. L. J. 182.
(7) 15 C. L. J. 187; 14 Ind. Cas. 456.

the record and transmitted to the Court of first instance, which will consider the question of their admissibility.

Appeal allowed: *Case remanded.*

MADRAS HIGH COURT.

ORIGINAL SIDE APPEAL No. 34 OF 1910.

September 16, 1912.

Present:—Sir Ralph Benson, Offg. Chief Justice, and Mr. Justice Sankaran Nair.

Syed GAFFUR SAHEB AND OTHERS—APPELLANTS

versus

Syed MOOSA SAHEB AND ANOTHER—RESPONDENTS.

Trust—Trusteeship of Darga—*Vesting of trurteeship in two persons—Succession to trusteeship, how to be determined*—Per stirpes *or* per capita—*Muhammadan Law.*

Where the trusteeship of a Darga and the right of management thereof and the enjoyment of its emoluments vested in two persons:

Held, that the office of trustee with the right to the emoluments devolved, on their death, to their heirs, according to the rules of Muhammadan Law, *per stirpes* and not *per capita.*

Kunhi Beevi v. *Abdul Aziz*, 6 M. 103, referred to.

Appeal from the judgment of the Hon'ble Mr. Justice Wallis, dated 11th August 1910, in the Ordinary Original Civil Jurisdiction of this Court in Suit No. 116 of 1909.

Mr. *C. Venkatasubramaniah*, for the Appellants.

Mr. *S. Guruswami Chetti*, for the Respondents.

JUDGMENT.—The suit relates to the possession and management of the Darga of Hazarath Syed Moosa Qadiri, situated in Mount Road, Madras. The plaintiff's case is that his father, Syed Ismail, and one Gulam Dastagir, the father of the defendants, had been in possession and management with equal rights during their life-time, performing the duties of the office of Superintendent of the said Darga and enjoying the emoluments and gifts pertaining to it by inheritance. He contends that he is entitled to succeed his father Ismail Sahib in the management with the rights that he had and that defendants Nos. 1 and 2 are only entitled to the interest which their father Gulam Dastagir had. The contention of the defendants is that, all of them being the descendants of a common ancestor, the succession is *per capita* and that each of them, the plaintiffs and defendants, is entitled to one-third share in the management and in the emoluments pertaining to the Darga. Wallis, J., upheld the plaintiff's contention and decided that the 1st plaintiff and defendants Nos. 1 and 2 are entitled to perform the duties of a *Majawar* (superintendent) by turns, the defendants being entitled to one moiety and the 1st plaintiff being entitled to the other moiety.

There is no evidence when the founder died; no evidence whether any rules of succession were established by him. Nor is there any evidence of any usage governing the succession to the management of this institution or of similar institutions in the locality.

It is conceded that the property is not devoted exclusively to religious purposes. After defraying the expenses of lighting and clearing the Darga, paying the watchmen, celebrating the annual saint's day, the balance of the income is appropriated by the parties to their own use. According to the plaint, the plaintiff got a moiety and defendants the rest. In the written statement that the plaintiff was paid a moiety is denied and it was stated that the defendants' father, who was in sole management after the death of plaintiff's father the plaintiff being a minor, paid something to the plaintiff's mother for her maintenance.

The plaintiff has not proved the allegation in the plaint and there is no finding in his favour. No other mode of succession having been set up, and both parties conceding that the right of management descends according to the laws of inheritance, the only question being whether it descends *per capita* or *per stirpes*, we are of opinion that succession must be governed by the Muhammadan law of inheritance. See also the case of *Kunhi Bivi* v. *Abdul Aziz* (1). The plaintiff is accordingly entitled to succeed his father and the defendants are only entitled to take their father's share. This view is supported by the authorities cited by Wallis, J., Macnaughten p. 341, Wilson's Digest, II Edition, 372, and Ameer Ali, Volume I, p. 426 (3rd Edition). The general statement in Macnaughten, p. 339, that charitable donations

(1) 6 M. 103.

should be distributed among the heirs of the departed saint is not applicable to the present case which is not a case of succession to the departed saint.

We agree, therefore, with the learned Judge and dismiss the appeal with costs.

Appeal dismissed.

CALCUTTA HIGH COURT.
SECOND CIVIL APPEAL NO. 954 OF 1906.
May 29, 1908.
Present:—Mr. Justice Mitra and Mr. Justice Bell.
BRAHAMDEO NARAIN SINGH—DEFENDANT—APPELLANT
versus
RAMDOWN SINGH—PLAINTIFF—RESPONDENT.

Landlord and tenant—Non-transferable holding, purchaser of portion of—Rights of purchaser—Collusive decree by landlord against recorded tenant to defeat purchaser's right—Payment of decretal amount by purchaser—Suit by purchaser for amount paid by him and for declaration that the decree was fraudulent, whether maintainable—Fraud—Right of suit.

A purchaser of a portion of a non-transferable holding cannot be ejected. He has a subsisting right which cannot be denied, though the landlord may not recognise him and only looks to the recorded tenant.

Kabil Sardar v. *Chunder Nath Nag Chowdhury*, 20 C. 590, relied upon.

Therefore, a suit for a declaration that a decree obtained by the landlord (defendant No. 1) against his recorded tenant (defendant No. 2) for arrears of rent, is fraudulent and inoperative against the plaintiff who is the mortgagee of a portion of the non-transferable holding of the tenant, and for recovery of the sum of money paid by the plaintiff for satisfaction of the said decree, is maintainable.]

Appeal from the decree of the first Subordinate Judge, Mozafferpur, dated the 21st March 1906, affirming that of the Munsif of Sitamarhi, dated the 20th November 1905.

Babu *Joy Gopal Ghosha*, for the Appellant.

Babus *Umakali Mukherjee* and *Kulwant Sahai*, for the Respondent.

JUDGMENT.—This is an appeal in an action for a declaration that the decree obtained by the defendants first party against the defendants second party for arrears of rent is fraudulent and inoperative as against the plaintiff and for recovery of the sum of money paid by the plaintiff for satisfaction of the said decree. The plaintiff said that he was compelled to pay the amount as his mortgage right, which he had obtained by assignment from the third party defendants, would have been jeopardized by the sale for arrears.

The lower Courts have held that the annual rental of the holding was Rs. 22, whereas in the rent suit the claim was at the rate of Rs. 60 and that no arrears were due and still the first party defendants had sued the second party defendants and obtained a decree. The lower Courts have accordingly found that the decree was fraudulent and was intended to defeat the right which the plaintiff had obtained by assignment from the defendants third party.

Two questions have been argued before us. The first is that the holding, to a portion of which the plaintiff has obtained a mortgage right, was not transferable by custom or local usage and the lower Courts did not come to any finding on this question. The second is that certain documents which were tendered in time were improperly rejected.

As regards the second contention, the lower Court excercised its discretion in rejecting the documents and no ground has been made out for our directing the lower Court to receive them.

As regards the first point, the contention raised is that, for the purposes of this appeal, it must be assumed that the holding was not transferable and the plaintiff, having a mortgage interest in respect of a portion, has no *locus standi* to sue and he cannot question the validity of the decree.

We are of opinion that this contention is not sound. In *Kabil Sardar* v. *Chunder Nath Nag Chowdhry* (1), the Court held that a purchaser of a portion of a non-transferable holding could not be ejected. He has a subsisting right though the landlord may not recognise him. The landlord only looks to the recorded tenant. But the right cannot be denied and in the present case, the right would have been seriously affected, if the amount of the decree had not been paid by the plaintiff. We cannot hold that the plaintiff had no *locus standi*. We accordingly dismiss this appeal with costs.

Appeal dismissed.

(1) 20 C. 590.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1263 OF 1911.

September 26, 1912.

Present:—Mr. Justice Sundara Aiyar and Mr. Justice Sadasiva Aiyar.

JAGADAMBAL AMMAL—APPELLANT

versus

RAMASWAMY IYENGAR—RESPONDENT.

Execution of decree—Attachment of properties, objections to, by parties—Inquiry in execution—Objection to plaintiff's purchase at auction sale—Objection by stranger.

All objections to attachment of property in execution of a decree raised by parties to the suit must be made in execution proceedings.

Ramaswami Sastrulu v. *Kameswaramma*, 23 M. 361 (F. B.), referred to.

If the attachment and sale were effected without the knowledge of the party objecting, the proper course for him is to get the sale set aside in execution proceedings.

An objection to the purchase of properties at a Court sale without the leave of the Court can only be raised by parties to the suit and not by strangers.

Second appeal against the decree of the Subordinate Judge of Trichinopoly in A. S. No. 374 of 1910, preferred against that of the District Munsif of Namakal, in O. S. No. 100 of 1908.

Mr. *G. S. Ramachandra Aiyar*, for the Appellant.

Mr. *C. Krishnamachariar*, for the Respondent.

JUDGMENT.—The questions arising in this second appeal are, no doubt, questions of law, but they have, in our opinion, all been decided correctly by the lower Appellate Court.

With respect to the objection of the plaintiff's purchase of the shares of the defendants Nos. 4 to 7 in Orignal Suit No. 3 of 1883 on the ground that they were not personally liable under the decree for the mortgage debt, those defendants were bound to raise any objection they had to the attachment of the property in execution proceedings. See *Ramaswami Sastrulu* v. *Kameswaramma* (1). The lower Courts have found that all rights in the land, including the shares of defendants Nos. 2 to 7, were attached. If, as is suggested, those defendants had no notice of the attachment and sale, the proper course for them would be to get the sale set aside in execution proceedings. The 1st defendant has been found to have no right in the property. The sale having become final against the defendants Nos. 4 to 7 in Original Suit No. 3 of 1883, the 1st defendant cannot now set up their title

With regard to the question of the plaintiff's purchase having been made without the leave of the Court, that is an objection that could be raised only by the parties to the suit and not by a stranger like the 1st defendant. We dismiss the second appeal with costs.

Appeal dismissed.

(1) 23 M. 361 (F. B.).

CALCUTTA HIGH COURT.

SECOND CIVIL APPEALS NOS. 1974 AND 2097 OF 1906.

July 23, 1908.

Present:—Mr. Justice Caspersz and Mr. Justice Sharfuddin.

GADADHAR GHOSE—PLAINTIFF—APPELLANT

versus

MIDNAPUR ZEMINDARI CO. LD.—DEFENDANTS—RESPONDENTS.

Fraud—Person affected by fraud—Right of suit—Landlord and tenant—Non-transferable holding, purchaser of—Rights of purchaser—Suit by purchaser to set aside fraudulent decree obtained by landlord against plaintiff vendor, whether maintainable.

It is open to any person affected by fraud to impeach it and to sue to set aside the results accruing from such fraudulent conduct.

The purchaser of a portion of a non-transferable holding has a subsisting right in spite of the non-recognition of the same by the landlord.

Kabil Sardar v. *Chunder Nath Nag Chowdhury*, 20 C. 590 and *Brahamdeo Narain Singh* v. *Ramdown Singh*, 17 Ind. Cas. 125; 16 C. L. J 139, relied upon.

The purchaser of a non-transferable holding has sufficient interest to maintain an action for declaration that certain rent decrees were collusively and fraudulently obtained by the landlord against the purchaser's vendor, that the plaintiff is not bound by those decrees, and that the holding cannot be sold in execution thereof. He should not be shut out from showing that there was collusion between his vendor and his vendor's landlord.

Patit Sahu v. *Hari Mahanti*, 5 C. W. N. 126; 27 C. 789, distinguished.

Appeals from the decrees of the 2nd Subordinate Judge, Midnapur, dated the 11th June 1906, affirming those of the third Munsif, Midnapur, dated the 6th December 1905.

Babu *Joy Gopal Ghosha*, for the Appellant.

GADADHAR GHOSE v. MIDNAPUR ZEMINDARI CO. LD.

Babu *Tarak Chandra Chakrabarti*, for the Respondents.

JUDGMENT.—The plaintiff-appellant before us purchased a certain *jote* from one Arun Chunder Biswas, who had held that *jote* under the defendant Company. The defendant Company obtained two decrees for rent against Arun Chunder Biswas, and the plaintiff instituted two suits giving rise to the present second appeals for declaration that the rent decrees were fraudulent, that the plaintiff is not bound by those decrees, and that the *jote* could not be sold in execution thereof.

The suits have been dismissed in both the Courts below: but the substantial issue No. 7, "Whether the decree in question is fraudulent, and liable to be set aside," has not been gone into. The Subordinate Judge thought that the plaintiff claiming as transferee of the *jote* was entitled to maintain the suit, but he has also found, in agreement with the Court of first instance, that the *jote* was a non-transferable one, and that, therefore, the plaintiff had no interest to support his character as such. The arguments before us must proceed, and have proceeded, on the finding that the *jote* of Arun was found to be a non-transferable *jote*.

The contentions raised are the following:—*first*, that the plaintiff by his purchase obtained a sufficient interest to maintain the suit; *secondly*, that it was not necessary in the present litigation to prove that occupancy-rights are transferable by custom; *thirdly*, that in a suit based on an allegation of fraud, the plaintiff can succeed if he can prove the fraud alleged; *fourthly*, that the question whether occupancy-rights are transferable or not, is not relevant to the present inquiry; *fifthly*, that the case should go back for a determination of the seventh issue already mentioned; and lastly that the landlords, having withdrawn a certain amount deposited by the plaintiff, thereby recognised the transfer.

In the view that we adopt, it will be necessary to send back the case for a determination on the merits. In paragraph 4 of the plaint, there was a distinct allegation not only of fraud, but also of collusion between the landlord and the plaintiff's vendor. It is open to any person affected by such a fraud to impeach it, and to sue to set aside the results accruing from such fraudulent conduct. The learned Subordinate Judge has distinguished the case of *Asgar Ali* v. *Asaboddin Kazi* (1). From the observations of the learned Judges at pages 139 and 140, it will appear that they held that the transferee of a holding which has not been recognised is never-the-less entitled to protect what interest he has, and that he can, therefore, make application under sections 310A and 311 of the Civil Procedure Code; and in making these observations, they referred to the case of *Kabil Sardar* v. *Chunder Nath Nag Chowdhry* (2). The latter decision was approved (by Mitra and Bell, JJ.) in *Brahamdeo Narain Singh* v. *Ramdown Singh* (3), where it was said that the purchaser of a portion of a non-transferable holding has a subsisting right in spite of the non-recognition of the same by the landlord. Of course, the landlord will not recognise the right but the right transferred cannot be denied. The case before us appears to be even stronger, because the question of fraud has not been gone into. The plaintiff has been absolutely shut out from showing, if he is able to show, that there was collusion between his vendor and the vendor's landlord. If, owing to such fraud, the Court was prevailed upon to pass decrees which it should not have passed, the plaintiff is entitled to go into the matter and he has sufficient interest to maintain the action whether the *jote* is transferable or not.

The learned Vakil for the respondent relies, particularly, on the case of *Patit Sahu* v. *Hari Mahanti* (4). That, however, was not a case involving a mere declaration, but other reliefs, including confirmation of possession, and it may be clearly distinguished from the case with which we are now dealing.

For these reasons, we are of opinion that the judgment of the Appellate Court cannot be sustained, and we accordingly allow these appeals and send back the cases to the Court of first instance for disposal of the other issues in due course.

The plaintiff appellant is entitled to a refund of the Court-fees paid on his memorandum of appeal. The other costs will abide the result.

Appeal allowed; Case remanded.

(1) 9 C. W. N. 134.
(2) 20 C. 590.
(3) 16 C. L. J. 139; 17 Ind. Cas. 125.
(4) 5 C. W. N. 126; 27 C. 789.

NEELAKANDAN NAMBUDRI *v.* NARAYANAN NAMBUDRI.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 983 OF 1911.

September 16, 1912

Present:—Mr. Justice Sundara Aiyar and Mr. Justice Sadasiva Aiyar.

SALLIJIB KOTAKAL MANAKAL NEELAKANDAN NAMBUDRI AND OTHERS—APPELLANTS.

versus

SALLYIL KOTTAKAT MANAKAL, KARNAVAN *and* MANAGER NARAYANAN NAMBUDRI AND OTHERS—RESPONDENTS.

Malabar Law and Usage—Uralans of temple—Saswatham, grant of, by devaswom to tarwad *whose Karnavan is an urulan.*

The grant of a Saswatham is *prima facie* an improper act and where it purports to be granted by a Devaswom to a *tarwad*, the Karnavan of which is himself the Uralan of the Devaswom, the Courts should ordinarily not enforce it.

Any transaction by which a trustee obtains an interest in properties belonging to the trust is to be deprecated, and where it can be set aside without injury to the trust, the Court should do so.

Second appeal against the decree of the Court of the Subordinate Judge of South Malabar at Palaghat, in A. S. No. 675 of 1910, preferred against that of the Court of the District Munsif of Ottapalam, in O. S. No. 144 of 1909.

Mr. *C. V. Ananthakrishna Iyer*, for the Appellants.

Messrs. *T. R. Ramachandra Iyer* and *N. A. Vaidyanath Iyer*, for the Respondents.

JUDGMENT.—This is a suit for a declaration that a Saswatham granted to the family of the 2nd defendant in 1897 is not binding on the Devaswom of which the 1st defendant, the managing member of the plaintiff's *tarwad* and the 2nd defendant, the manager of the family of defendants Nos. 2 to 9, are the Uralans. The Saswatham was granted by a *karar* executed between the 1st defendant and the 2nd defendant. Admittedly, the 2nd defendant's family did not possess any Saswatham rights in these properties before. The grant of a Saswatham is *primafacie* an improper act. It has been upheld in this case by the lower Courts on the ground that the Devaswom was not in a position to establish its title to at least four out of the six items of the properties comprised in the Saswatham. This finding is not open to any legal objection. With regard to item 2, one of the remaining two items, the *jenmam* title of the Devaswom was admitted by the Karnavan of the 2nd defendant's *tarwad* about the year 1863. According to the admission, the *tarwad* was then holding it on a Kanom under the Devaswom.

Whether in 1897 the Devaswom was in a position to recover the property by proving that the Kanom was not made more than sixty years before 1863, the date of the admission, appears to be very doubtful According to the finding of the Subordinate Judge, there is nothing to show what the date of the Kanom was.

With respect to item 6, however, the case stands on a different footing. The Devaswom had actually obtained a decree in ejectment against the 2nd defendant's *tarwad*. The 2nd defendant, though a minor at the time of the suit in which that decree was passed, was apparently a party to the suit and he could not have recovered the property back except by establishing that the decree was not binding on him on the ground of fraud or collusion. The position of matters then may be taken to be this: there were five items of property which it is not shown that the Devaswom could have recovered from the family of defendants Nos. 2 to 9. The 1st defendant, who was the Uralan representing the plaintiff's branch, entered into a *karar* by which he got an acknowledgment of Devaswom's *jenmam* title to these five items by giving a Saswatham over those five items as well as over the 6th item, the Devaswam's title to which had been established. The plaintiffs have not shown how much loss the Devaswom has sustained by grant of the Saswatham over the 6th item. We are not prepared to differ from the lower Courts and to hold that the circumstances, on the whole, do not warrant the finding that the Saswatham was for the benefit of the Devaswom. We cannot, however, conclude this judgment without expressing our strong disapprobation of the grant of a Saswatham to a family, the Karnavan of which is one of the Uralans. Any transaction by which a trustee obtains an interest in properties belonging to the trust is much to be deprecated; and, in our opinion, it is equally vicious to allow the members of a *tarwad*, the Karnavan of which is a trustee, to acquire an interest in the properties of the trust. We have no doubt that where transactions of this character could be set aside without injury to the trust, the Courts would be much disinclined to upheld them. The circumstances of this case,

however, are rather peculiar. The *tarwad* of the 2nd defendant was apparently in possession of the properties for a long time before the grant of the Saswatham and the result of setting aside the *karar* which created the Saswatham's right might be injurious to the Devaswom, as the 2nd defendant's *tarwad* might then be in a position to assert its own *jenmam* right to the properties. Mr. Anantakrishna Iyer contends that the 2nd defendant's *tarwad* itself was the trustee and that any previous possession on its part would be of no avail as against the Devaswom. In the plaint apparently, there was an allegation that the *tarwads* of the plaintiffs and the 1st defendant, on the one hand, and of the 2nd defendant, on the other hand, were the Uralans of the temple. This allegation was denied in the written statement and it was stated that it was the Karnavans of the two *tarwads* that had the Uraima right. No issue was framed on this question. It is contended that the Subordinate Judge proceeded on the footing that the Uraima right was vested in the two *tarwads*. We do not think this argument is correct. The Subordinate Judge does, no doubt, use the language referred to; but we cannot help thinking that the language used was loose and was intended to signify no more than that the head of each *tarwad* was the Uralan. It is, of course, possible that all the members of two *tarwads* might be trustees of a temple. But where the Uraima right is said to be in several *tarwads*, the fact usually is that it is vested in the senior member of each of the *tarwads*. Very serious and anomalous consequences might follow, with respect to a temple in which there is a plurality of Uralans, who get their rights by virtue of their being the heads of *tarwads*, if it should be held that all the members of each of the *tarwads* are trustees. As the plaintiffs did not ask for an issue to establish their allegation, we do not think we should frame an issue at this stage. The result is that the second appeal must be dismissed with costs.

Appeal dismissed.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 19 OF 1911.

April 22, 1912.

Present:—Mr. Stanyon, A. J. C., and Mr. Hallifax, A. J. C.

SHIOLAL—APPELLANT

versus

NANHELAL—RESPONDENT.

Mortgage—Foreclosure—Foreclosure of same property twice under separate mortgages—Mortgage of undivided share of village—Mortgagee's right to sir—Nature of sir right—Proprietary and cultivating rights—Central Provinces Tenancy Act (IX of 1883), s. 42—Applicability to mortgages—Central Provinces Tenancy Act (IX of 1898), as amended by Act XXI of 1899, s. 45 (6)—Transfer of Property Act (IV of 1882), s. 8.

A mortgagee is fully entitled to foreclose twice on the same property. Where a mortgagee holds two mortgages by conditional sale over the same property, he can get a separate foreclosure decree under each of them, whether at the same time or one after the other.

The cultivating or occupancy-rights in the *sir* land do not come into existence on loss of the proprietary right in the land. The proprietary and cultivating rights are co-existing and component parts of the *sir* right.

Diwan Zalim Singh v. *Chhaumilal*, 11 C. P. L. R. 133, followed.

Consequently, a mortgagee, entitled to proceed against a mortgagor's rights in the *sir* land, can get a decree against what is left of those rights—the ex-proprietary cultivating rights in the land, although the proprietary right may have passed to the same mortgagee or to another person.

Section 42 of the Central Provinces Tenancy Act of 1883, applies only to sales of three specified kinds and not to mortgages, whether by conditional sale or of any other kind.

Behari v. *Sadwar*, 7 C. P. L. R. 25, followed.

Although a mortgage in India is not a transfer of property but only of an interest in property, yet section 8 of the Transfer of Property Act is applicable to mortgages.

A mortgage of an undivided share in a village includes the *sir* rights and all other rights, which the mortgagor is capable of transferring, in the absence of any words showing an intentain to retain or exclude them.

Asghar Rizz Khan v. *Mahomed Mehdi Hossein Khan*, 30 C. 556; 7 C. W. N. 482, 30 I. A. 71 (P. C.), followed.

First appeal against the decree of the District Judge, Seoni, dated the 12th December 1910.

Mr. *J. Mitra*, for the Appellant.

Mr. *J. C. Ghosh*, for the Respondent.

JUDGMENT.—The plaintiffs sued for foreclosure on a mortgage executed in their favour on 23rd August 1888 by the defendant and four others now deceased. The property mortgaged was a third share in

Mouza Dhaturia and a half share in *Mouza* Dongaria, the income of both shares and eight houses, four in each village. On the 13th May 1889, there was a second mortgage between the same parties of the same two village shares. The second deed does not mention the houses, and neither deed says a word about *sir* land. In 1896, the plaintiffs sued on their second mortgage, that of 1889, and obtained a foreclosure decree, which was made absolute. On that decree absolute, the first Court gave them cultivating rights in the *sir* land, but the two Appellate Courts refused it. The judgment of this Court (Obbard, J. C.) is dated the 22nd July 1899. The learned Judicial Commissioner held that section 45 of Act IX of 1898 was applicable and not section 42 of Act IX of 1883. It is to be remembered that both appellate judgments were given while Act IX of 1898 was in force as originally passed, and before the amendment of the sixth sub-section of section 45 by Act XXI of 1899, which came into force on the 8th September 1899.

The plaintiffs' prayer was for foreclosure, not of the whole of the property mentioned in the deed on which they are suing, but of the houses, which were not included in the other deed, and of the cultivating rights in the *sir* land which were held in the previous suit not to have been so included. It will be convenient to deal first with the houses. In regard to them, the defendant's pleading was as follows: "The houses referred to do not exist. Plaintiffs have already foreclosed them and taken possession under the deed, dated 13th May 1889. They were pulled down and destroyed long ago." The issue arising out of this was thus stated: "Is the defendant in possession of any of the houses mortgaged in the deed in suit?" The learned District Judge held that the evidence of the three witnesses examined by the plaintiffs conclusively proved the contention of the defendant, and thinking it, therefore, unnecessary to hear the defendant's evidence, found that the defendant is not in possession of any of the houses mortgaged. These are the very general terms used in the judgment for the finding and the reasons therefor. There is no definite finding that the houses have ceased to exist or that they passed into the possession of the plaintiffs under the mortgage of 1889 or otherwise. The finding of fact is contested in appeal, and it would not be necessary for us to discuss it, if it were not for what seems like an implied finding that the plaintiffs themselves took possession of the houses under their mortgage of 1889. Even if they have ceased to exist or have passed into other hands than those of the defendant, the plaintiffs are entitled to a decree in respect of the property admittedly mortgaged to them, and they can be left to follow up that property after foreclosure.

And even if the plaintiffs have already taken possession of the houses, it has been admitted before us, and it cannot be denied, that a mortgagee is fully entitled to foreclose twice on the same property. The second decree may be worth nothing or it may be worth a great deal to him, but that is no body's concern but his own. But we cannot find that any part of the defendant's contention is proved. Of the three witnesses, the first two speak only of the houses in Dhaturia and the third only of those in Dongaria. The first says merely that the defendant Nanha owns a house which he has lately built on the outskirts of the village on a site which formerly belonged to his cousin Deman Patel. The second witness, the Kotwar of Dhaturia, says the plaintiffs took formal possession of the four houses in the village under their foreclosure decree in the previous suit, but were never actually in possession; the sites of three of them are vacant and Behari, the Lambardar, has built a house on the site of the fourth. The third witness, who is Kotwar of Dongaria, mentions only three houses in that village, and says the plaintiffs never took possession of them, and then goes on to speak of two only. He says the defendant's father Amri pulled down one and took away the materials and "the other fell down." What he says in cross-examination seems to mean that two out of the three sites have since been built over by other persons and the third is still vacant. This very poor evidence is far from sufficient to prove that the defendant is not now in possession of the houses or that they have ceased to exist. The first witness knows nothing, so what it comes to is that the Kotwar of each village says the houses have passed out of the possession of the defendant and have ceased to exist. And they are both obviously mis-

taken, the first because he says the houses were foreclosed in the previous suit (and they are not mentioned in the deed or any of the three judgments on the record), and the other because he speaks of three houses only.

If a definite finding on this issue were required at this stage, the case would, undoubtedly, have to go back for the examination of the witnesses whom the defendant apparently was ready to produce. If it were apparent that there was no other property included in the mortgage and claimed in this suit, then it would probably be advisable to thresh out this matter, to save the Court from the absurd position of granting a decree in respect of property which had been alleged and could possibly be proved not to exist. But there are still the cultivating rights in the *sir* land, which, in our opinion, the plaintiffs are entitled to foreclose. In the conditional decree, we propose, therefore, to include the houses mentioned in the bond, leaving the question of their existence and identity to be settled at the proper time, that is, after the decree is made absolute.

It has been argued at some length before us that the cultivating or occupancy-right in the *sir* land only came into existence on loss by the defendant of the proprietary right in that land, but the view taken by Ismay, J. C., in *Diwan Zalimsingh* v. *Chadamilal* (1), that the proprietary and cultivating rights are co-existing and component parts of the *sir* right, seems to us so natural and obvious as to admit of no question. The occupancy-right now held by the ex-proprietor is the right which he held as proprietor to cultivate his *sir* land himself. Now, under section 45 (6) of Act IX of 1898, as amended by Act XXI of 1899, the rights of the parties in this case to occupy the *sir* land accrue as if that Act had not been passed. We have then to go back to the Tenancy Act of 1883 and we accept as the settled and unquestionable law of these Provinces the ruling in *Behari* v. *Sadwar* (2) that section 42 of that Act applies only to sales of three specified kinds and not to mortgages, whether by conditional sale or of any other kind. This takes us still further back for the law governing this case to section 8 of the Transfer of Property Act, 1882. The slight difficulty suggested that a mortgage in India is not a transfer of property but only of an interest in property and that, therefore, the provisions of section 8 would not apply, is settled by the judgment of the Privy Council in *Asghar Reza Khan* v. *Mahomed Mehdi Hossein Khan* (3), where their Lordships held that the profit rents of a bazar were included in a mortgage of an undivided share in a village and bazar in the absence of any words showing an intention to retain or exclude them. We hold, therefore, in this case that the mortgage of 1888 included the cultivating rights in the *sir* land. The decree of the lower Court is set aside. In lieu thereof, a conditional decree for foreclosure will issue against the defendant-respondent in respect of the houses and the ex-proprietary cultivating rights in the land specified in the plaint and in the mortgage bond in default of the payment on or before the 22nd of October 1912 of Rs. 12, 228-15-0, the amount due for principal and interest on the mortgage on that date, together with the costs of the plaintiffs-appellants in the suit and in this appeal.

Decree set aside.

(1) 11 C. P. L. R. 133.
(2) 7 C. P. L. R. 25.
(3) 30 C. 556; 7 C. W. N. 482; 30 I. A. 71 (P. C.).

MADRAS HIGH COURT.
SECOND CIVIL APPEAL NO. 854 OF 1911.
September 11, 1912.
Present:—Mr. Justice Sundara Aiyar and Mr. Justice Sadasiva Aiyar.
VELUTHEMANA *alias* PALLIKAT *alias* CHEERAKUSHI ILLOTH, KARNAVAN AND MANAGER ASHTAMURTI NAMBUDRI—APPELLANT
versus
KAPPAT PALAMPADIYAN KOYAMU'S DAUGHTER, PATHUMA AND OTHERS—RESPONDENTS.

Malabar Tenancy Improvements Act (Mad. Act I of 1900), ss. 6, 15—Tables prepared under clause 2 of section 15, object of—Tables prepared after disposal of suit and pending appeal—Remand of suit—Re-valuation—Admissibility of tables.

The preparation by Government of tables under section 15, of the Malabar Tenancy Improvements Act I of 1900, is not intended to create any fresh right in favour either of the tenant or of the landlord. They are admissible in evidence to prove the compensation to which the tenant is entitled and are presumptive evidence of the proper amount of compensation. The compensation, however, is itself

determined by the provisions of section 6, *viz.*, by the market-value.

Where the tables are prepared after the disposal of a suit and pending an appeal, the Appellate Court should not remand the suit for the purpose of determining the compensation according to the tables, though, if a re-valuation became necessary in execution or otherwise, the tables might be received in evidence.

Second appeal against the decree of the District Court of South Malabar, in A. S. No. 406 of 1910, preferred against the decree of the District Munsif of Manjeri, in O. S. No. 308 of 1909.

Mr. *C. V. Ananthakrishna Iyer*, for the Appellants.

Mr. *K. R. Subramanya Sastri*, for the Respondents.

JUDGMENT.—In this case, the plaintiff obtained a decree against the defendant for recovery of certain land. The defendant was entitled to compensation for improvements made by him according to the provisions of the Malabar Tenancy Improvements Act, I of 1900. Section 15 of the Act empowers the Local Government to prepare tables to regulate the manner in which the value of improvements should be computed. Clause 2 of the section provides that "the tables prepared under the section shall, on publication, be receivable in evidence and that the rates and the amounts therein specified shall be presumed to be the proper rate and amounts until the contrary is proved." The compensation due to the defendants was decided by the District Munsif by the appointment of a Commissioner for the purpose. The defendant appealed against the Munsif's judgment. After the judgment of the Munsif and before the presentation of the appeal, the Local Government prepared certain tables under section 15 of the Act. The Appellate Court was of opinion, when the appeal came on for hearing, that the defendant was entitled to the benefit of the rates provided for in the schedule prepared by Government. The District Judge remanded the case to the Munsif for assessing the compensation payable according to the Government tables. The District Munsif did so. The plaintiff apparently adduced no evidence to rebut the presumption that the compensation according to the tables was the proper amount to be awarded to the defendant.

The plaintiff, who has preferred this second appeal to this Court, contends that the District Judge was wrong in holding that on the publication of the tables prepared by Government, the defendant became entitled to compensation at the rates provided in them. We are of opinion that this contention must be upheld. Now, it must be noted that the preparation of the tables by Government is not intended to create any fresh right in favour either of the tenant or of the landlord. The tables are admissible in evidence to prove the compensation to which the tenant is entitled and are presumptive evidence of the proper amount of compensation. The amount to which the tenant is entitled as compensation is itself determined by section 6, namely, the market-value. It is open to both the landlord and the tenant to show that the actual market-value is not what is provided for in the tables. The District Munsif, therefore, had to decide at the original trial what was the actual market value of the improvements. He had to do so on evidence legally admissible then. The new tables prepared by Government did no more than bring into existence fresh evidence of the market value. That evidence was not available when the District Munsif decided the suit. The duty of the Appellate Court was to examine the correctness of the Munsif's judgment and to pass such judgment as the Munsif should have passed. It cannot be said that the judgment of the Munsif was wrong because it was not in accordance with evidence which was not available when he tried the suit. Our attention is drawn by the learned Vakil for the respondent to some provisions in the Act which, he says, show that the intention of the Legislature is that the new tables prepared should be admitted as evidence. Reference is made to clause 2 of section 15, which provides that the tables when published shall be receivable in evidence, and the rates and amounts therein specified shall be presumed to be the proper rates and amounts until the contrary is proved. If the Appellate Court had to take evidence of the value of the improvements, then the tables prepared would be admissible for the purpose. But clause 2 of section 15 would be of no help to the respondent unless the Appellate Court had the right to receive evidence regarding the compensatisn payable. The District Judge here did not distrust the report submitted by the Commissioner on

which the Munsif acted, nor did he come to the conclusion that it was necessary, in order to determine the rights of the parties as they should have been adjudicated by the Munsif, that fresh evidence should be received. The clause does not say that the tables should be received in evidence whenever tendered. The preamble to the Act, in our opinion, does not help the respondent at all. It only shows that the object of the statute was to secure to the tenants the full market-value of their improvements. Reliance was also placed on section 6, clause 3, which entitles a tenant or landlord to a re-valuation of the improvements in execution proceedings when there is a change in the condition of the improvements after their valuation.

It is pointed out that, if a valuation becomes necessary, the tables would then be admissible in evidence. This is, no doubt, so; but that is because, in consequence of a re valuation becoming necessary, the Court has the power then to admit evidence, and whatever is then admissible in evidence could be received. It may be that, if the tenant in this case becomes entitled to a re valuation in execution, he may be able to claim the benefit of the new tables. But no claim to re-valuation was urged in the Appellate Court on account of any change in the condition of the improvements. Section 12 merely says that the mode of valuation most favourable to the tenant out of the modes mentioned in sections 9, 10 and 11, should be adopted by the Court. But that does not entitle the tenant to a value higher than he could claim according to the rules of evidence in force at the time when the value is determined. The District Judge must, therefore, be held to be wrong in directing re-assessment of the compensation according to the new tables. It is admitted that no evidence was adduced by the tenant to show that the valuation submitted by the Commissioner in the Munsif's Court was wrong. That valuation which was adopted by the Munsif must, therefore, be accepted.

We must reverse the decree of the lower Appellate Court and restore that of the District Munsif with costs both here and in the lower Appellate Court. Time for redemption is extended to two months from this date.

Appeal allowed.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 241-B OF 1911

April 29, 1912.

Present:—Mr. Stanyon, A. J. C.

SITARAM—APPELLANT

versus

LAXMAN—RESPONDENT.

Hindu Law—Widow—Re-marriage, effect of—Custom—Re-marriage valid by custom—Kunbis *of Berar*—*Personal law*—Mitakshara—Mayukha—*Unchastity of widow after inheritance*—*Widow's inheritance, essence of*—*Widow re-marrying, incapable of acting as guardian of sons by first marriage*—*Adoption, power to give in*—*Hindu Widows' Re-marriage Act* (*XV of* 1856), *scope of.*

Among *Kunbis* of Berar, widow re-marriage, by a form called *pat*, is permitted and is treated as a valid union.

The personal law of the Berar *Kunbis* is the *Mitakshara* as interpreted by the *Mayukha*, called the Bombay School of Hindu Law.

In a community governed by the general Hindu Law, every custom at variance with that law must be strictly applied and cannot be made the basis of any other variation from the law.

A Hindu widow who contracts a valid re-marriage in accordance with a custom of her caste, is thereby transferred from the *gotra* of her deceased husband to that of her husband by re-marriage, and *ipso facto* forfeits all interest in any estate, which she may have inherited from the former, in favour of the next heir or reversioner of the deceased.

The Hindu Widows' Remarriage Act applies generally to all Hindu widows, irrespective of caste regulations concerning re-marriage.

Obiter dicta:—

Though unchastity in a wife will prevent her from taking an estate of inheritance from her husband, unchastity by a widow, after she has inherited such estate, will not divest what has already vested in her.

It is of the very essence of inheritance by a Hindu widow, as such, that she is the surviving portion of her husband, that, after physical death, he still lives in her as a sort of incarnation of his spiritual being.

By re-marriage, a Hindu widow becomes incapable of giving in adoption a son of her deceased husband or of being the guardian of her minor children by her former husband by virtue of motherhood.

Second appeal against the decree of the District Judge, West Berar, Akola, dated the 21st April 1911, confirming that of the Subordinate Judge, Morsi, dated the 30th November 1909.

Mr. *M. R. Dixit*, for the Appellant.

Mr. *M. Chuckerbutty*, for the Respondent.

JUDGMENT.—The following genealogical tree will facilitate comprehension of this judgment:—

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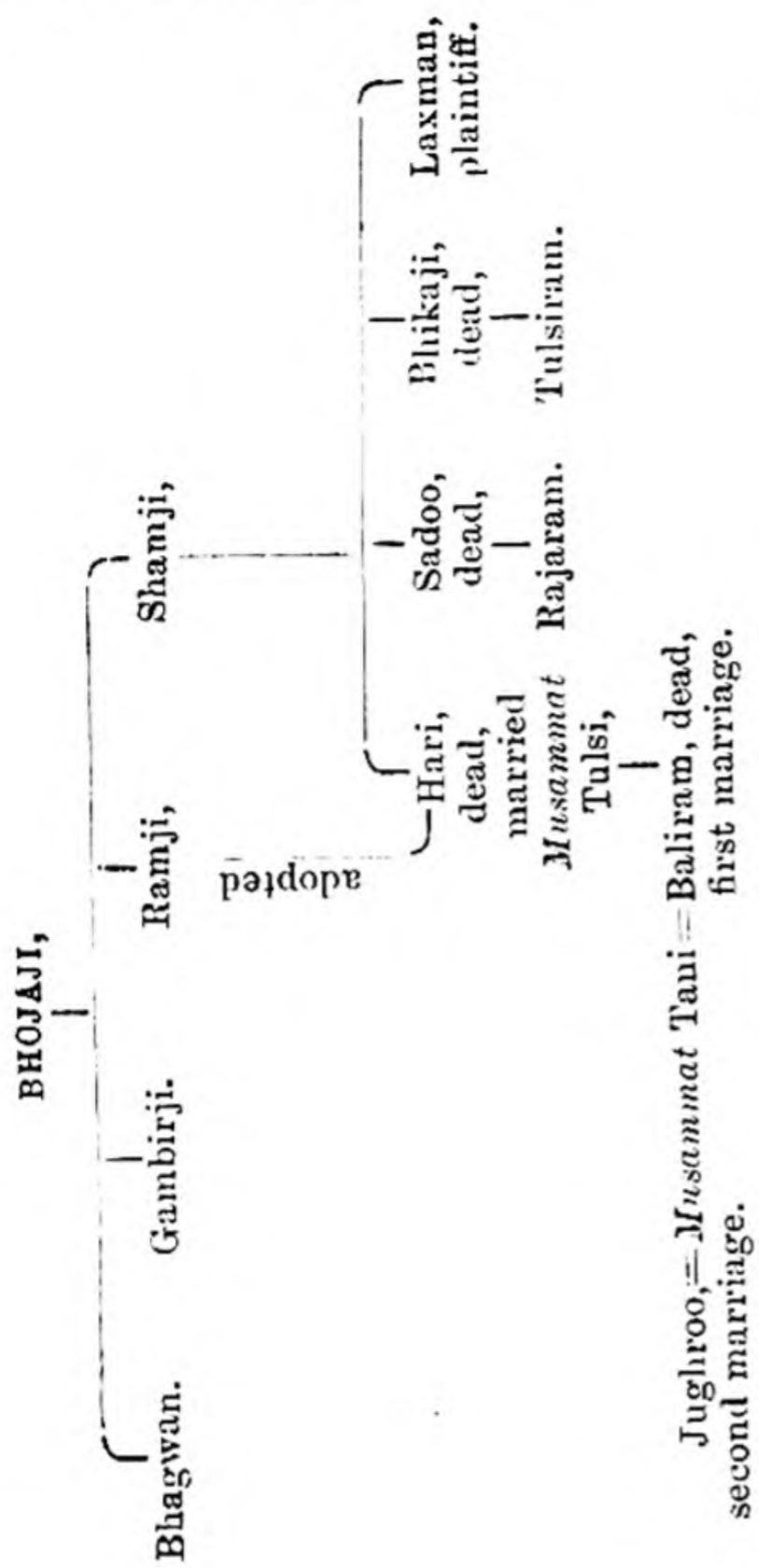

The above genealogy is of a *Kunbi* family in Berar, and the last male holder of the property in dispute was Baliram, who died in June 1900 leaving a widow, *Musammat* Tani, and his mother, *Musammat* Tulsi, him surviving. In accordance with a custom of the caste allowing widow re-marriage, *Musammat* Tani re-married very shortly after the death of Baliram, and *Musammat* Tulsi obtained or retained possession of Baliram's estate. She died in 1906, but *Musammat* Tani is still alive. The plaintiff has brought the present suit for possession of the land as the nearest reversioner of Baliram, entitled to succeed to his estate after the death of *Musammat* Tulsi.

The defendants, who are the appellants in this Court, resisted the suit on the grounds—

(1) that Hari orally gifted the property in 1893, and left directions with his wife *Musammat* Tulsi to confirm the same by executing a deed, which Tulsi accordingly did on the 9th August 1901;

(2) that these defendants had held adverse possession of the land since 1893, and had, in any case, acquired a title therein by prescription; and

(3) that the plaintiff could not maintain this suit during the life-time of *Musammat* Tani, the widow of Baliram, as until her death the reversionary interest would not vest.

The Courts below have found that the alleged gift and adverse possession have not been proved, and that the fact of *Musammat* Tani being still alive is no bar to the suit as on her re-marriage, she forfeited her interest in the estate of Baliram. The claim of the plaintiff has, therefore, been decreed, and the contesting defendants have made this second appeal.

So far as the title set up by the appellants is concerned, they are concluded by the findings of fact arrived at in the Courts below. The only question to be considered in this appeal is whether the existence of *Musammat* Tani makes the suit premature and, therefore, unsustainable. This depends upon whether, on re-marriage with Jughroo, she ceased to be the heiress of Baliram. It is not disputed that among the *Kunbis* of Berar, widow re-marriage, by a form called *pat*, is permitted, and is treated as a valid union and the source of legitimate issue. It is also beyond question that, subject to diversions created by caste customs, the personal law of the Berar Kunbi is the *Mitakshara* as interpreted by the *Mayukha*, otherwise called the Bombay School of Hindu Law.

According to that law, no Hindu widow may re-marry; and if she does so, *ipso facto* she forfeits any estate she may have inherited from her deceased husband. In the eyes of the orthodox among the regenerate classes, such a re-marriage is an act of signal incontinency, necessarily involving a degradation from caste. But, under the present interpretation of the law, a claim for forfeiture of a Hindu widow's estate on re-marriage could not be based on the ground that such an union is an act of unchastity. It is now well established that, though unchastity in a wife will prevent her from taking an estate of inheritance from her husband, unchastity by a widow, after she has inherited such estate, will not divest what has already vested in her. This interpretation of the *Shastras* may be secular

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rather than "Brahminical" but it is an interpretation established by numerous decisions in India, and one which has also received the sanction of the supreme tribunal: *Kery Kolitany* v. *Moneram Kolita* (1); *Parvati* v. *Bhiku* (2); *Nehalo* v. *Kishen Lal* (3); *Bhawani* v. *Mahtab Kuar* (4); *Sellam* v. *Chinnamma* (5). Moreover, in a caste of Sudras, who have always allowed and recognized widow re-marriage, a union following that custom could not be called unchastity for any purpose.

Nevertheless, there is ample authority for the proposition that in the absence of an express custom to the contrary, the re-marriage of a Hindu widow, even where legalized by caste custom, entails a forfeiture by her of any property which she may have inherited as the widow of her deceased husband: *Murugayi* v. *Viramakali* (6); *Koduthi* v. *Madu* (7) and *Rasul Jehan Begum* v. *Ram Surun Singh* (8). No doubt, there is also authority the other way: *Har Saran Das* v. *Nandi* (9); *Dharam Das* v. *Nand Lal* (10); *Raniit* v. *Radha Rani* (11) and *Khuddo* v. *Durga Prasad* (12). In *Brijlal and Kevalpat* v. *Musammat Sakrasa* (13), Second Appeal No. 399 of 1878, it was laid down by this Court that "a union between a *Kurmi* widow and a kinsman of her deceased husband carries with it neither the disgrace attaching to an irregular union, nor the disability which the law has imposed upon widows making a formal re-marriage". This decision probably recognizes a custom, legalizing the union and preventing forfeiture, which prevails in the locality from which the case came. It is within my personal experience that such a custom exists among some clans of *Kurmis* settled in the Northern Districts of these Provinces. The essentials of the custom are (1) that the second husband should be a kinsman of the deceased first husband, and (2) that he should take up his residence in the house of the widow. It closely resembles the custom among the ancient Israelites mentioned in the Bible—38 Genesis, v. 8 and 9—according to which one brother raised up seed to another and deceased brother. The above ruling of this Court is, therefore, distinguishable from the Allahabad cases. But the Allahabad view, which has now become a *cursus curiæ* in that Court, is directly in favour of the contention for the appellants before me, the case of *Raniit* v. *Radha Rani* (11) being between *Kurmis*. It is the fact that the *Kurmis* of the United Provinces and the Northern Districts of the Central Provinces are practically the same general caste of agriculturists as the *Kunbis* in our Southern Districts and the adjoining territory of Berar. The slight difference in designation is due to the difference of tongues—Hindi and Marathi—respectively prevailing in the two areas [See Sherring's *Hindu Castes and Tribes*, Volume II, page 100]. *Kunbis* or *Kurmis* are the true Sudras of the Hindu Text Books [Steele's *Castes and Tribes*, page 100], and are governed by the Common Hindu law, subject to local and caste variations. Widow re-marriage is almost universally recognized among all clans of them.

It is, therefore, necessary in this case to follow or dissent from the Allahabad view. With due respect, I am unable to accept that view as sound. It seems to me that, in a community governed by the general Hindu Law, every custom at variance with that law must be strictly applied, and cannot be made the basis for inferring any other variation from the law. According to the *Kunbi* custom, widow re-marriage is a valid marriage for all the purposes of Hindu Law. By that law marriage effected by any form or ceremony recognised as valid by the caste of the persons marrying, transfers the woman from her ante-nuptial *gotra* to the *gotra* of the man she marries. Therefore, when the widow of *A.* marries *B.*, she is transferred from the *gotra* of *A.* to the *gotra* of *B.* Now, it is of the very essence of inheritance by a Hindu widow, as such, that she is the surviving portion of her husband—that, after physical death, he still lives in her as a sort of incarnation of his spiritual being. Therefore, it follows that her possession of his estate should only continue while she remains

(1) 13 B. L. R. 1; 19 W. R. 367.
(2) 4 B. H. C. R. A. C. J. 25 at p. 43.
(3) 2 A. 150.
(4) 2 A. 171.
(5) 24 M. 441.
(6) 1 M. 226.
(7) 7 M. 321.
(8) 22 C. 589.
(9) 11 A. 330.
(10) A. W. N. (1889) 78.
(11) 20 A. 476.
(12) 3 A. L. J. 729; A. W. N. (1906) 299.
(13) D. C. R., Pt. VIII, Section 7, No. 76.

his widow. Her widowhood comes to an end on a valid re-marriage with another man, and she becomes incapable of representing her former husband any further It is upon some such ground that it has been held that by re-marriage, a Hindu widow becomes incapable of giving in adoption a son of her deceased husband: *Panchappa* v. *Sanganbasawa* (14); or of being the guardian of her minor children by her former husband by virtue of her motherhood: *Khushali* v. *Rani* (15). The above Allahabad view as to non-forfeiture of a widow's estate on a re-marriage permitted by caste custom, has not been followed by any of the other High Courts as far as I know. It was not approved by the Calcutta Court in *Matungini Gupta* v. *Ram Rutton Roy* (16) and was more expressly dissented from by the same tribunal in *Rasul Jehan Begam* v. *Ram Surun* (8).

For these reasons, I hold that a Hindu widow, who contracts a valid re-marriage in accordance with a custom of her caste, is thereby transferred from the *gotra* of her deceased husband to that of her husband by re-marriage, and *ipso facto* forfeits all interest in any estate which she may have inherited from the former in favour of the next heir or reversioner of the deceased.

So far I have regarded the question at issue purely from the point of view of the Hindu law. I will now discuss the application of the Hindu Widows' Re-marriage Act (XV of 1856) to the matter. There is a considerable conflict of judicial opinion on the question whether this enactment applies to Hindu widows who are under no disability to re-marry by reason of being members of a caste wherein their re marriage is permitted. The Allahabad and Calcutta High Courts have answered this question in the negative in some of the cases already cited: but in *Vithu* v. *Govinda* (17), a Full Bench of the Bombay High Court held that the Act applies generally to all Hindu widows, irrespective of caste regulations concerning re-marriage. The reasoning in this case commends itself to me as sound and incontrovertible, and I accordingly hold that, under section 2, Hindu Widows' Re-marriage Act, 1856 (as applied to Berar by Government of India, Foreign Department Notification No. 212-J., dated 24th October 1873), a *Kunbi* widow in Berar, who has inherited property from her deceased husband, forfeits, by re-marriage, her interest in such property in favour of the next heir of her deceased husband, notwithstanding that by the custom of her caste such a marriage constitutes a permissible and valid union.

It follows that, both under the Statute Law and the Hindu Law governing the devolution of the property in dispute, the existence of *Musammat* Tani, the ex-widow of Baliram, offers no obstacle to the plaintiff's suit. This appeal, therefore, fails and is dismissed with costs.

Appeal dismissed.

(14) 24 B. 89.
(15) 4 A. 195.
(16) 19 C. 289 at pp. 292, 293 and 295.
(17) 22 B. 321.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 855 OF 1911.

September 11, 1912.

Present:—Mr. Justice Sundara Aiyar and Mr. Justice Sadasiva Aiyar.

PONNAYA TIRUMALAI VANDAYA THEVAR AND OTHERS—APPELLANTS

versus

KANDASAMI VENDAYA THEVAR AND OTHERS—RESPONDENTS.

Limitation Act (IX of 1908), Sch. I, Art. 141—Property held by widow—Suit by reversioner to recover after death of widow—Adverse possession—Limitation—Tenant-in-common—Right to recover whole property.

One *R.*, the holder of an impartible *zemindari*, died leaving two illegitimate sons, *viz.*, 1st plaintiff and the father of plaintiffs Nos. 2 and 3, a brother, 1st defendant, and a widow, *P.*

The *zemindari* fell to the 1st defendant. In a previous litigation relating to the private property of *R.*, it was decided that the 1st plaintiff was entitled to one-fourth, the father of plaintiffs Nos. 2 and 3 to one-fourth and *P.* to the other half. In the present suit to recover *P.*'s half share after her death:

Held, (1) that the suit was not barred under Article 141 of the Limitation Act, as *P.* did not hold her half share absolutely and plaintiffs' claim was as heirs of *R.*;

(2) that, though defendant's adverse possession might bar any suit by *P.* to recover her share after the expiration of 12 years, it would not bar the plaintiffs' right to recover the half share as heirs of *R.* after the death of *P.*

The right of a tenant-in-common to recover the whole property as against a trespasser is a right

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which he is entitled to assert only on behalf of himself and his co-tenants. He cannot do so in the assertion of a right to the whole property in himself.

Kola Naiken alias *Rama Naicken* v. *Muthayammal*, 21 M. L. J. 997; 10 M. L. T. 265; 12 Ind. Cas. 76 and *Dursun Singh* v. *Durbijoy Singh*, 9 C. L. J. 623; 1 Ind. as. 530, referred to.

A tenant-in-common is not bound to make a claim on behalf of his co-tenants.

Second appeal against the decree of the Temporary Subordinate Judge of Ramnad, in A. S. No. 295 of 1910, presented against that of the District Munsif of Srivallipattur, in O. S. No. 46 of 1908.

Mr. *C. V. Ananthakrishna Iyer*, for the Appellants.

Mr. *T. Rangaramanujachariar*, for the Respondents.

JUDGMENT.—We are of opinion that the judgment of the Appellate Court in this case is right. The plaintiff claimed to recover the properties in question as the reversioners of one Ramasami Tevar, a *zemindar*, who held an impartible estate. At the time of his death, he left a widow, Parvati, a brother, the 1st defendant in the suit, and two illegitimate sons, the 1st plaintiff and the father of the plaintiffs Nos. 2 and 3. It was established in a previous litigation that the *zemindari* fell to the 1st defendant. Subsequently, Original Suit No. 25 of 1892 was instituted by the 1st plaintiff against the 1st defendant, in which the father of plaintiffs Nos. 2 and 3 was made a party defendant. The claim in that case related to the private property of the deceased *zemindar*, Ramasami Thevar. It was held in that suit that the plaintiff there, that is the 1st plaintiff, was entitled to a one-fourth share and the father of plaintiffs Nos. 2 and 3 to another one-fourth share, the widow Parvati being entitled to the remaining half. Parvati died recently and the present suit is for the recovery of the half share which belonged to her. The defendants, consisting of the 1st defendant and his issue, pleaded limitation. The Subordinate Judge held that the plaintiffs' right to Parvati's share accrued only at her death and, under Article 141 of the Limitation Act, the suit was not barred by limitation.

It is not contended in second appeal that Parvati was entitled to a half share absolutely and that the plaintiffs' claim must be taken to be as her heirs. Parvati, no doubt, intercepted a half share of her husband's (Ramasawmy's) estate from the plaintiffs so long as she lived, but the plaintiffs' claim is as heirs of Ramasami, a right which accrued to them only on the death of the widow. It is argued that the plaintiffs could and should have sued the 1st defendant for the whole of the property when he instituted Original Suit No. 25 of 1892, because, as against a stranger, a tenant-in-common is entitled to recover the whole estate. And it is further contended that, in consequence of the plaintiffs' failure to do so, the defendant's possession must be treated as adverse to the plaintiffs. We cannot accept this argument. Parvati was entitled to a half share during her life and the 1st plaintiff was entitled only to the remaining half. The right of a tenant-in common to recover the whole property as against a trespasser is a right which he is entitled to assert only on behalf of himself and his co-tenants. He could not do so in the assertion of a right to the whole property in himself. See *Kola Naiken* alias *Rama Naicken* v. *Muthyammal* (1) and *Dursun Sing* v. *Durbijoy Singh* (2). If he asserted an exclusive title in himself, the suit would be liable to be dismissed. A tenant-in-common is not bound to make a claim on behalf of his co-tenants. It is quite open to him to recover his own share. The adverse possession of the defendant might bar any suit by Parvati to recover her share after the expiration of 12 years, but it would not bar the plaintiffs' right to recover the half share as the heirs of Ramasami after the death of Parvati.

A point of minor importance is urged, namely, that it has not been found that the defendants are in possession of one-half of items Nos. 6 to 10, which they asserted were in the enjoyment of one Subramania Pillai and that, therefore, the plaintiffs are not entitled to a decree for mesne profits against the defendants for the half share of those items. This contention must be upheld, unless it be found that the defendants are in possession of all the properties. The learned Vakil for the respondents is willing to waive his claim for the mesne profits of half of items Nos. 6 to 10.

(1) 21 M. L. J. 997; 10 M. L. T. 265; 12 Ind. Cas. 76.

(2) 9 C. L. J. 623; 1 Ind. Cas 530.

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The decrees of the lower Courts will, therefore, be modified by directing that the plaintiffs do recover mesne profits only on one-half of items Nos. 6 to 10. We affirm the decree of the Subordinate Judge in other respects and dismiss this second appeal with costs.

Appeal dismissed.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 112-B OF 1911.

April 20, 1912.

Present:—Mr. Hallifax, Offg. A. J. C.

PANDURANG—APPELLANT

versus

NAGOJI—RESPONDENT.

Cause of action—Right to sue—Custom—Vatandar Joshi—*Suit to recover fees paid to usurper—Liability of* yajman—*Action against person procuring breach of contract.*

A *vatandar joshi* is entitled to sue for the recovery of fees paid by his *yajman* to a usurper of the functions of the *Joshi*.

Yeshwant Rao v. *Bhaskar Rao Patwari*, 3 N. L. R. 47 and *Vithal Krishna Joshi* v. *Anant Ram Chandra*, 11 B. H. C. R. 6, relied upon.

Both the *yajman* and the intruder are jointly and severally liable to the *Joshi* for the amount of his fees.

Raja v. *Krishnabhat*, 3 B. 232, relied upon.

An action lies not only against a person who breaks a contract but also against any one who wilfully and with notice procures a breach of the contract to the detriment of the plaintiff.

Sher Ali v. *Ahmed Ali*, 13 C. P. L. R. 23, relied upon.

Second appeal against the decree of the Additional District Judge, West Berar, Akola, dated the 16th December 1910, modifying that of the Additional Munsif, Akola, dated the 4th October 1910.

Mr. *J. Mitra* and Rao Bahadar *V. R. Pandit*, for the Appellant

Mr. *M. R. Dixit*, for the Respondent.

JUDGMENT.—The learned Counsel for the respondent endeavoured to support the decree of the lower Appellate Court on the ground that the two concurrent findings of fact on which the decree rests are based not on insufficient evidence, but on no evidence whatsoever. These findings are that the plaintiffs hold the hereditary office of *Joshi* for the village, among others, in which they and the first defendant reside, and that the *vastu* is one of the ceremonies falling within what may be called the religious jurisdiction of the *Joshi*. Of the five witnesses called by the plaintiffs, every one says quite distinctly that they are the *watandar Joshis* of the village, as their father was before them, and are exclusively entitled to perform the duties of a *Joshi*. The first two also say that the *vastu* ceremony is one that falls within the province of the *Joshi* exclusively, and the other three that it does fall within his province.

The findings on both points were contested in first appeal, and the judgment of the lower Appellate Court on them is as follows: "As to whether plaintiffs are *Vatandar Joshis* of village Rajanda or not, the evidence is not as satisfactory as it should have been. No doubt, it has been shown that they and their father alone did *Joshi's* business in the village all along and they were also considered *Vatandar Joshis*. There is, however, no clear evidence that they asserted their rights as *Vatandar Joshis* and that such rights were admitted or acquiesced in by the villagers. However, I do not see sufficent grounds for holding that the lower Court's finding in this respect was wrong. As to whether *vastu* ceremony is one which a *Joshi* alone can perform, is a question which need not be determined by a Civil Court. But the evidence shows that such ceremony used to be performed by the plaintiffs as *Joshis*. The question is, however, not important in the present case." I take this to be a definite finding on each issue based on an examination of the evidence, though the learned Additional District Judge thought it was not really necessary to decide either of them for the purposes of the appeal before him.

The facts then with which we are concerned are these. The plaintiffs are exclusively entitled to officiate as *Joshis* at all *vastu* or house hanselling ceremonies in the village of Rajanda and to receive the fees therefor. The first defendant Nagoji, a resident of that village and aware of this right, engaged the second defendant, Lakshman, to perform this ceremony for him and paid him the sum of Rs. 12-3-3 as *Joshi's* fees. The plaintiffs sued both Nagoji and Lakshman for this sum. They claimed other reliefs as well, but we are not now concerned with them.

The first Court, that of the Additional Munsif, Akola, gave them a decree making the two defendants jointly and severally liable for the sum claimed. The defendant Nagoji alone appealed and the lower Appellate Court, that of the Additional District Judge of Akola, absolved him from liability, holding that the intruder alone was liable for the money had and received to the holder of the office, and not the employer or *yajman*. This is the one point to be dealt with in second appeal.

On this narrow issue, it is not necessary to discuss the rulings in *Gourmoni Debi* v. *Chairman of Panihati Municipality* (1); *Ramakristna* v. *Ranga* (2) and *Krishna Aiyan* v. *Anantarama Aiyan* (3), cited on behalf of the respondent in this Court, where it was held that there was no cause of action against either the intruder or his employer. That there is a cause of action in cases of this nature has always been the view, taken by the Bombay High Court, (whose rulings particularly in matters of custom must always have more weight in cases arising in Berar than those of other High Courts), and by this Court. *Yeshwant Rao* v. *Bhaskar Rao Patwari* (4) was a suit against the intruder only, and the question whether the employer would also be liable or not did not arise. Similarly, in *Vithal Krishna Joshi* v. *Anant Ramchandra* (5), the usurper of the functions alone was sued, but in the seven cases quoted with approval in the judgment, the liability of the *yajman* was recognised, though in regard to one of them West, J., said: "In the recent case, Special Appeal No. 291 of 1872, however, a *Gramupadhya*, holding under a *sanad* from the Peshwar, was held to have a good cause of action against the *yajmans*, who had employed another *Bhat*, but none against the *Bhat* whose employment by the villagers had been purely voluntary. It is clear that he could not be entitled to recover from both, and that if he obtained a decree against the *yajmans*, he could not obtain one against his rival *Bhat* also."

(1) 12 C. L. J. 75; 6 Ind. Cas. 864; 14 C. W. N. 1057.
(2) 7 M. 424.
(3) 2 M. H. C. R. 330.
(4) 3 N. L. R. 47.
(5) 11 B. H. C. R. 6.

Raja valad *Shivapa* v. *Krishnabhat* (6) was a suit against both *yajman* and intruder. The Court of first appeal, on the authority of the case last mentioned, absolved the intruder from liability, probably relying on the words quoted above, and the High Court restored the original decree making both employers and intruder liable to pay. But it is unnecessary to go abroad for authorities, as the point now in issue was examined at length in *Sher Ali* v. *Ahmad Ali* (7), a parallel case to this, in which the father and husband of a girl were sued for damages by the man to whom she had been betrothed. Ismay, J. C., dissented from a previous ruling of Stevens, J. C., in *Behari Malwai* v. *Bhondu* (8), in which it was held both the defaulting party to the contract and the instigator of the breach might be legally liable, but that the plaintiff must elect between his two remedies and could not sue both, and, after an exhaustive discussion of the authorities, held that an action lies not only against a person who breaks a contract but also against any one who wilfully and with notice procures a breach of that contract to the detriment of the plaintiff. In this view, I set aside the decree of the lower Appellate Court and restore that of the first Court. Costs in this and in the lower Appellate Court will be paid by the respondent Nagoji, and in the first Court will be paid as already ordered by that Court.

Decree set aside.

(6) 3 B. 232.
(7) 13 C. P. L. R. 23.
(8) 8 C. P. L. R. 25.

MADRAS HIGH COURT.

APPEAL AGAINST ORDER No. 218 OF 1911.

October 15, 1912.

Present:—Mr. Justice Sundara Aiyar and Mr. Justice Sadasiva Aiyar.

S. T. P. L. PALANIAPPA CHETTIAR—APPELLANT

versus

T. R. M. A. R. R. M. ARUNACHELAM CHETTIAR AND OTHERS—RESPONDENTS.

Decree, assignment of—Assignment by agent acting under power-of-attorney — Absence of provision in

power to transfer decree—Power of assignee to execute decree—Contract Act (IX of 1872), s. 188.

A power-of-attorney should be construed strictly. Such a construction does not disable an attorney from exercising all powers incidental to the execution of powers expressly conferred on him or from exercising powers which are necessarily implied and which may be termed 'medium' powers.

This is the principle laid down in section 188 of the Indian Contract Act, 1872.

The power to transfer a decree for a consideration is not incidental to any power expressly conferred in a power-of-attorney to execute the decree.

Where a power-of-attorney contained the following clause: "to execute all decrees in the name of my father or in any other name on my behalf or otherwise to attach and realize all monies due thereon:"

Held, that the agent acting under the power could not assign the decrees that he was authorized to execute.

Bryant Powis and Bryant v. *La Bingredu Penple, Bryant Powis and Bryant* v. *The Quebeck Bank*, (1893) App. Cas. 170; 62 L. J. P. C. 68; 1 R. 336; 68 L. T. 546; 41 W. R. 600, referred to.

Appeal against the order of the Subordinate Judge of Tuticorin, dated 20th October 1911, in E. P. No. 78 of 1911, in O. S. No. 9 of 1905.

Mr. *V. Viswanatha Sastri*, for the Appellant.

Mr. *B. Sitaram Row*, for the Respondents.

JUDGMENT.—The Subordinate Judge has dismissed the assignee's application for execution in this case on the ground that Aiyavaiar, who executed the assignment in his favour, acted beyond the powers given to him under the power-of-attorney, Exhibit A, in making the assignment. The scope of Aiyavaiar's agency under the power-of-attorney has been discussed at length at the bar; and we have examined the provisions of the document carefully. We are obliged to arrive at the same conclusion as the Subordinate Judge did. Arunachalam Chetti authorizes Aiyavaiar by Exhibit A to act for him for the purposes enumerated in the power-of-attorney. The enumerated powers include mortgaging and hypothecating lands, houses and property for debts due or to become due by the principal selling immoveable properties for any lawful purpose, demanding and suing for debts and other claims, giving valid discharges, receipts and releases for payments made, negotiating, accepting, endorsing and making promissory-notes and negotiable instruments, paying debts, compromising disputes and differences between the principal and other persons. There is a clause relating to the realization of decrees in these terms: "to execute all decrees in the name of my father or in any other name on my behalf or otherwise to attach and realize all monies due thereon." There is no clause of a comprehensive character which would show that the principal intended to confer plenary powers on his attorney to deal with all properties and rights belonging to him The clause relating to decrees does not in terms authorize the transfer of decrees. It is argued that it might be held to be comprised in the power to execute decrees. Execution of decrees would not, according to the ordinary meaning of the expression, include transferring decrees. The power to realize all monies due to the principal might be held to include a power to receive the money due under a decree by means of a transfer of it to a third person; but it would be difficult to make it include a power to transfer a decree for a sum considerably less than the amount due under the decree. No attempt was made in the lower Court to prove that there was any compromise with the debtor which reduced the amount of the decree. A power-of-attorney has, according to established law, to be construed strictly. Such a construction does not disable an attorney from exercising all powers incidental to the execution of powers expressly conferred on him or from exercising powers which are necessarily implied and which may be termed 'medium powers.' See Bowstead on Agency, 4th Edition, page 74; Story on Agency, section 68. Section 188 of the Indian Contract Act lays down the same rule. It is necessary to find any power contended for within the four corners of the instrument relied on. See *Bryant Powis and Bryant* v. *La Banque dus Peuple, Bryant Powis and Bryant* v. *Quebeck Bank* (1). It is not possible to hold that the power to transfer decrees for a consideration, which the attorney thinks reasonable, is incidental to any power expressly conferred under Exhibit A or is necessarily required for the execution of any of such powers. The appellant stated in his petition that Aiyavaiar was also a partner of the principal and that the transfer of the decree by Aiyavaiar

(1) (1893) App. Cas. 170; 62 L. J. P. C. 68; 1 R. 336; 68 L. T. 546; 41 W. R. 600.

was within the scope of his powers as partner. He also stated that the assignment of the decree was subsequently ratified by the principal; but he did not prove either of these facts. The diary of the case shows that the parties had an opportunity of adducing any evidence they wished to let in. There is nothing before us to show that any evidence tendered by the appellant was rejected by the Court. The order of the Subordinate Judge must, therefore, be confirmed and the appeal dismissed with costs.

Appeal dismissed.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

MISCELLANEOUS CIVIL APPEAL No. 2 OF 1911.

April 13, 1912.

Present:—Mr. Batten, A. J. C.

BAJIRAO—APPELLANT

versus

GULABSINGH—RESPONDENT.

Hindu Law—Mortgage by father—Foreclosure proceedings and suit against minor sons through their mother—Minor grandson not made party—Right to redeem—Regulation XVII of 1806, *s.* 8—*Transfer of Property Act* (*IV of* 1882).

A. mortgaged certain ancestral property in 1875. After *A.*'s death, foreclosure proceedings under Regulation XVII of 1806 were taken against his sons in 1881; as the sons were minors, the notices were served on them through their mother. At that time, one of the sons had a minor son, *B.*, who was not made a party to the foreclosure proceedings nor to the suit for possession brought by the mortgagee after the expiry of the year of grace. *B.* subsequently sued for redemption of the mortgage on the ground that he was not bound by the proceedings as he was not made a party:

Held, (1) that the case was not governed by the provisions of the Transfer of Property Act;

(2) that *B.*'s interests were adequately represented in the foreclosure proceedings and the suit by his grandmother who was the guardian both of *B.* and his minor father.

If the person, who would naturally be the manager of the family, is incapacitated by minority from acting as manager and the other members are incapacitated by still greater minority, then the person, who is guardian of the minor, who would naturally be manager, takes the place of that manager as regards the other minors and fully represents them.

Pandit Gopal Rao v. *Gangay*, 2 C. P. L. R. 221, relied upon.

Miscellaneous appeal against the order of the Divisional Judge, Chhattisgarh Division, dated the 28th November 1910, remanding the case for re-trial by the Subordinate Judge, Raipur.

Mr. *F. W. Dillon*, for the Appellant.

Sir *B. K. Bose*, for the Respondent.

JUDGMENT.—The suit for redemption out of which this appeal arises is brought on the ground, as stated in the plaint, that the plaintiff, Gulab Singh, was not made a party to the foreclosure suit brought against his father, Narayansingh, and others, although the mortgagees, of whom the present defendants are the representatives, had full knowledge of the existence of the plaintiff and of his interest in the family property.

The facts are that Sheoprasad and Lalsingh, sons of Dalpatsingh, mortgaged their ancestral property on the 23rd October 1875. They died before any proceedings were taken under the mortgage-deed. Sheoprasad had three sons, Narayansingh, Manoharsingh and Meherbansingh, and Lalsingh had one son, Amarsingh. Proceedings against these four sons were taken under Regulation XVII of 1806, and they were noticed on the 5th October 1881; as they were minors, the notices were served on them through their mothers. The year of grace having expired, a suit for possession was instituted against them on the 31st October 1882. This was after the Transfer of Property Act had come into force, but it is admitted in this Court that all the proceedings were taken under the Regulation. The plaintiff's case is that he was 18 months old on the 31st October 1882, so that he must have been, on his own showing, less than 6 months old at the date of the notice.

The Subordinate Judge dismissed the suit as time-barred. He held that Article 144 of the Limitation Schedule was applicable and that the suit was time-barred as the defendants had been in adverse possession since the 10th September 1883. On appeal, the learned District Judge held that the suit was not time-barred and remanded the suit for trial on the merits. The defendants appeal to this Court on the ground that, in the circumstances of the case, the plaintiff has no right of redemption.

The learned Counsel on both sides adopt the position that the rulings under the Transfer of Property Act, as to whether or not a son may re-open a mortgage foreclosed against his father, have no application. The learned Advocate for the respondent supports the plaintiff's right of redemption on the following grounds. Under section 8 of Regulation XVII of 1806, the Judge, on receiving the application of the mortgagee to the effect that he intends to foreclose, "shall cause the mortgagor or his legal representative to be furnished ..... with a copy of it; and shall at the same time notify to him ..... that if he shall not redeem the property mortgaged in the manner provided for by the foregoing section, within one year from the date of the notification, the mortgage will be finally foreclosed". It is admitted that the property was ancestral in the hands of the mortgagors, and, therefore, the plaintiff on his birth had an equal share with his father. It is argued that he was entitled to be served with a notice, and if he was not so served, his right of redemption still subsists. It is conceded by the learned Advocate that if plaintiff's father, Narayansingh, had been a major, then the notice to his father would have been sufficient notice to him, for under Hindu law the minor son is sufficiently represented by the father. But the right of representation residing in the father is a personal right and a minor father's guardian cannot be said to represent the minor father's son. The notice was served on "*Musammat* Motin, guardian of Narayan, Manohar and Meherban". The minor son of Narayan was not mentioned and so it should be held that the plaintiff was not served with the notice. The right of representation is derived from paragraphs 27, 28 and 29 of Chapter I, section 1 of the *Mitakshara*.

The learned Counsel for the respondent argues that the fact that the father was a minor does not prevent him having represented his son. There is no authority for the contrary view. The father, who was under 18, was under the guardianship of his mother, who was not a certified guardian, but his guardian under the Hindu Law. His son was equally under her guardianship and the case is not affected by a separate notice not having been issued to her as his guardian. The notice informed her fully what the mortgagees intended, and she fully represented the interests of the family.

It appears to me that this case should be decided on the same principles as that of *Pandit Gopal Rao* v. *Gangay* (1), since it is not a case under the Transfer of Property Act. No exactly similar case to the present can be found, but it seems to me that if the person, who would naturally be the manager of the family is incapacitated by minority from acting as, manager, and the other members (in this case the son) are incapacitated by still greater minority, the person who is guardian of the minor, who would naturally be manager, takes the place of that manager as regards the other minors and fully represents them. In this case, their mother was the guardian of Narayan and his two brothers and of Narayan's son. In the ordinary course, Narayan or one of his brothers, would have been manager and the plaintiff would have been adequately represented by that manager. As things stood, I think he was adequately represented by the mother guardian of his father and uncles. On these principles, I am of opinion that he must be considered as having been served with the notice under section 8 of the Regulation. I set aside the order of the Divisional Judge and I dismiss the suit with costs in all Courts.

Suit dismissed.

(1) 2 C. P. L. R. 221.

BOMBAY HIGH COURT.
SECOND CIVIL APPEAL No. 439 OF 1911.
July 12, 1912.
Present:—Sir N. G. Chandavarkar, Kt., Judge, and Mr. Justice Batchelor.
BHURCHAND HUNSRAJ DOSHI—APPELLANT
versus
VIRA CHAMPA KHACHAR—RESPONDENT.

Civil Procedure Code (Act V of 1908), ss. 69, 70, Sch. III, s. 7 (1) (b)—Execution of decree—Decree awarding interest till realisation—Application for execution calculating interest to date of application—Execution transferred to Collector—Duty of Collector to calculate interest to date of payment—Nature of Collector's authority—Jurisdiction—Question of satisfaction of decree.

Under section 7 (1) (b) of Schedule III to the Civil Procedure Code, 1908, the Collector has to take into account the decretal amount with the whole

BHUROHAND HANSRAJ DOSHI v. VIRA CHAMPA KHACHAR.

of the interest awarded by the decree. That includes not merely interest up to the date of *darkhast*, but also interest which runs according to the decree up to the date of payment. It is the duty of the Collector to do so, even though the decree-holder has omitted to mention in his application the particular claim for further running interest. The Collector cannot return the decree to the Civil Court as satisfied till after the whole amount, including interest awarded by the decree up to the date of satisfaction, has been paid.

Sections 69 and 70 of the Civil Procedure Code give authority to the Collector for the purpose of enabling him to determine the best mode or modes of satisfying the decree, whether it is to be satisfied by management by the Collector himself of the land attached in execution of decree, or whether it is to be by its sale or letting.

So far as the machinery necessary for the satisfaction of the decree is concerned, the Collector is the sole authority. The discretion is his and no Civil Court can interfere with that discretion. But that discretion does not extend to any jurisdiction in the Collector to determine whether the decree itself has been satisfied or not. The latter jurisdiction is the Civil Court's. It is that Court alone which is competent to determine the question judicially.

Second appeal from the decision of the District Judge of Ahmedabad, in Appeal No. 40 of 1911, reversing that passed by the Subordinate Judge at Dhandhuka, in *Darkhast* No. 1363 of 1895.

Mr. *T. R. Desai*, for the Appellant.

Mr. *N. K. Mehta*, for the Respondent.

JUDGMENT.

CHANDAVARKAR, J.—The District Judge has taken an erroneous view of the jurisdiction of the Collector, or rather the Talukdari Settlement Officer who exercised the powers of Collector under section 320 of the old Code of Civil Procedure (Act XIV of 1882), and under sections 69 and 70 of the present Code of Civil Procedure (Act V of 1908), in respect of the execution of the decree concerned in this case. The Chapters, in which these sections respectively occur, deal with the functions of the Collector as the authority invested with jurisdiction to see that the decree is satisfied. The authority is given for the purpose of enabling the Collector to determine the best mode or modes of satisfying the decree, whether it is to be satisfied by management by the Collector himself of the land attached in execution of the decree, or whether it is to be by its sale or letting. So far, therefore, as the machinery necessary for the satisfaction of the decree is concerned, the Collector is the sole authority. The discretion is his and no Civil Court can interfere with that discretion. But that discretion does not extend to any jurisdiction in the Collector to determine whether the decree itself has been satisfied or not. The latter jurisdiction is the Civil Court's. It is that Court alone which is competent to determine the question judicially.

But it is argued in support of the decree of the lower Court appealed from that in any case, the decree must be upheld because the determination by the Talukdari Settlement Officer that the decree was satisfied is perfectly consistent with the facts of the case. And the facts relied upon shortly are, that the present appellant did not, by his *darkhast*, sent to the Collector for execution, ask for any running interest allowed to him by the decree, but he asked merely for execution in respect of the principal amount allowed by the decree and interest up to the date of the *darkhast*. Although that is so, if we have regard solely to the prayer in the *darkhast*, we must also have regard to the fact that the *darkhast* could not have been presented by the appellant in any other form. It was not necessary for him to ask for running interest because the law itself makes provision for its award in execution when the decree has been sent to the Collector. When it is so sent, the Collector has to see, not that it is partially satisfied, but that it is wholly satisfied. When interest awarded by the decree up to the date of satisfaction is running from day to day, the decree-holder being unable at the date of his *darkhast* to specify the day up to which interest can be calculated, it is the Collector who has to take into account the whole of the period, present and future, and he cannot return the decree to the Civil Court as satisfied till after the whole amount including interest awarded by the decree has been paid.

Section 7 (1) (*b*) of the third Schedule of the Code of Civil Procedure, 1908, provides that where the amount to be recovered and the property available have been determined as provided in paragraph 4 or paragraph 5, the Collector may, if it appears that the amount with interest (if any) in accordance with the decree may be recovered without such sale, raise such amount and interest. According to the plain language, then, of this section the Collector has to take into account the amount, with the whole of interest awarded by the decree. That in-

cludes not merely interest up to the date of the *darkhast*, but also interest which runs according to the decree thereafter.

On these grounds, the decree appealed from must be reversed and that of the Subordinate Judge restored with costs both of this appeal and of the appeal in the District Court on the respondents.

BATCHELOR, J.—I am of the same opinion. The most that Mr. Mehta could urge for the respondents in this case was that the appellant, in his *darkhast* of 1895, had not specifically prayed for interest up to the date of payment. That is true. He had asked in terms only for interest up to the date of his application, but in his application he had specifically referred to that clause in the decree which ordained that interest should run up to the date of realization. And under section 7 (1) (*b*) of the third Schedule of the Civil Procedure Code, it appears to me that, despite the appellants' omission to make the particular claim for further interest, it was the Collector's duty to arrange for the satisfaction of the decree with such interest as the decree itself awarded, that is to say, with running interest up to the date of payment. I agree, therefore, that this appeal should succeed.

Appeal allowed.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL NO. 5 OF 1904.

April 11, 1912.

Present:—Mr. Batten, A. J. C. and Mr. Stanyon, A. J. C.

RATANLAL—APPELLANT

versus

BHASKAR—RESPONDENT.

Central Provinces Land Revenue Act (XVIII of 1881), ss. 136-R, 136-S—Revenue partition—Date of effect—Sanction by Commissioner—Previous private partition—Hindu law.

A revenue partition, under the provisions of the Central Provinces Land Revenue Act, does not take effect from the date on which it is sanctioned by the Commissioner but from the first day of the agricultural year next after the Deputy Commissioner has published a notification of the Commissioner's sanction under section 136-S. (1) of the Act.

A private partition was effected between two Hindu brothers and the share of each was ascertained. Subsequently, there was a revenue partition between the brothers, which was sanctioned by the Commissioner on 9th April 1894. The notification of sanction was published after 1st June 1894:

Held, (1) that the revenue partition did not take effect till 1st June 1895;

(2) that the revenue partition could only take effect according to Revenue law and the rule of Hindu law that partition dated from ascertainment of shares did not apply to the revenue partition.

First appeal against the decree of the Civil Judge, Saugor, dated the 8th July 1903.

Dr. *H S. Gour* and Mr. *G. L. Subhedar*, for the Appellant.

Messrs. *J. Mitra* and *P. S Kotwal*, for the Respondent.

JUDGMENT.—This appeal was originally made to the Court of the Divisional Judge, Jubbulpore, but it was transferred to the file of this Court with reference to section 28 (1) of the Central Provinces Courts Act II of 1904. Then Jamna Bai one of the appellants died, and there was a dispute as to who was her legal representative, which had to be determined by a suit under section 367 of the then Civil Procedure Code. After the decision of that suit, there was an appeal to this Court against the decision, and only after the decision of that appeal (Miscellaneous Appeal No. 6 of 1906) could this appeal be taken up. Then a preliminary objection was raised on behalf of the respondent, Bahadur Singh, that the stamp duty paid on the petition of appeal, namely, Rs. 10, was insufficient, and that an *ad valorem* stamp duty should be paid on the value of the subject-matter of the appeal. After hearing arguments, we held that the appeal is one to obtain a decree for sale of an estate, which has been entirely exonerated by the lower Court, the debt to be satisfied by such sale being Rs. 12,000, and we ordered that the appellants must pay the same Court-fee as was paid on the plaint, *viz.*, Rs. 535. The deficient stamp duty was paid within the time allowed.

There is practically no dispute as to the main facts of the case. Two brothers, Krishna Rao and Gopal Rao, owned some twenty-one villages and a share in the village of Mohli in the Saugor District. In 1891, they separated and effected a partition privately under which each brother took a half share in each of the said villages. This arrangement apparently did not work well and in 1893 Gopal Rao applied for imperfect partiton in the Revenue Department. The order of

the Commissioner sanctioning the partition was made on the 9th April 1894 (Exhibit P-3), but no mutation of names was effected until after the death of Krishna Rao, which occurred after June 1895. The principal village of Pithoria was divided into two equal shares, and of the remaining villages ten whole villages were allotted to each of the brothers, and the share of Mohli was allotted to Krishna Rao. It is noted in the final order that Gopal Rao had *sir* land in Bidwasan only and Krishna Rao in Kamrol only. The entire villages of Kamrol, Sewan and Atatila as well as the share of Mohli fell to the share of Krishna Rao.

By documents, dated respectively the 9th March 1892 and the 9th March 1894, Krishna Rao had mortgaged, among other properties, his eight-annas shares in Kamrol, Sewan and Atatila, that is to say, the shares to which he was entitled under the private partition, to Lachmandas and Rampershad. On the 30th September 1894, Krishna Rao executed a mortgage-bond for Rs. 7,000 in favour of Girdhari Lal, Jawahir Lal and *Musammat* Maharani Bahu, the predecessors-in-title of the present plaintiffs, the property mortgaged as security being an eight-annas share in each of the villages of Kamrol, Sewan and Atatila and a four annas share in the village of Mohli.

In 1895, Bansidhar, the 6th defendant in the present suit, obtained a money-decree against Krishna Rao for Rs. 3,756 and costs. In execution of this decree, which, with costs and interest, amounted to Rs. 4 320, he applied on 21st July 1896 for attachment of the eleven villages (including the half of Pithoria) which had been allotted to Krishna Rao by the partition. Apparently, however, only those villages and shares of villages were attached, which stood in Krishna Rao's name in the Collector's register. The attached property included an eight-annas share in each of the villages of Kamrol, Sewan and Atatila. Execution of the decree was transferred to the Collector with a note of the incumbrances on the property including the mortgages already referred to. Subsequently, however, the decree-holder applied to the Collector, stating that the property attached was so heavily incumbered as to leave no margin for the satisfaction of his decree and asking that the case be struck off. The proceedings accordingly came to an end on the 27th July 1898, and two days afterwards, the decree-holder applied for the attachment of the shares which had not been encumbered. Amongst other property, an eight-annas share in each of the villages of Kamrol, Sewan and Atatila was attached, and the decree was again transferred to the Collector for execution. For some reason, which does not appear on the record, Bansidhar had at that time assigned his rights to one Bahadur Singh, the 5th defendant in the present suit. While the sale was proceeding before the Collector, Ranchori Lal, the general *Mukhtiar* of Girdhari Lal, was examined and made the following statement :— "My master holds a mortgage-deed, dated the 30th September 1894, in favour of Jawahir Lal, Girdhari Lal and Maharani Bahu for Rs. 7,000. The property mortgaged is,—

Kamrol	...	8-annas.
Sewan	...	8 annas.
Atatila	...	8 annas.
Mohli	...	4-annas.

These shares belong to the judgment-debtor. The shares mortgaged are those formerly belonging to Krishna Rao, not those of Gopal Rao." Later on, and before the sale took place, Ranchori Lal made an application, dated the 6th May 1902, to the effect that the shares about to be sold were mortgaged to his master and asking that the attachment should be raised. On this application, the Collector passed the following order :— "The applicant should have objected long ago. The sale must now proceed as it has been sanctioned by the Chief Commissioner. Applicant must seek his remedy in the Civil Court."

Accordingly, the sale was held with the result that an eight-annas share in Atatila was purchased by Bahadur Singh, an eight-annas share in Sewan by Bansidhar for Ramdayal and Permanand, the 9th and 10th defendants in this suit, and an eight-annas share in Kamrol by Bihari, the 7th defendant.

On the 20th December 1902, the plaintiffs brought the present suit to enforce their mortgage, dated the 30th September 1894. The defendants, Shridhar Rao, Madho Rao, Mukund Rao and Raghunath Rao, are the sons of the mortgagor Krishna Rao; they

admitted the mortgage and offered no defence. The defendants Bahadur Singh, Bansidhar, Bihari, Ramdayal and Permanand were joined on the ground that, under the circumstance already set forth in this judgment, they had purchased portions of the mortgaged property. The 8th defendant Pancham was joined on the ground that, he had purchased a four-annas share in the village of Mohli in 1900. He admitted the fact of the purchase and offered no defence. Thus, the only defendants who contested the claim were Bahadur Singh, Bansidhar, Behari, Ramdayal and Permanand. They asserted that the shares in the villages of Kamrol, Sewan and Atatila, which were mortgaged by Krishna Rao to the predecessors-in-interest of the plaintiffs, were the shares held under the private arrangement by Krishna Rao and not the shares which under that arrangement were held by Gopal Rao and which by the subsequent partition passed to Krishna Rao. The Court has held this plea to be established, and, so far as the villages of Kamrol, Sewan and Atatila are concerned, has passed a decree for sale of the shares already mortgaged to Lachmandas and Rampershad. The defendants had also raised a plea of estoppel based on the first statement of the agent Ranchori Lal, but the finding on the main issue rendered any finding on the question of estoppel unnecessary.

Against this decree, the plaintiffs have appealed. It is argued for the appellants that on the 30th September 1894, the date on which the mortgage-deed sued on was executed, Krishna Rao was full owner of the villages of Kamrol, Sewan and Atatila, by reason of the Commissioner's order of the 9th April 1894, and that he was entitled to mortgage either the whole or a share in these villages. It is admitted that when the brothers Gopal Rao and Krishna Rao separated, there was no partition by metes and bounds. When, therefore, it is argued, Krishna Rao mortgaged his shares to Lachmandas and Rampershad, what he mortgaged was an undefined share in an undivided estate, such share to be ascertained by partition in the event of the mortgage being foreclosed or the mortgaged property brought to sale. It is an admitted fact that the shares in the three villages held by Bahadur Singh, Bansidhar and Behari are still undefined. Similarly, it is argued when Krishna Rao as full owner of the villages mortgaged a half share in each village, he mortgaged not a defined share but a share to be ascertained when partition (with his mortgagees) took place. He could not specifically mortgage either the share which he originally possessed under an arrangement with his brother or his brother's share which came to him on partition. It is argued that under section 65 (a) of the Transfer of Property Act, the wording of which is similar to that of section 55 (2) of the Act,—there is an implied contract that the interest the mortgagor professes to transfer is transferable, and hence it must be presumed that the mortgagor covenanted that there was an unencumbered eight-annas share which he was transferring, and it follows that since the mortgagor did possess an unencumbered eight-annas share as well as an encumbered eight-annas share, what was transferred to the mortgagees in 1894 was the unencumbered eight-annas share. The problem before us may be put in another way. Let Krishna Rao's share, according to the private partition of 1891, before the Revenue partition, be called A. Let the other 8-annas share, which originally was with Gopal Rao and which Krishna Rao got on the Revenue partition, be called B. We have to see whether the plaintiffs got a mortgage of share A, or share B, or an undefined eight-annas share of A and B combined, and whether Bansidhar brought to sale A or B. We would here say, with regard to the argument that Krishna Rao mortgaged to Lachmandas and Rampershad an undefined share in an undivided estate, that the brothers had actually effected a private partition of their estate under which each had become the owner of an eight-annas share in each of the 22 villages. As regards each village, therefore, each brother was the owner of half. It was not a case in which neither of the brothers could say what his share in the family property was. Each was owner of a half share in each of the 22 villages, and it, in our opinion, makes no difference that they chose to enjoy each village as tenants-in-common instead of dividing the villages by metes and bounds. But as regards the mortgage of the 30th September 1894, two questions arise :—

(1) Did Krishna Rao intend to mortgage share B ?

(2) If not, still if he did not disclose his intention to mortgage only share A, must he not be held to have mortgaged share B ?

It is further argued for the appellants that as the auction-purchasers (the contesting respondents) purchased merely the right, title and interest of the judgment-debtors, they are not helped by section 55 (2) of the Transfer of Property Act since it was not a sale under the Act.

As regards the first of the above questions, we agree with the lower Court that what Krishna Rao intended to mortgage was his share before the Revenue partition, *viz*, share A. Krishna Rao had all along objected to the Revenue partition, and was anxious that the *status quo ante* should remain, or that the Revenue partition should be on the lines of the private partition. Even after the Commissioner's order of 9th April 1894, Krishna Rao, on the 4th August 1894, petitioned the Deputy Commissioner objecting to the lines on which the new partition was being carried out (*vide* Exhibit D-23). The mortgage deed of the 30th September 1894 makes no reference to the Revenue partition, and there is nothing on the record to show that the mortgagees were even aware of the Revenue partition, or thought that they were getting an unencumbered eight-annas share transferred to them.

But as regards the second question, it appears to us that the contentions of the appellants would prevail if, as a matter of fact and law, the whole of the villages in suit were vested in the mortgagor at the date of the mortgage. But here a very serious objection is raised by the learned Counsel for the respondents, namely, that the Revenue partition did not come into effect until the 1st June 1895, so that at the date of the mortgage, Krishna Rao owned only an eight-annas share in each of the villages in suit under the private partition, and that this share was the same that had already been mortgaged to Lachmandas and Rampershad. The law as to Revenue partitions is contained in Chapter X-A of the Central Provinces Land Revenue Act. Section 136-R runs:—"On completion of the partition, the Deputy Commissioner shall submit the proceedings to the Commissioner, who may either uphold the partition proposed or modify it or quash the proceedings; and a partition shall not take effect until it has been sanctioned by him."

In this case, the Commissioner upheld the partition proposed. It is clear that the partition was only in the inchoate stage of a proposal until it was so upheld. The question remains whether the partition took effect immediately it was sanctioned by the Commissioner. Section 136 S runs:—"On a partition being sanctioned by the Commissioner, the Deputy Commissioner shall publish a notification of the fact at his office and at some conspicuous place in the village or villages of the *mahal* of which the partitioned *pattis* formed part.

"(2) The partition shall take effect from the first day of the agricultural year next after the date of such notification."

After carefully weighing the arguments on both sides, we are of opinion that the partition did not come into effect and the share B did not vest in Krishna Rao on the passing of the Commissioner's order, but on the first day of the June following the publication of the Deputy Commissioner's notification under section 136-S (1). It is argued for the appellants that under Hindu law, partition dates from ascertainment of the shares, which were ascertained directly the Commissioner's order was passed. But there had already been a private partition in which the shares of each brother had been ascertained, and the new distribution according to the Revenue partition could only take effect according to the Revenue law, *viz.*, from the date mentioned in section 136-S (2). This date must have been the 1st June 1895. It is extremely unlikely that the necessary formalities for the publication of the notification by the Deputy Commissioner could have been completed before the 1st June 1894, and the fact that the partition did not have effect until 1st June 1895 is established beyond reasonable doubt by the *Amin's* report, Exhibit D-24, dated 13th June 1895, and Gopal Rao's receipt, Exhibit D 23, dated 12th June 1895. Exhibit D-24, moreover, shows that Krishna Rao had not even then accepted the Commissioner's decision. For these reasons, we are of opinion that only what we have called share A was mortgaged by Krishna Rao to the predecessors-in-interest of the present plaintiffs. We, therefore, consider that the decree of the Court was correct and we dismiss the appeal with costs.

Appeal dismissed.

MAGANCHAND *v.* VITHALRAO.

BOMBAY HIGH COURT.
SECOND CIVIL APPEAL NO. 483 OF 1911.
July 15, 1912.
Present:—Sir Basil Scott, KT., Chief Justice, and Mr. Justice Beaman.
MAGANCHAND FULCHAND—APPELLANT
versus
VITHALRAO KAMALRAO—RESPONDENT.

Hereditary Offices (Vatan) *Act* (*Bom. Act III of* 1874), *ss.* 11, 11 *A*—*Revenue Jurisdiction Act* (*X of* 1876), *s.* 4—Deshmukhi Vatan—*Alienation of* Vatan—*Power of Collector to set aside alienation and resume possession—Order granting alienor's heir permission to recover possession—Adverse possession of alienee for more than* 12 *years—Suit by alienee—Injunction—Jurisdiction of Civil Court—Decree, form of.*

In 1877, *A.* came into possession of certain *Deshmukhi vatan* lands by virtue of a *miras* lease and mortgage executed by *B.* After the death of *B.* in 1892, *A.* remained in possession for 10½ years when *B.'s* son obtained an order from the Collector to the effect that the land in suit may be recovered from the possession of *A.* and given to *B.'s* son under the Hereditary Offices Act. The Collector did not summarily resume possession of the land or assess it at the rates prescribed. *A.* continued in possession even after the Collector's order.

In 1906, *A.* filed the present suit to restrain *B.'s* grandsons by a perpetual injunction from recovering possession of the lands, as his title had been perfected by adverse possession for upwards of twelve years:

Held, (1) that the Revenue Jurisdiction Act, 1876, was no bar to the suit as the order passed by the Collector was not authorised by the Hereditary Offices Act;

(2) that although *A.* might be obliged to yield to summary eviction at the hands of the Collector under section 11A of the Hereditary Offices Act, he was not obliged to submit to proceedings for recovery of possession at the hands of *B.'s* heirs;

(3) that the mere fact that the application was made to the Collector within 12 years from the death of the alienor did not interrupt the adverse possession of *A.*;

(4) that *A.* was entitled to an injunction against *B.'s* grandsons restraining them from taking proceedings in a Court of law or *otherwise than under the Hereditary Offices Act*, 1874, to recover possession from *A.*

Adverse possession runs in favour of the person in possession and will confer a title on him unless a suit is brought within twelve years.

Second appeal from the decision of the District Judge of Satara, in Appeal No. 41 of 1910, confirming that passed by the Subordinate Judge of Islampur, in Civil Suit No. I of 1906.

Mr. *K. N. Koyajee*, for the Appellant.

Mr. *Jayakar* (with him Mr. *D. A. Khare*), for the Respondent.

JUDGMENT.—The plaintiff, by virtue of a *mirasi* lease and mortgage, executed by the grandfather of the defendant No. 1 in 1877, came into possession of a certain land which has been held in the lower Courts to be *Deshmukhi Vatan* property and which, therefore, could not be alienated validly beyond the life of the alienor. After the death of the first defendant's grandfather, which occurred in 1892, the plaintiff remained in possession for 10½ years, when the son of the alienor applied to the Assistant Collector for a decree for possession on the ground that the land was *Deshmukhi Vatan* property. He obtained an order from the Assistant Collector in February 1905, declaring the alienation null and void under section 11 of the Hereditary Offices Act (Bombay Act III of 1874) and ordering the land to be restored to the applicant. There was an appeal to the Collector from that order but the Collector dismissed the appeal. The plaintiff has now been in possession of the land adversely to the defendants for upwards of twelve years, and he brings this suit to restrain the defendants by a perpetual injunction from recovering possession of the land mentioned in the plaint.

The order of the Collector is referred to in paragraph 3 of the plaint as follows:—

"The first defendant has obtained an order from the Collector to the effect that the land in suit may be recovered from the possession of the plaintiff and may be given to the defendant under the Vatan Act. On the authority of the same, the defendants are about to take possession from the plaintiff. As to that, the said order which they have obtained being contrary to law, the defendants have no right under that order to take away the plaintiff's possession."

Now, it is contended that this suit is not maintainable by reason of the provisions of the Revenue Jurisdiction Act, X of 1876, paragraph IV (*a*) of which provides:—"No Civil Court shall exercise jurisdiction as to suits to set aside or aviod any order under Bomaby Act III of 1874."

The question, therefore, is whether the order challenged as being contrary to law is an order under Bombay Act III of 1874. It is clear that under section 11, the Collector had authority to declare an alienation contrary to the terms of Vatan Act to be null and void. The validity of that declaration i

not, however, impugned. Section 11A then prescribes what the Collector shall do in order to give effect to his declaration. He can do one of two things. He can either summarily resume possession of the property to which his declaration relates or assess it at the rate prescribed in clause 2 of section 9 as he may think fit and the said property shall thenceforth revert to the *Vatan*. Now, he has done neither of these things, but he has purported to authorise the defendants to recover possession from the plaintiff.

There is nothing in the Act which authorises him to pass any such order, and the plaintiff, although he may be obliged to yield to summary eviction at the hands of the Collector, is not obliged to submit to proceedings for recovery of possession at the hands of his opponents, the defendants.

The order is, therefore, not an order under the Vatan Act, and the Revenue Jurisdiction Act is no bar to the suit.

The learned District Judge was of opinion that, as an application had been made to the Assistant Collector within twelve years from the death of the alienor, adverse possession had not run against the defendants in favour of the plaintiff.

We cannot, however, find anything in the Limitation Act to justify such a conclusion. Adverse possession runs in favour of the person in possession and will confer a title upon him unless a suit is brought within twelve years. We, therefore, disagree with the finding of the District Judge upon issues 2 and 5, and the plaintiff, being *prima facie* entitled to the land by virtue of adverse possession, is entitled to an injunction against the defendants restraining them from taking proceedings in a Court of law or otherwise than under the Vatan Act to recover possession from the plaintiff. The words "otherwise than under the Vatan Act" must be inserted in the injunction in order to make it clear that this Court does not make any order purporting to interfere with or hamper the Collector in the execution of such powers as are given to him by section 11A of the Vatan Act.

The respondents must pay the costs throughout.

Decree reversed.

PUNJAB CHIEF COURT.

CIVIL REFERENCE No. 12 OF 1912.

November 9, 1912.

Present:—Mr. Justice Robertson and Mr. Justice Beadon.

MAJOR STEPHENSON—PETITIONER

versus

THE MUNICIPAL COMMITTEE, LAHORE—RESPONDENT.

Punjab Municipal Act (XX of 1891), ss. 44, 45, 62, 120H—Water-tax—When leviable—"500 feet from public water main", meaning of—Benefit to be derived from works.

Section 44 of the Punjab Municipal Act, XX of 1891, which prescribes the imposition of a water-tax upon buildings or lands so situated that their occupiers may benefit by the works, means buildings or lands so situated that their occupiers can derive benefit from the works as they stand, and not that by having further connections made and paying an additional tax they can put themselves into a position to benefit.

The expression "500 feet from the public water main" in a notification of the Punjab Government, sanctioning the imposition of water-tax on the rents of all houses and buildings, means the public water main from which "water can be drawn" and not "public water main absolutely closed and from which no one can benefit as it stands." A Municipal Committee, therefore, would not be justified in claiming such tax from the occupier of a house merely by reason that a closed water pipe passes within 500 feet of the house, and the nearest hydrant is not within 500 feet of it, as such occupier is not in a position to benefit by the water works.

Case referred, under section 84 of the Municipal Act, by the Commissioner, Lahore, with his No. 1781, dated the 28th November 1911, for the orders of the Chief Court.

Mr. *Hari Chand*, for the Respondent.

JUDGMENT—This is a case of very considerable importance. It appears that one Major Stephenson resides in a house situated on the Jail Road, Lahore. Along this Jail Road runs the main water-pipe with which Major Stephenson's house is not connected. The nearest hydrant to Major Stephenson's house is said to be at a distance of three-quarters of a mile. The Municipal Committee of Lahore called upon Major Stephenson to pay water-tax at the rate of Rs. 2-8-0 per cent. on the rent of his house. Now this occurrence took place, we may note, before the passing of the Act, which is at present in force, and comes within the purview of Act XX of 1891. The authority in the Act itself for levying any such tax appears to be contained in section 44, which runs as follows:—

"44. (1) Besides the taxes mentioned in

the foregoing sections, a Committee, with the previous sanction of the Local Government, may, for the purpose of constructing or maintaining works for the supply of water to the Municipality or paying the principal or interest of any loan raised for the construction of such works, impose, in manner directed by this Act, a tax to be called the water tax, upon buildings or lands which are so situated that their occupiers can benefit by the works.

"(2) The rate or amount of the tax so imposed on different buildings or lands may be determined with reference, among other considerations, to their distance from the nearest point at which the water is deliverable by the works and to their level; but in fixing it regard shall be had to the principle that the total net proceeds of the tax, with the estimated income from payments for water supplied from the works under special contracts, should not exceed the amount required for the said purpose."

The procedure for imposing a tax is laid down in section 45.

Section 63 provides that the tax shall be paid by the occupier of the property. The only other section of the Act which was quoted to us as giving any authority for the levy of a water-tax is section 120 H., which runs as follows, and to which we shall have occasion to refer again later:—

"120 H. The Committee may, from time to time, fix the rates and charges to be made in respect of communications from and connections with mains or service cables, wires and pipes for the supply of lighting, telephonage, gas or water, and in respect of meters or other appliances for testing the quantity or quality thereof supplied, and may levy such rates and charges accordingly."

Under section 45, a notification was issued fixing the rate of water-tax to be levied in certain circumstances at Rs. 2-8-0 per cent. That notification runs as follows:—

"Water-tax, No. 585, dated 8th December 1897. It is hereby notified that, with the previous sanction of the Local Government, the Municipal Committee of Lahore, in the Lahore District, in accordance with the provisions of section 45, sub-sections (7) and (8) of the Punjab Municipal Act, XX of 1891, has, at a special meeting held on the 30th October 1897, directed the imposition of a water-tax under section 44 (1) of the said Act at the rate of Rs. 2-8-0 per cent. on the rents of all houses and buildings in the Civil Station of Lahore which are situated within 500 feet from the public water main and are not connected with such main; provided that houses and buildings, the rental value of which does not exceed Rs. 40 per month, shall be exempt. The Municipal Committee has fixed the 1st April 1898, as the date from which the said tax shall come into force, and the payments shall be made by the occupiers of houses and buildings quarterly in advance on 1st day of April, the 1st day of July, the 1st day of October, and the 1st day of January of each year."

It appears that in 1905 a very similar case arose. The Municipal Committee made a similar claim, against which an appeal was made to the Commissioner of Lahore, and we think it best to quote the order passed by the Commissioner on that occasion in its entirety:—

"I think that the Lahore Municipal Committee will have been better advised to send their Secretary to attend my Court in compliance with my notice of the 8th May 1905.

"The facts of the present case are that a new main was laid down past appellant's house in January 1904, and that hydrants were not put up till October 1904. Appellant has been charged with water-tax under Notification No. 585, dated 8th December 1897, from January 1904. His contention is that he ought not to be asked to pay water-tax until the hydrants were put up. I am bound to say that this contention appears to me to be sound. In reply to a question what benefit the pipe was to appellant until a hydrant was put up, the Committee's representative states that appellant could have connected his house with the main. But the notification under which the tax is levied affects only houses and buildings which are *not* connected with the main. Such houses derive no benefit from the main until hydrants are put up, and should not, in my opinion, be taxed until hydrants are put up. Mr. McDonald has paid the tax from October 1904. The appeal is allowed with costs."

This case has arisen because the Committee, in their wisdom, are of opinion that the judgment passed by the Commissioner in a precisely similar case, to which they were parties, is not correct; and they have, we understand, in the face of that judgment,

been calling upon house occupiers in the Civil Station of Lahore to pay this water-tax at Rs. 2-8-0 per cent. under the notification quoted above. Major Stephenson has resisted that attempt, and we are glad to see that the Committee were ordered to suspend the levy of this tax pending a reference to this Court. The reference has been made by Colonel Parsons, Commissioner of Lahore, under section 84 of the present Municipal Act, and this, again, we consider it desirable to quote *in extenso*. It runs as follows: —

"*Read* Committee's Resolution No. 86, dated 27th May 1911, and Major Stephenson's appeal therefrom. *Read* also my order of 8th November 1911, which may be read as part of this order of reference.

"The Municipality have suggested that I should state this case for the decision of the Chief Court.

"The point is whether, under section 61 (*h*) of the new Municipal Act (section 44 of the old) and Punjab Notification No. 585, dated 8th December 1897, the Municipality can levy water-tax from a person residing in a house within 500 feet of the water main (in the present case the main is outside the house door) when no water connection to the house has been established. The Commissioner in 1905 decided *ex parte* that there should, in such circumstances, be a hydrant within 500 feet to justify such levy.

"The case has been fully stated in the note of the Secretary of the Municipality, dated 8th April 1911, in the note of the President (Deputy Commissioner) dated 13th April, and the note of the Legal Adviser of the Municipality, dated 2nd May 1911, copies of which have been extracted from the Municipal file and are attached.

"The point, or a similar one, is most exhaustively discussed in a Full Bench ruling of the Madras High Court in *G. E. Branson* v. *Municipal Commissioners, Madras*(1). This was a ruling of 1879, G.E. Branson being appellant against the Municipal Corporation of Madras. One of the Judges dissented. The decision in this ruling was that a Municipality could levy water-tax even within a division of the Municipality into which water supply system had not been introduced. (The Madras Municipal Act was, however, there in force.)

(1) 2 M. 362.

This ruling contains many observations very apposite to the present question now being referred; and it is clear that the question is by no means easily to be decided. The question is of such general importance in Lahore and likely to crop up continually as house building extensions occur that I think an authoritative decision is desirable.

"My own opinion at first inclined to coincide with the Commissioner's decision of 1905, but after reading the Secretary's note of 8th April 1911, and the Madras ruling, I feel doubt. The argument that the occupier cannot force the owner to establish connection is an individual one. When the main runs near houses, the general result likely to occur if water-tax were levied on unconnected houses would be that people would not take them or would abandon them until or unless connections were established; thus, the general result would be that owners would, as a body, be forced to establish them, and it is general results that legislation has to keep in view. I mention this argument as it is one of the main arguments of Major Stephenson.

"I think the arguments for either side so considerable that I refer the point. I think it quite possible that the words 'so situated that their occupiers can benefit by the works' were imported to the Punjab Municipal Acts of 1891 and 1911 owing to the Madras ruling of 1879: the legislators being inclined to agree with the dissenting Judge. If this surmise were correct, then the intention of the Punjab Act would be that the Muncipality could not levy in a case like the one now referred. Pending the result of this reference, levy from Major Stephenson should be suspended."

With respect to this reference, we will proceed to deal first with the judgment of the Madras High Court, which apparently has been quoted by the Commissioner as the authority on the point before us. It is, however, of no use to us in this case. It was a judgment regarding the terms of a particular Act, which Act is not in force in the Punjab, nor is the wording of the Punjab Act at all identical with that of the Madras Act nor is the point before us identical with the point before them. Their decision was in that case that the Act gave the Committee power to levy a tax quite independently of any corresponding liability on the part of the Committee and we know that this view has been taken in regard

to certain Acts of the Legislature in England of late years. We have no reason to doubt that the ruling of the Madras Court was, on the point before it, quite correct, but the point before us is quite a different one. Section 44 provides that a tax may be levied upon buildings or lands so situated that their occupiers may benefit by their works. A notification by the Local Government, No. 585 of 8th December 18 7, indicates certain classes of persons as coming within the purview of section 44. We have to decide whether or not Major Stephenson comes within this category. That notification issued under section 45 of the Act, which, so far as we can see, is the only authority under which the Committee could levy a tax of this kind. For purposes of comparison, we asked the learned Pleader for the Committee to point out to us under what further notification a tax of 5 per cent., which we understand is levied upon houses which are connected up with the main, has been levied. But he is unable to produce any, and states that this tax is levied in accordance with rules passed under section 120-H, a section which we note was only imported in the Act in the year 1900, and apparently has no connection at all with the actual tax under discussion but provides for a charge being made for connections and plant. We, therefore, can get no assistance in interpreting the notification under discussion from any other similar notification.

We find that section 44 provides that for certain purposes a tax,to be called a water-tax, may be levied upon buildings or lands which are so situated that their occupiers can benefit by the works. In the notification issued under section 45, it is provided that the tax should be levied at the rate of Rs. 2-8-0 per cent. on the rent of houses and buildings in the Civil Station of Lahore which are situated within 500 feet from the public water main and are not connected with it.

We have given the point our most careful consideration and we are unable to accept the contention of the Municipal Committee that the occupier of a house is in a position to benefit by the works merely by reason that a closed water-pipe passes within 500 feet of his house. The interpretation placed upon the notification by the Commissioner, which we should have supposed would have been held binding upon the Municipal Committee, in 1905, until reversed by competent authority, seems to us to be a reasonable one in its intention. We think that section 44 clearly means buildings or lands so situated that their occupires can derive benefit from the works as they stand, and not that by having further connections made and paying an additional tax, they can put themselves into a position to benefit. The section does not say that those are liable who can by taking connection get themselves into the position to benefit, but that they are so situated that the occupiers can benefit from the works. No doubt, the words used in the notification are 500 feet from the public water main, but we think a reasonable and proper interpretation is, "the public water main from which water can be drawn" and not "public water main absolutely closed and from which no one can benefit as it stands." We do not know that the benefit can be restricted to hydrants. There may be other methods by which occupires could benefit, but it is not alleged that any such exist and we know that in this case the nearest hydrant is not within 500 feet of Major Stephenson's house. We hold that the principle laid down by the Commissioner of Lahore in his order, dated the 19th May 1905, is correct, and that the Notification No. 585 of December 1897, does not justify the Committee in claiming this rate from Major Stephenson, and we reply to the reference accordingly.

BOMBAY HIGH COURT.

ORIGINAL CIVIL SUIT NO. 272 OF 1911.

April 1, 1912.

Present:—Mr. Justice Macleod.

BHAGVANDAS PARASHRAM—APPELLANT

versus

BURJORJI RUTTONJI BOMONJI—RESPONDENT.

Pakka Adatia, *position of—Suit by* Pakka Adatia—*Wagering, defence of—Evidence—Surrounding circumstances—Interrogatories, questions to be asked.*

A *pakka adatia* is a person who enters into a contract of employment with his constituent for reward. He obtains instructions from his client what contracts to enter into. But, generally speaking, the constituent is not concerned with the method in which his instructions are carried out.

In the Bombay Presidency, it is open to the constituent to prove, in a suit by the *pakka adatia*, that the

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contracts made by the latter were wagering contracts.

A party relying on the defence of wagering must prove that at the time the contract was entered into, it was the common intention of both parties neither to give nor receive delivery, but merely to pay or receive differences according to the market-rate at the due date. In determining the question what was the common intention of parties at the time of the contract, the Court can look to the surrounding circumstances, as it hardly ever occurs that there is direct evidence of a common intention to wager.

A party seeking discovery by interrogatories is entitled to put questions for the purpose of extracting from his opponent information as to the facts material to the questions between them, which he has to prove on any issue raised between them, or for the purpose of securing admissions as to such facts in order that expense and delay may be saved or to destroy his opponent's case or to support his own case.

The mere fact that the questions would be admissible in cross-examination of a witness, does not make them good as interrogatories.

Interrogatories must not be exhibited unreasonably or vexatiously, nor be prolix, oppressive, unnecessary or scandalous. Nor should interrogatories be allowed which are sought to be administered obviously for the purpose of fishing out a case.

In cases where the defence of wagering has been set up, the party setting up this defence should not be allowed to interrogate his opponent generally as to his business transactions apart from the particular transactions in suit. It is manifestly unfair to compel a man to disclose his general dealings on the chance that thereby his opponent may discover something which will support his case.

Mr. *Robertson*, for the Plaintiff.

Mr. *Jardine*, for the Defendant.

JUDGMENT.—The plaintiffs filed this suit against the defendant in April 1911, alleging that in June 1910 defendant requested them to act as his *pakka adatias*, that in consequence of such instructions they entered into contracts for the sale of large quantities of cotton and linseed which resulted in heavy losses. These they seek to recover from the defendant after giving him credit for a large sum which, it is alleged, he deposited with them as margin money.

The defendant pleads that he entered into cotton and linseed contracts with the plaintiffs as principals and that the common understanding between the parties was that no delivery was to be given or taken but that differences alone should be dealt in. He denies that the plaintiffs acted as his *pakka adatias*.

On the 19th January 1911, the defendant obtained leave to administer interrogatories to the plaintiffs. The affidavit of the managing clerk of defendant's Solicitors supporting the application states that in order to answer the questions, the plaintiffs would have to refer to their books and if those questions were put to them in cross-examination, a good deal of the Court's time would be wasted.

The following five interrogatories were administered in pursuance of the leave so obtained: —

"1. What were the daily cash balances from 1st September 1910 to 1st October 1910 of the plaintiffs' firm as appearing in their daily cash book?

"2. What were the daily bank balances during the same period?

"3(*a*) How many contracts did the plaintiffs' firm enter into for the sale and purchase of linseed in *Samvat* year 1964, *Samvat* year 1965, and *Samvat* year 1966, and what quantity was agreed to be sold or purchased in each case as per the said contracts?

"3(*b*) Which of the said contracts were purchased by you by actually weighing out and giving delivery and which by actually taking delivery on weighment?

"4. In all these years from 1964 to 1966, what was the amount of linseed for April-May delivery and what for Bhadarwa delivery?

"5. How many contracts for April-May delivery were performed by actual weighment of ready linseed and how many contracts for Bhadarwa delivery were so performed?"

The plaintiffs filed their answer on the 29th February 1912.

They objected to answering interrogatories 1 and 2 on the ground that they had no possible reference to the defences raised in the suit.

They objected to answering interrogatories 3, 4 and 5 on the following grounds, that they were administered solely with the object of fishing out a case for the defendant and getting information of the plaintiffs' general dealings and transactions, and their general business; that they were irrelevant to the issues to be tried and, in any event, could only be asked in cross-examination; that as the defendant admitted that his application was made expressly for the purpose of saving the time of the Court at the hearing, the plaintiffs now knew what questions the defendant wished to ask, and would be ready with the answers from their books if the Judge at the hearing allowed the questions.

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The defendant thereupon obtained a summons on the 13th March calling upon the plaintiffs to show cause why they should not forthwith fully answer the interrogatories on the ground that they were relevant and material to his defence, and were neither fishing, nor made to annoy the plaintiffs.

The first issue on these pleadings will be whether the plaintiffs acted as *pakka adatias* for the defendant A *pakka adatia* has been held by the Court to be a person who enters into a contract of employment with his constituent for reward. The *pakka adatia* obtains instructions from his client what contracts to enter into, but, generally speaking, the constituent is not concerned with the method in which his instructions are carried out. It would appear, however, that in the Bombay Presidency, it is open to the constituent to prove that the contracts made by the *pakka adatia* were wagering contracts. So the issue of wager will arise whether the plaintiffs contracted direct with the defendant or acted as his *pakka adatias*.

According to the decisions of the Court, a party relying on the defence of wagering must prove that at the time the contract was entered into, it was the common intention of both parties neither to give nor receive delivery, but merely to pay or receive differences according to the market-rate at the due date. The Court, in determining the questions what was common intention of the parties at the time of the contract, can look to the surrounding circumstances, as it hardly ever occurs that there is direct evidence of a common intention to wager. Each party hopes to win, and it is only when the due date has arrived and it is apparent which party has lost, that the looser sets up the defence of wagering. He is always ready to swear he was wagering, he has to prove that his opponent was likewise wagering.

Now, 'surrounding circumstances' is a very loose expression and it is quite impossible to foresee what questions will be allowed by the Judge at the hearing to be put to the plaintiffs in cross-examination. The party seeking discovery by interrogatories is entitled to put questions for the purpose of extracting from his opponent information as to the facts material to the questions between them, which he has to prove on any issue raised between them, or for the purpose of securing admissions as to such facts in order that expense and delay may be saved, or to destroy his opponent's case, or to support his own case.

The mere fact that the questions would be admissible in cross-examination of a witness does not make them good as interrogatories. Interrogatories must not be exhibited unreasonably or vexatiously, nor be prolix, oppressive, unnecessary or scandalous. Nor should interrogatories be allowed which are sought to be administered obviously for the purpose of fishing out a case.

It may be difficult to decide where the line is to be drawn between interrogatories which should be allowed to be administered, and those which are prolix, vexatious or fishing, but in cases of doubt, it is advisable to leave the questions to be put at the hearing. I have hitherto, in cases where the defence of wagering has been set up, refused to allow the party setting up this defence to interrogate his opponent generally as to his business transactions apart from the particular transactions in suit, on the ground that it is manifestly unfair to compel a man to disclose his general dealings on the chance that thereby his opponent may discover something which will support his case, and I am not disposed to decide differently on this summons.

The plaintiffs are asked to disclose their daily cash balances and daily bank balances from the 1st September 1910, till the 1st October 1910, to disclose the whole of their contracts for the sale and purchase of linseed during these specified years with the particulars of each contract, the quantity agreed to be sold or purchased in each contract and how each contract was performed.

Further, they are asked what was the total amount of their linseed contracts for April-May and Bhadarwa deliveries and how many contracts were performed by actual weighment.

I presume that the defendant hopes to discover that the plaintiffs' cash and bank balances in September to October 1910 were so small, and that the contracts for linseed during the years 1965 to 1966 which were performed by actual weighment, if any, were so few, that the Judge at the hearing will find those are surrounding circumstances which prove the intention of the plaintiffs

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in the contracts in question was merely to pay or receive differences.

In the *General Stock Exchange* v. *Bethell*, (1), the plaintiffs sued on the balance of account on stock exchange transactions. The defendant pleaded that the plaintiffs had not bought and sold stocks as authorized by him and sought to obtain particulars of the dates of the purchases and sales and the names of the persons to or from whom the shares had been sold or bought and of the amounts paid by the plaintiffs on his behalf and the mode of payment of such money.

The Judge in Chambers refused to order the plaintiffs to give further and better answers to interrogatories administered to them. In appeal, Manisty, J., said that the appeal must be dismissed as the order asked for by the defendant was a mere attempt to get hold of some technical defence to the action. Mathew, J., concurring, said that the only effect of allowing the appeal would be to delay the trial and to make an order oppressive to the plaintiffs.

In *Petre* v. *Sutherland* (2), the plaintiff, a stock broker, sued the defendant, his client, for the balance of an account. The defendant who had had dealings with the plaintiff for fifteen years, claimed to have the accounts re-opened for the whole of that period, and with that view to be allowed to examine the plaintiff's books for that period. It was held by the Court of Appeal that the discovery would be useless, unnecessary and oppressive. The defendant was dealing for differences and had taken moneys, but when he was sued for losses, he sought to set up a technical defence and to obtain that discovery to assist him. Bowen, L. J., observed that the power of discovery was too often abused and its exercise was a matter of discretion. On the other hand, in the *Universal Stock Exchange Co.* v. *Crowther* (3), the defendant, who was disputing a claim by his stock-brokers on the balance of an account for dealing in shares, was allowed to interrogate the plaintiffs as to whether they had, if they acted as brokers, at any time in their possession, or were the owners of, and were entitled to, the various stocks which they claimed to have bought on behalf of the defendant. In the account, the same shares appeared to have been bought on one side and sold on the other, and for that reason, the interrogatory was allowed.

In this case, however, the interrogatories relate not to the particular transactions on which the plaintiffs sue but to their general dealings and the decision in *Petre* v. *Sutherland* (2) seems directly in point.

In my opinion, therefore, the summons should be dismissed. Costs reserved to the hearing.

The defendant appealed.

On the 20th August 1912, the Appeal Court (Scott, C. J., and Chandavarkar, J.) confirmed the order with costs.

Attorneys for the Plaintiffs: Messrs. *Tyabji & Co.*

Attorneys for the Defendant: Messrs. *Mulla & Mulla.*

(1) (1886) 2 T. L. R. 683.
(2) (1887) 3 T. L. R. 275.
(3) (1892) 8 T. L. R. 650.

CALCUTTA HIGH COURT.

REGULAR CIVIL APPEALS NOS. 173 AND 148 OF 1910.

July 23, 1912.

Present:—Sir Ashutosh Mookerjee, KT., Judge, and Mr. Justice Beachcroft.

PROSONNO KUMARI DEBI—PETITIONER—APPELLANT

versus

RAM CHANDRA SINGHA AND OTHERS—OPPOSITE PARTY—RESPONDENT.

*Appeal—Memorandum of appeal not accompanied by copy of decree appealed against, though decree was in existence when appeal filed—Copy of decree given to Vakil but not filed—Subsequent death of Vakil—Appeal ordered to be admitted after time—Sufficient cause—Limitation Act (XV of 1877), s. 5—Letters of Administration—*Debuttar *property—Whether Letters should be granted where no estate to be administered—Device to secure decision on contested question of title.*

The omission to file a copy of the decree appealed against, along with the memorandum of appeal, is a fatal defect, and the Court has no power under the Code to exempt the appellant from producing a copy.

Hem Chundra Bakshi v. *Jadab Chandra Bakshi*, 17 Ind. Cas. 99; 16 C. L. J. 116 and *Binapani* v. *Sashi Bhushan Sinha*, 17 Ind. Cas. 119; 16 C. L. J. 133, relied upon.

Where an appellant obtained a copy of the decree

to be appealed against and made it over in proper time to a Vakil who filed the appeal, but by mistake, the precise nature of which could not be explained as the Vakil had since then died, the copy was not filed with the memorandum, the High Court, at the time of the hearing of the appeal, accepted the copy of the decree by extending the time for filing the appeal under section 5 of the Limitation Act

Where there is no estate which stands in need of administration, no suggestion that any creditors have to be paid or any debts due to the estate have to be collected, and an application for Letters of Administration is a transparent device to secure from the Probate Court a decision upon a contested question of title to the estate, there is no occasion for the grant of Letters of Administration.

Lakshmi Narain Chatterjee v. *Nanda Rani*, 3 Ind. Cas. 287; 9 C. L. J. 116; *Lalit Chandra Chowdhury* v. *Baikuntha Nath*, 5 Ind. Cas. 395; 14 C. W. N. 463; 15 C. L. J. 305 and *Parsania* v. *Hari Charan*, 16 Ind. Cas. 588, referred to.

Appeal from the decree of the District Judge of Bankura, dated January 10th, 1910.

Babus *Ram Chandra Majumdar*, *Biraj Mohan Majumdar*, *Amarendra Nath Bose* and *Hari Bhushan Mukherji*, for the Appellant.

Babus *Dwarka Nath Chakravarti*, *Dwarka Nath Mitter*, *Manmotha Nath Mukherji*, *Sarat Kumar Mitra* and *Hira Lal Sanyal*, for the Respondents.

JUDGMENT.—This appeal is directed against a decree whereby Letters of Administration, in respect of the *debuttar* properties of the Bishunpur Raj, have been granted to the respondent, to continue during the minority of her son. The properties were admittedly in the possession of Raja Ram Krishna Singha down to 1889, when he died leaving two widows, the senior Rani Dhajamoni and the junior Rani Prosonno Kumari. Upon his death, Rani Dhajamoni became the *shebait* and managed the properties till 1892 when she died. It is alleged that, shortly before her death, she executed in 1891 an *arpannama* or deed of gift in favour of one Nilmoni Singh, who was thus constituted the *shebait* of the *debuttar* properties. This *arpannama* has not been produced or proved in this case, and the Court is, therefore, not in a position to pronounce any opinion upon the question of the execution of the alleged deed of gift by Rani Dhajamoni and its true legal effect. It is stated, however, that upon the death of Rani Dhajamoni, Nilamoni Singh became the *shebait* and managed the properties till 1903, when he died, leaving a minor son, Ram Chandra Singh, and a widow, Churamoni. On the 1st January 1909, Churamoni applied for Letters of Administration, on behalf of her infant son Ram Chandra Singh, in respect of the *debuttar* properties. The application was opposed by Rani Prosunno Kumari, the junior widow of Raja Ram Krishna Singh, and in her turn, she applied on the 1st April 1909 for Letters of Administration to that very estate. The District Judge has taken evidence and has come to the conclusion that the title of Rani Prosunno Kumari has been extinguished by lapse of time, as the properties were in the possession of Nilmoni Singh from the time of the death of Rani Dhajamoni in 1892 to the time of his death in 1903 In this view, the District Judge has granted Letters of Administration to Churamoni for the benefit of her minor son, to continue till the latter comes of age. The District Judge has also dismissed the application for Letters of Administration by Rani Prosunno Kumari. The present appeal has been preferred by Rani Prosunno Kumari against the grant of Letters of Administration to Churamoni.

A preliminary objection has been taken to the hearing of the appeal on the ground that the memorandum is not in conformity with the provisions of the Code of Civil Procedure, inasmuch as a copy of the decree was not attached thereto. It has not been disputed on behalf of the appellant that this is a fatal defect and that the Court has no power under the Code to exempt the appellant from the production of a copy of the decree against which the appeal is preferred. [*Hem Chandra Bakshi* v. *Jadab Chandra Bakshi* (1) *Binapani Debi* v. *Sashibhusan Sinha* (2)]. An application has, however, been made on behalf of the appellant to the effect that a certified copy of the decree may now be received and allowed to be attached to the memorandum of appeal. It is competent to the Court to make an order of this description, if it is satisfied that the discretion vested in it under section 5 of the Limitation Act should be exercised in favour of the appellant. It has been explained in an affidavit that the copy of the decree now tendered was obtained before the appeal was lodged in this Court, that it was made over in proper time to the learned Vakil who filed the appeal

(1) 16 C. L. J. 116; 17 Ind. Cas. 99.
(2) 16 C. L. J. 133; 17 Ind. Cas. 119.

but that by a mistake, the precise nature of which cannot now be explained as the learned Vakil has since then died, the decree was not attached to the memorandum of appeal when it was filed. We are of opinion that the appellant ought not to suffer by reason of what was very possibly an accidental mistake or oversight on the part of her Vakil. We, therefore, grant the application for extension of time and direct that the copy of the decree now produced be accepted and attached to the memorandum of appeal. We may add that a similar order was made by this Court in the case of *Surja Kant Roy Chowdry* v. *Bihari Bholliachya* (3).

The question next arises, whether the order for grant of Letters of Administration ought to have been made. In our opinion, it is obvious that the order cannot be sustained. In fact, this case illustrates how statutory provisions may be abused and misapplied in a manner never contemplated by their framers. The application of the respondent to the Court below purports to be one for Letters of Administration in respect of *debuttar* properties, but there is manifestly no estate which stands in need of administration. Even if it be assumed, as was held in the case of *Ranjit Singh* v. *Jagannath Prosad Gupta* (4), that Letters of Administration may be granted in respect of *debuttar* properties in certain events, though the contrary view was indicated in *Jib Lal Gir* v. *Jaga Mohan Gir* (5), there is clearly no occasion for a grant here. There is no suggestion that any creditors have to be paid or that any debts due to the estate have to be collected; in fact, no foundation is laid for a possible theory that the estate really needs what is technically meant by administration. This is confirmed by what we have already stated, namely, that Nilamoni Singh died in 1903 and the present application was not made till six years later; *prima facie*, therefore, there is no estate of which administration can be granted. But we may add that we are not satisfied that this is at all a case under section 37 of the Probate and Administration Act of 1881. That section provides that where a person dies, leaving properties of which he was the sole or surviving trustee or in which he had no beneficial interest on his own account and leaves no general representative or one who is unable or unwilling to act as such, Letters of Administration limited to such property may be granted to the beneficiary or to some other person on his behalf. It has not been proved that the infant, on whose behalf the application has been made, is a beneficiary within the meaning of section 37 and the case thus falls within the rule recognised in *Jib Lal Gir* v. *Jagan Mohan Gir* (5). We are further of opinion that the application for Letters of Administration in this case is a transparent device to secure from the Probate Court a decision upon a contested question of title to the *debuttar* properties. But, as laid down in *Lakshmi Narain Chatterjee* v. *Nanda Rani Debi* (6); *Lalit Chandra Chowdhury* v. *Baikuntha Nath Chaudhri* (7) and *Parsania* v. *Hari Charan* (8), the Court will not allow the provisions of the Probate and Administration Act to be misapplied for such a purpose. If there is any controversy between the parties as to the *shebaitship* of the disputed properties, they must seek for its decision in a title suit properly framed for the purpose.

The result is, that this appeal is allowed, the decree of the District Judge set aside and the application dismissed.

It is conceded that the other appeal (Regular Civil Appeal No. 148 of 1910) stands on precisely the same footing. In that appeal, however, the decree of the Court below will be affirmed and the application for Letters of Administration will stand dismissed. There will be no order for costs here or below, in either of these cases.

Appeals allowed.

(3) (1910) R. A. No. 86 of 1908.
(4) 12 C. 375.
(5) 16 C. W. N. 798; 16 Ind. Cas. 453.
(6) 3 Ind. Cas. 287; 9 C. L. J. 116.
(7) 5 Ind. Cas. 395; 14 C. W. N. 463; 15 C. L. J. 305.
(8) 16 Ind. Cas. 588.

BASAVESWARASWAMI *v.* HAVALIGI HUSSAIN.

MADRAS HIGH COURT.

SECOND CIVIL APPEALS NOS. 1331 AND 1334 OF 1910.

September 11, 1912.

Present:—Mr. Justice Sundara Aiyar and Mr. Justice Sadasiva Aiyar.

IN NO. 1 31.

BASAVESWARASWAMI, BY DHARMA-KARTHA ASPALLI PANCHAPPA—APPELLANT

IN NO 1334.

HAVALIGI HUSSAIN SAHEB—APPELLANT

versus

1. THE BELLARY MUNICIPAL COUNCIL
2. THE SECRETARY OF STATE FOR INDIA IN COUNCIL, REPRESENTED BY THE COLLECTOR OF BELLARY—RESPONDENTS.

Streets and drains in Municipal towns—Ownership in Government—Right of Municipality vesting in Municipality by statutory provisions—Construction by house owner of pial over drain—Adverse possession — Prescriptive right — Limitation -- Extinguishment of title in Municipality after 12 years—Encroachment—Right of Municipality to remove pial—Madras District Municipalities Act (IV of 1884), s. 168 (1)—Injunction—Prayer for declaration, granting of—Subsidiary relief.

The streets and the drains therein in Municipal towns are vested in the Municipalities by Government for purposes for which they were constituted. Their right is not a mere right of easement, but a special kind of property in the site previously unknown to the law, but created by statute.

Sundaram Iyer v. *The Municipal Corporation of Madura and the Secretary of State for India in Council*, 25 M. 635; 12 M. L. J. 37, *Rolls* v. *Vestry of St. George the Martyr Southwark*, 14 Ch. D. 785 at pp. 795, 796; 43 L. T. 140; 28 W. R. 867; 44 J. P. 680; 49 L. J. Ch. 691, *Municipal Council of Sydney* v. *Young*, (1898) App. Cas. 457; 67 L. J. P. C. 40; 71 L. T. 365; 46 W. R. 561, referred to.

Though the Municipalities cannot give up the rights of the public in the streets or affect their right of way by any act of their own, it would not affect the capacity of a person in hostile possession to acquire rights which would affect the public.

Midland Railway Co. v. *Wright*, (1901) 1 Ch. 738; 70 L. J. Ch. 411; 49 W. R. 474; 84 L. T. 225; 17 T. L. R. 261, referred to.

Although the soil may belong to one person, another person may be the owner of a building above the soil, and the right to occupy a portion of the space above the soil may be acquired by limitation.

Laybourn v. *Gridley*, (1892) 2 Ch 53; 61 L. J. Ch. 352; 40 W. R. 474; *Bevan* v. *London Portland Cement Co., Ld.*, 67 L. T. 615; 3 R. 47; *Mohan Lal Jechand* v. *Amrat Lal Bechardas*, 3 B. 174, referred to.

The construction of a pial over a drain by a house owner in front of his house is a user by him adverse to the Municipality and 12 years' adverse enjoyment (before 1906) extinguishes the right of Municipality to the space of the pial, and 60 years' adverse enjoyment extinguishes the rights of the Government.

The Municipality, however, has the right under section 168 (1) of the District Municipalities Act, the statutory right to demolish the pial as 'an encroachment,' notwithstanding the existence of a prescriptive title as against it and Courts have no jurisdiction to restrain the demolition by an injunction.

Where plaintiff sought to have it declared that he had acquired a prescriptive right to the site of a pial built by him over a drain and for an injunction restraining the Municipality from demolishing it:

Held, that the Court would not grant him the declaration, though he succeeded in establishing his prescriptive right to the site, as it was only subsidiary to the substantial relief asked for, *viz.*, injunction, which could not be granted.

Second appeal against the decree of the Subordinate Judge of Bellary, dated 7th April 1910, in A. S. Nos. 2 and 18 of 1907, respectively, preferred against that of the Court of the District Munsif of Bellary, in O. S. Nos. 185 and 174 of 1905, respectively.

Mr. *J. C. Adam*, for the Appellant.

The Hon'ble Mr. *L. A. Govindaragava Iyer*, for 1st Respondent.

The Hon'ble Mr. *T. V. Seshagiri Iyer*, for 2nd Respondent.

JUDGMENT.

SUNDARA AIYAR, J.—This is a suit by the owner of a house in Bellary for a declaration of his right to a pial and for restraining the Municipal Council of the town from removing it. At the instance of the Municipal Council, the Secretary of State for India in Council was made a party to the suit. The plaintiff's case was that the pial belonged to him and that the Municipal Council had, therefore, no right to remove it as it threatened to do. The Council denied the plaintiff's right to the site of the pial and the Government set up its ownership to the site. The issues framed in suit raised the questions, how long the suit pial was in existence, whether the plaintiff acquired a prescriptive title to the site of the pial, if he was not the original owner, and whether the Municipality was entitled to demolish it.

Both Courts have found that the street was dedicated to the public by the Government. The houses were built on sites originally belonging to Government, which it gave to the people when they were compelled to remove from houses occupied by them within

the fort of Bellary. The lower Court also found that the land over which the pial stands was not part of the plaintiff's house. These findings are binding on us in second appeal. It has also been found by the lower Courts that the pial was constructed about the year 1883 or 1884, that prior to its construction, there were loose slabs of stone which were used for the purpose of vending various articles but that the Municipal servants used to remove these slabs when necessary for the purpose of repairing the drain.

It was argued before us that the plaintiff's possession must be taken to date from the time when the loose slabs were in existence; but, having regard to the fact that the slabs used to be removed when the Municipality wished to do so, it is not possible to regard the plaintiff's possession as having been effective until the present pial was constructed in 1883. If the Municipality had the right to the space above the drain up to the portion occupied by the plaintiff, its right to possession was not disturbed in an effective manner by the use of the loose slabs of stone. From 1883, however, the plaintiff must be taken to have obtained an effective and exclusive possession of the pial. The learned Pleader for the Municipal Council argued that this possession was not adverse to the Municipality, inasmuch as, for the purposes of its functions, it was not necessary for the Municipality to use the site of the pial. This contention I am entirely unable to accept. According to the decision in *Sundaram Iyer* v. *The Municipal Corporation of Madura and the Secretary of State for India in Council* (1), the street, which on the findings must be taken to include the drain, was vested in the Municipality for the purposes for which the Council was constituted. Their right was not a mere right of easement, according to the view adopted by the learned Judges who decided that case, but was a special kind of property in the site previously unknown to the law but created by statute. This was also the view adopted by James, L. J., in *Rolls* v. *Vestry of St. George the Martyr Southwark* (2). See also the judgment of Lord Morris in *Municipal Council of Sydney* v. *Young* (3). *Sundaram Iyer* v. *The Municipal Council of Madura and the Secretary of State for India in Council* (1), regards a Municipal Council as having a right both to the surface of the street and to a portion of the soil beneath and the space above so far as would be necessary for the discharge of its functions as the authority bound to maintain, protect and repair the road. If, then, the Municipality was the owner of the site occupied by the pial in 1883, it must be taken to have been dispossessed by the plaintiff when he constructed the pial. The rights to possession would be extinguished when, according to the Limitation Act in force, a suit for possession instituted by it became barred. As the law stood before 1900, the time within which the Muncipality could institute such a suit was twelve years. In 1895 or 1896, therefore, the Municipal Council's right to the site of the pial became extinguished and the rights of the public incidental to their right of way also became extinguished according to the view taken in *Sundaram Iyer* v. *The Municipal Council of Madura and the Secretary of State for India in Council* (1). Although it was not open to the Municipality to give up the rights of the public or to affect the right of way possessed by the public by any act of their own, that would not affect the capacity of a person in hostile possession to acquire rights which would affect the public. See the judgment of Byrne, J., in *Midland Railway Co.* v. *Wright* (4). A similar principle applies in other cases. Thus, a trustee cannot alienate trust property except in certain circumstances, but a person can acquire a right by limitation to trust properties by adverse possession. Similarly, the trustee's office itself is *extra commercium* but the right to it may be acquired by limitation. Mr. Govindaraghava Iyer drew attention to an observation of Benson, J., in *Sundaram Iyer* v. *The Municipal Council of Madura and the Secretary of State for India in Council* (1), in support of his argument that the possession of the plaintiff was not adverse to the Municipality so long as the Council did not require the site for the discharge of its function. But the question whether possession was adverse or not, does not depend on the needs or requirements of the owner, but on the character of the occu-

(1) 25 M. 635; 12 M. L. J. 37.
(2) (1880) 14 Ch. D. 785 at pp. 795, 796; 43 L. T. 140; 28 W. R. 867; 44 J. P. 680; 49 L. J. Ch. 691.
(3) (1898) App. Cas. 457; 67 L. J. P. C. 40; 71 L. T. 865; 46 W. R. 561.
(4) (1901) 1 Ch. 738; 70 L. J. Ch. 411; 49 W. R. 474; 84 L. T. 225; 17 T. L. R. 261.

BASAVESWARASWAMI v. HAVALIGI HUSSAIN.

pation of the person in possession. It may, no doubt, be held that fugitive or unimportant acts of possession would not be sufficiently effective to make the possession adverse and that the license of the owner may be implied in such cases. But I cannot conceive what could be more effective occupation than building up the pial and occupying it exclusively. It must be taken to be now well established that, although the soil may be in one person, another person may be the owner of a building above the soil and that the right to occupy a portion of space above the soil may be acquired by limitation. See Lightwood's Time Limit on Actions, pages 17 and 18 and *Laybourn* v. *Gridley* (5). In *Midland Railway Co.* v. *Wright*(4), it was held that the right to surface level over a tunnel could be acquired by prescription. In *Bevan* v. *The London Portland Cement Company Limited* (6), it was held that the right to a tunnel itself could be acquired by adverse possession. A similar view was held in *Mohan Lal Jechand* v. *Amrat Lal Bechardas* (7) by a Bench of which West, J. was a member. It must, therefore, be held that, as against the Municipal Council, the plaintiff acquired a right to the pial by limitation on the expiration of 12 years from 1883 or 1884. I must observe that the view, taken in *Sundaram Iyer* v. *The Municipal Council of Madura and The Secretary of State for India in Council* (1), that the right of a Municipal Council by virtue of streets vesting in it includes the right of possession, was not questioned by any of the parties during the arguments. If the Municipal Council had no right to the possession of the space above the drain but only a right of user for the discharge of its functions with respect to the drain, the plaintiff's position would even then not be worse, for, as the person in possession of the pial, he would have a right to it as against all but the true owner, namely, Government in this case; and the Municipal Council would have no right to interfere with his possession or to demolish the pial. So far, then, as the right of ownership is concerned, the plaintiff's right must, be taken to be established as against the Municipality. As against Government, however, the plaintiff has not succeeded in establishing a title. The presumption of title arising from possession is of no use to the plaintiff in this case, because it has been found that the ownership of the site of the drain belonged to Government before the plaintiff took possession of the site of the pial. Until 1883, either the Government or the Municipality must be taken to have been in legal possession on the site; and the plaintiff has not been in possession for a period of 30 years so as to acquire a title by limitation as against Government.

The next question is, whether the plaintiff is entitled to an injunction restraining the Municipal Council from removing the pial. That question depends on the construction of section 168 of the District Municipalities Act. The right of the Municipal Council to the drain has not been affected by the acquisition of title to the pial by the plaintiff. According to section 168, the Municipality is entitled to "cause any projection, encroachment or obstruction made against or in front of any land in any public street to be removed or altered as they think fit." Now, the pial must be regarded as an obstruction made on land in the public street. As it appears that the pial is only three feet above the drain, it must be regarded as an obstruction of the drain in the street. The right of the Municipal Council to remove an obstruction does not depend on its title or right to the possession of it, as is clear from clause 3 of section 168, which entitles a person lawfully erecting an obstruction to reasonable compensation for the removal. The right to remove is given in the interests of the public to prevent encroachment on the public roads and is not dependent on the Municipal Council's ownership. The injunction must, therefore, be refused. No claim was made in the plaint for compensation, nor does it appear whether the pial itself had been removed at the date of the suit; it does not even appear whether it has been removed now. It was argued by Mr. Seshagiri Aiyar, who appeared for Government, that the Municipal Council had received the sanction of Government for the removal of the pial and had, therefore, the right to remove it, but the Municipality did not set up the plea that its act was justified by the orders of Government. Nor does it appear in what capacity, if at

(5) (1892) 2 Ch. 53; 61 L. J. Ch. 352; 40 W. R. 474.

(6) (1893) 67 L. T. 615; 3 R. 47.

(7) 3 B. 174.

all, Government sanctioned the removal. I consider it somewhat extraordinary that, after allowing the plaintiff to construct and occupy his pial for nearly a quarter of a century, the Municipality should claim to remove it without any compensation, and I take leave to doubt whether the Government would sympathise with and authorise such conduct on the part of the Council. As the prayer for a declaration of title was only incidental to the substantial relief asked for, namely, injunction, no declaration can be granted in this suit as against the Municipality. The second appeal must, therefore, be dismissed with 2nd respondent's costs.

Second Appeal No. 1334 follows.

SADASIVA AIYAR, J.—The plaintiff is the appellant before us. The finding of the lower Court is that he had been in possession of the pial in front of his house for only 25 or 30 years before the suit. This pial is built so as to cover the Municipal drain and is 3 feet high from the road level, the drain being $1\frac{1}{2}$ feet in width The lower Appellate Court found that the plaintiff has not acquired a prescriptive title to the land over which the pial in question projects either against the Bellary Municipal Council in whom the street and the drain sites were vested or against the Government and hence dismissed plaintiff's suit which was brought for an injunction against the Bellary Municipal Council to restrain them from removing the pial as an encroachment on the drain and road.

I shall first shortly consider the question whether the drain and the road over which the pial is built belong to the Municipal Council or the Secretary of State or both. In *The Municipal Commissioners for the City of Madras* v. *Sarangapani Mudeliar* (8), Collins, C J., and Parker, J., state as follows:— "The English maxim 'once a highway always a highway' is based on the theory that the property in a highway is in the owner of the soil subject to an easement in favour of the public. In the case before us, this legal fiction peculiar to English Law cannot arise; for there is no question of any easement whatever. *The street itself and the soil thereof is vested in the Municipality in trust for the public.* Both are united in the same person, that is, the 'proprietor," and then they held that the defendant acquired a perfect title to a part of the road site which had been encroached upon by him "*more than* 12 *years before the suit*" brought by the Municipal Commissioners of the City of Madras to eject him from the encroached site. In that case, the learned Judges further stated that "when the Crown has once ceded property to an individual or Corporation, the grantee of the property stands in respect of the property granted in the same position as any other proprietor," *i. e*, they clearly held that the Government "*lost all right of proprietorship in the street and the drain sites adjoining the street after they had once vested it in the Municipality.*" Next, we come to the case in *Sundram Iyer* v. *The Municipal Council of Madura and the Secretary of State for India in Council* (1), where Bashyam Iyengar, J., dissented from the above decision in *The Municipal Commissioners for the City of Madras* v. *Sarangapani Mudaliar* (8) and introduced all the fine distinctions known to English Law and held that the Municipal Council did not become, by the vesting of the street and the drains in it, the full owner of the site or soil over which the street exists, that it did not own the soil from the centre of the earth *usque ad coelum* and that it had only the right to manage and control the surface of the soil and so much of the soil below and of the space above the surface as was necessary to enable it to adequately maintain the street as a street. With the greatest deference, I might be permitted to express some regret that the complications known to English Law were thus introduced into this Presidency throughout this judgment of Bashyam Iyengar, J. The result has been, as pointed out by that very learned Judge himself, that there sprang up a sort of divided ownership between the Municipal Council and the Secretary of State, that there has been introduced different periods of limitation as against the Municipal Council and as against the Secretary of State and that, further, "the curious result" of the new Article 146 A of the Limitation Act, I. of 1908, would be that, on the expiration of 30 years from the date of the dispossession of the Municipality, the Crown will have the land freed from the burden of the highway, both the Municipality and the man who had been in possession adversely to the Municipality losing all their rights. However, it is probably now too late to

(8) 19 M. 154

go back on these distinctions which were based upon the view of the English and Scotch Law that the site of public highways is presumed to be in the conterminous proprietors and that they merely allow the public to impose a servitude upon the highway, a view which need have no place in a country where porambokes, streets, streams, water etc., almost invariably belong to Government till a private person is able to acquire a title by grant or prescription.

The plaintiff has acquired the right as against the Municipality in the present case to have the pial filled over to the drain site by enjoyment for 12 years, (which was the period for the perfection of title by prescription even against a Municipality before the amending Act of 1900 was passed), for his adverse possession against the Municipality of this stratum of space at the height of 3 feet over the level of the drain began about 1880 and the 12 years' possession was completed in 1892 ; *Mohanlal Jechand* v. *Amratlal Bechardas* (7) and *Ratnavelu Mudiliar* v. *Kolandavelu Pillai* (9); but so far as the Government is concerned, he had not had possession for 60 years before the suit and hence his title against Government has not been perfected.

Now, even in the case of the Municipality, though plaintiff's title to the stratum of space at the 3 feet height above the drain covered by the pial has been acquired by prescription, the Municipalty has, under section 168 of the District Municipalities Act, 1884, (clause 3), power to cause projections, encroachments or obstructions in any public street to be removed, and the definition of "street" under section 3, clause (2) includes the drian space on either side of the street. There can be no doubt that though the Municipalfty may not have vested in it the right to the space up to the sky over the drain and street, it must have had such a right at least up to a height of about 12 feet over the level of the street in order that it might properly exercise its power of repairing, widening and altering, cleansing and doing other duties in connection with the street and the drain. The pial is, therefore, clearly an encroachment, a projection and an obstruction in the street. They have the right accordingly to remove it and this suit for an injunction against their removal of such projection was rightly dismissed by the lower Appellate Court. I would, therefore, confirm its decree, though not on the grounds on which the lower Court based its decision. The appellant must pay the costs of the 2nd respondent, the Secretary of State.

Second Appeal No. 1334 of 1910 follows.

Appeals dismissed.

(9) 29 M. 511; 16 M. L. J. 281.

CALCUTTA HIGH COURT.

REGULAR CIVIL APPEAL No. 118 OF 1911.

June 19, 1912.

Present:—Sir Ashutosh Mookerjee, KT., Judge, and Mr. Justice Beachcroft.

RAJ KRISHNA DEY—PLAINTIFF—APPELLANT

versus

BEPIN BEHARY DEY—DEFENDANT—RESPONDENT.

Court-fee—Suit for declaration that plaintiff is sole shebait *and for injunction—Valuation for jurisdiction identical with valuation for Court-fees—Plaintiff not to assign arbitrary value on suit—Court Fees Act (VII of* 1870), *s.* 7 (*IV*) (*c*) *and* (*d*), *Sch. I, Sch. II, Art.* 17 (*iii*)—*Suits Valuation Act* (*VII of* 1887), *s.* 8.

A suit in which the plaintiff seeks for a declaration that he is the sole *shebait* of a certain idol and also for an injunction to restrain the defendant from interfering with his possession of the endowed properties, falls within section 7, clause 4, sub-clause (*c*) of the Court Fees Act, 1870, and the value, as determined for purposes of jurisdiction, must, under section 8 of the Suits Valuation Act, 1887, also determine the value for the purpose of Court-fees.

Where the plaintiff valued his suit for the purpose of jurisdiction at Rs 11,005, but for the purpose of Court-fees valued the prayer for injunction at Rs. 1,000, and paid Rs. 10 as Court-fees for the declaration under Schedule II, Article 17 (iii) and Rs. 75 for the injunction under Schedule I, read with section 7 (*iv*) (*d*) of the Court Fees Act:

Held, that the plaintiff was bound to pay *ad valorem* Court-fees upon the plaint and memorandum of appeal, on the basis that the value of the relief claimed was Rs. 11,005.

In cases falling under section 7 (*iv*) of the Court Fees Act, although the plaintiff is to state the amount at which he values the relief sought, the Legislature never intended that he should be at liberty to assign any arbitrary value and thus be free to choose capriciously the forum of trial or appeal.

Umatul Batul v. *Nanji Kuar*, 6 C. L. J. 427; 11 C. W. N. 705; *Dayaram* v. *Gordhandas*, 31 B. 73; 8 Bom. L. R. 885, relied upon.

Boidyanath v. *Makhanlal*, 17 C. 680, referred to.

RAJ KRISHNA DEY *v.* BEPIN BEHARY DEY.

Appeal from the decree of the Subordinate Judge, Midnapur, dated the 23rd August 1909.

Babu *Hara Kumar Mitter*, for the Appellant.

Babu *Tarak Chandra Chakravarty*, for the Respondent.

JUDGMENT.—A preliminary objection has been taken to the competency of this appeal. The appeal arises out of a suit in which the plaintiff seeks for declaration that he is the sole *shebait* of Lakhi Baraha Jieu, and the principal defendant is not a *shebait* of the idol, and also for an injunction to restrain the defendant from interfering with his possession of the endowed properties. In the plaint as originally framed, there was no prayer for an injunction. Objection was thereupon taken by the defendant to the effect that the suit was not maintainable in view of the proviso to section 42 of the Specific Relief Act. The plaintiff then amended the plaint and inserted the prayer for injunction to which reference has just been made. He valued the suit for the purpose of jurisdiction at Rs. 11,005, but, for the purpose of payment of Court-fees, valued the prayer for injunction at Rs. 1,000. He then paid Rs. 10 as Court-fees for the declaration under Schedule II, Article 17(*iii*) and Rs. 75 for the injunction under Schedule I, read with section 7 (*iv*)(*d*) of the Court Fees Act, 1870. The suit was heard on the merits and dismissed. The plaintiff has appealed to this Court, and upon the memorandum of appeal, he has paid Court-fees in the same manner as in the Court of first instance. It has been contended on behalf of the respondents that under section 8 of the Suits Valuation Act, the valuation for the purpose of Court-fees is identical with the valuation for the purpose of jurisdiction, and that, consequently, if the value assigned by the plaintiff for purposes of jurisdiction be accepted, the plaint and the memorandum of appeal are both insufficiently stamped, while, if the value assigned by the plaintiff for purposes of Court-fees be accepted, the appeal lies to the District Judge and not to this Court.

Section 8 of the Suits Valuation Act provides as follows: "Where in suits other than those referred to in the Court Fees Act, 1870, section 7, paragraphs 5, 6 and 9 and paragaph 10, clause (*d*), Court-fees are payable *ad valorem* under the Court Fees Act, 1870, the value as determinable for the computation of Court-fees and the value for purposes of jurisdiction shall be the same." The suit as framed falls within section 7, clause 4, sub-clause (*c*) of the Court Fees Act, 1870. Consequently, the value as determined for purposes of jurisdiction, namely, Rs. 11,005, must also determine the value for the purpose of payment of Court-fees.

The same conclusion follows from another point of view. Section 7 (*iv*) (*c*) of the Court Fees Act provides that the amount of fee payable in suits to obtain a declaratory decree, where, as here, consequential relief is prayed, shall be determined according to the amount at which the relief sought is valued in the plaint or memorandum of appeal. It was pointed out by this Court in the case of *Umatul Batul* v. *Nanji Kuar* (1) that in cases falling under section 7(*iv*) of the Court Fees Act, although the plaintiff is to state the amount at which he values the relief sought, the Legislature never intended that the plaintiff should be at liberty to assign any arbitrary value and thus be free to choose capriciously the forum of trial or appeal. The same view was taken in *Dayaram* v. *Gordhandas* (2), and is implied in *Boidyanath* v. *Makhanlal* (3). In the case before us, there is no room for controversy that the prayer for injunction has been arbitrarily under-valued. The plaintiff contends that he is the sole *shebait* of the idol Lakhi Baraha Jieu, and is entitled, as such, to exclusive possession of the disputed properties on behalf of the idol. He further contends that the principal defendant has been improperly placed in joint possession of the endowed properties under an erroneous order of the Revenue Authorities made on the 6th May 1908. If he succeeds in these contentions, he will obtain exclusive possession of the endowed properties, of which, according to his allegation, he was in joint possession at the date of the commencement of the suit. The value of the prayer for injunction, therefore, is the value of the relief claimed by the plaintiff, and upon the facts stated, that value, as estimated by the plaintiff himself, is Rs. 11,005. The plaintiff is, therefore, bound to pay *ad valorem* Court fees upon the plaint and memorandum of appeal, on the basis that the

(1) 6 C. L. J. 427: 11 C. W. N. 705 at p. 710.
(2) 31 B. 73; 8 Bom. L. R. 885.
(3) 17 C. 680.

value of the relief claimed is Rs. 11,005. The Court-fees payable upon Rs. 11,005 is Rs. 520; but the plaintiff has paid only Rs. 75; he is thus liable to pay the difference, Rs. 445, both upon the plaint and the memorandum of appeal; he is accordingly directed to pay Court-fees to the extent of Rs. 890 within three weeks from this date. If the amount is paid, the appeal will be heard. If it is not paid, the Court will consider what further order should be passed. The appeal will stand adjourned for three weeks.

The respondents are entitled to the costs of this hearing. We assess the hearing fee at five gold *mohurs*.

MADRAS HIGH COURT.

ORIGINAL SIDE APPEAL No. 49 OF 1910.

September 16, 1912.

Present:—Sir Ralph Benson, Offg. Chief Justice, and Mr. Justice Sankaran Nair.

KARRAY MANGIAH CHETTY—APPELLANT

versus

KANACHI RAMIAH CHETTY AND OTHERS—RESPONDENTS.

Insolvent Debtors Act (11-12 *Vic. c.* 21), *s.* 39—*Set-off—Right of petitioning creditor to set-off costs payable by him to insolvent as against his debt.*

A petitioning creditor in an insolvency proceeding cannot set-off the costs payable by him to the insolvent as against his debt as the former is an asset of the insolvent's estate in which all the creditors are entitled to share.

Such a case is not a case of "mutual credit."

In re a Debtor, (1907) 2 K. B. 896, *Robarts* v. *Buce*, L. R. 8 Ch. Div. 198 at p. 200; 47 L. J. Ch. 414; 26 W. R. 393; *Collett* v. *Preston*, 15 Beav. 458 and *Throckmorten* v. *Crowley*, L. R. 3 Eq. 196, relied upon.

Appeal from the order of the Hon'ble Mr. Justice Wallis, Commissioner in Insolvency, dated 7th November 1910, in Insolvency Petition No. 139 of 1908, on the file of the Court for the Relief of Insolvent Debtors at Madras.

Mr. *K. Narain, Row*, for the Appellant.

Mr. *M. K. Ramaswami Aiyar*, for the Insolvents.

JUDGMENT.—Ramiah Chetty filed his insolvency petition and schedule on the 21st July 1897 and a vesting order was passed the same day. He obtained his personal discharge on the 28th September alleging that he had paid all his creditors. He applied in 1906 to have his petition dismissed, when Mangiah Chetty, the appellant before us, came forward to prove his claim, which was rejected by the Official Assignee. He applied to Mr. Justice Boddam, who rejected his application with costs to be paid to the insolvent on the 21st January 1907. This order was reversed by the Appellate Court and the case was remanded to the Commissioner in Insolvency for a re-hearing. The costs incurred up to the date of the appellate order were also to be dealt with by him. Wallis, J., again dismissed the application on the 16th November 1908 and ordered Mangiah Chetty to pay the costs of the application and the appeal to the insolvent's attorney.

It was argued before us, on behalf of Mangiah Chetty, that Mr. Justice Boddam's order of the 21st January 1907 is a subsisting order. We are of opinion that that order was set aside in appeal and the order on 16th November 1908 is the final order now in force.

Mangiah Chetty obtained a decree on the 17th December 1907 against Ramiah Chetty, the insolvent, and his son Adinarayana Chetty for Rs. 3,000 and costs in Original Suit No. 94 of 1905. Of this, a sum of Rs. 1,602 is still said to be due.

Ramiah Chetty and his son have now filed their insolvency petition and schedule, and the vesting order was passed on the 1st July 1908.

Mangiah Chetty now applies that the costs he had been ordered to pay to the insolvent's Solicitor amounting to Rs. 615-4-0 might be set-off against the decree debt of Rs. 1,602 due to him.

Wallis, J., has rejected the application and this is an appeal against his order. The set-off claimed in insolvency proceedings does not rest on the same principle as the set-off in ordinary suits which is intended to prevent a multiplicity of suits. The debt due by Mangiah Chetty is an asset of the insolvent's estate in which all the creditors of the insolvent are entitled to share while Mangiah Chetty is only entitled to his dividend. Section 39 of sections 11 and 12 Vic. Ch. 21 introduces an exception to the ordi-

nary rule of distribution of all assets among the creditors of the insolvent by enacting that where there has been mutual credit given to the insolvent and any other person or persons, one debt or demand may be set against another. The reason is obvious.

The case before us in which Mangiah Chetty has to pay 'costs' under a decree is obviously not a case of mutual credit.

The order for costs against him has nothing to do with the decree in his favour. They are two entirely different matters. There is no other provision of law which allows a set-off.

It is the practice in England to set off costs against costs in bankruptcy proceedings between the same parties But a petitioning creditor is not allowed to set-off his debt against costs. See *In re a Debtor* (1).

It is pointed out in *Robarts* v. *Buce* (2) that the Master of the Rolls decided in the case of *Collett* v. *Preston* (3) that where the proceedings were different, one being an action at law on a covenant, and the other a suit in equity, there could not be set-off. "That is in accordance with sound sense, and the distinction there taken was recognised by Vice-Chancellor Wood in the case of *Throckmarten* v. *Crowley* (4), where set-off was allowed in regard to costs arising in the same suit, but not allowed where the costs had arisen in matters which were different." According to these decisions, Mangiah Chetty is clearly not entitled to set-off his debt against the costs payable by him.

We agree with the learned Judge and dismiss the appeal with taxed costs.

Appeal dismissed.

(1) (1907) 2 K. B. 896.
(2) 8 Ch. D. 198 at p. 200; 47 L. J. Ch. 414; 26 W. R. 393.
(3) 15 Beav. 458; 92 R. R. 507.
(4) 3 Eq. 196.

CALCUTTA HIGH COURT.
REGULAR CIVIL APPEAL NO. 74 OF 1910.
June 19, 1912.

Present:—Sir Ashutosh Mookerjee, KT., Judge, and Mr. Justice Beachcroft.

KANTA LAIK—PLAINTIFF—APPELLANT

versus

LACHMAN OJHA—DEFENDANT—RESPONDENT.

Landlord and tenant—Decree for arrears of rent—Sale in execution—Purchaser to acquire property free from incumbrances—Decree should be one for arrears due in respect of under-tenure—Single decree obtained for rents of two tenures—Sale in execution of such decree—Rights of purchaser—Rent Recovery Act (X of 1859), s. 105—Sale of Under-tenures Act (VIII of 1865 B. C.), ss. 4, 6, 16.

Section 4 of Bengal Act VIII of 1865 makes it essential in order that the purchaser may acquire the property free from all incumbrances under section 16, that the decree under execution should be one for arrears of rent due in respect of the under-tenure brought to sale.

If a single decree is obtained for arrears of rent of two distinct tenures, it operates as a decree for money when in execution thereof either tenure is brought to sale.

Hridoy Nath Das v. *Krishna Prosad Sircar*, 11 C. W. N. 497; 34 C. 298; 6 C. L. J. 153; *Baikanta Nath Roy* v. *Thakur Debendro Nath Sahi*, 11 C. W. N. 676; *Nanda Lal* v. *Sadhu Charan*, 7 C. L. J. 96; *Bipra Das* v. *Rajaram*, 3 Ind. Cas. 306; 13 C. W. N. 651; 36 C. 365; *Mulluk Chand Das* v. *Satish Chandra Das*, 3 Ind. Cas. 306; 11 C. L. J. 56; 14 C. W. N. 335, and *Rash Mohini Dasi* v. *Debendra Nath Sinha*, 13 Ind. Cas. 604; 16 C. W. N. 395, relied upon.

The rent is not regarded as due from the person against whom the decree is obtained, but is due in respect of the tenure.

Sham Chand Kundu v. *Brojonath Pal Chowdhry*, 21 W. R. 94; 12 B. L. R. 484, referred to.

Therefore, if the landlord seeks to recover by the sale of a tenure, not merely arrears due therefor, but an additional sum not realisable in respect of that tenure, the purchaser at the execution sale does not acquire the special status mentioned in section 16 of Act VIII of 1865 B. C.

Appeal from the decree of the Subordinate Judge of Manbhum, dated the 12th October 1909.

Babus *Dwarka Nath Mitter* and *Mohini Mohan Chatterjee*, for the Appellant.

Babus *Dwarka Nath Chakrabutty* and *Jnanendra Nath Sarkar*, for the Respondent.

JUDGMENT.—The substantial question in controversy between the parties to this litigation, relates to the true effect of an execution sale held on the 7th April 1902. The events antecedent to that sale may be briefly narrated. Prior to the year 1870, three brothers Chatradhar, Godadhar and Sarobar were in joint possession of the disputed properties on a *jagir* tenure under the Raja of Pachete. In 1878, default was made in the payment of rent, and on the 15th July of that year, the *jagir* was sold in execution of a rent-decree at the instance of the landlord, and was purchased by himself. Three suits for reversal of the sale were then commenced by the tenants, each in respect of a third share of the property. The suit

KANTA LAIK v. LACHMAN OJHA.

of Chatradhar abated, while those commenced by Godhadhar and Sarobar were dismissed by the Court of first instance on the 30th September 1893. Upon appeal to this Court, these two suits were decreed on the 2nd March 1896. The Raja appealed to the Judicial Committee only against the decree in the suit of Godadhar. Upon the death of Godadhar, shortly after the decree of this Court, that appeal was contested by his brother Sarobar in whom his interest had vested by survivorship ; on the 9th December 1899, the decision of this Court was reversed by the Judicial Committee in *Tara Lal* v. *Sarobar* (1). The ultimate result of the litigations, therefore, was that, in so far as Chatradhar and Godadhar were concerned, the Raja of Pachete became the owner of their interest in the tenure ; but the tenure continued in operation in respect of the interest of Sarobar. Meanwhile, default had again been made in payment of rent, and, on the 6th March 1901 the Raja obtained a decree for rent of the years 1896 and 1898 for the two shares of the tenure originally belonging to Godadhar and Sarobar. That decree was subsequently executed and the present appellant became the purchaser at the execution sale held on the 7th April 1902. His contention is that the effect of the sale is to annul all incumbrances created on the property by the tenure-holder. This position has been negatived by the Court below; in our opinion, that decision cannot be successfully challenged.

It was finally determined by the Judicial Committee on the 9th December 1899 that the interest of Godadhar had vested in the Raja of Pachete ; consequently, after that date, it was not open to the Raja as landlord to sue for arrears of rent in respect of that share, though he might possibly have claimed mesne profits. The decree obtained by the Raja on the 6th March 1901 was thus essentially a decree for arrears of rent of the share of the tenure still held by Sarobar and for damages for use and occupation of the share of the tenure once held by Godadhar. In execution of this decree, the third share of the tenure owned by Sarobar was brought to sale. The question thus arises whether this was a sale under section 105 of Act X of 1859 read with section 16 of Act VIII of 1865 B. C.

Section 105 of Act X of 1859 provides that if the decree be for an arrear of rent due in respect of an under-tenure, which by the title deeds or the custom of the country is transferable by sale, the judgment-creditor may make application for the sale of the tenure, and the tenure may thereupon be brought to sale in execution of the decree according to the rules for the sale of under-tenures for the recovery of arrears of rent due in respect thereof contained in any law for the time being in force. Section 16 of Act VIII of 1865 B. C. then provides that the purchaser of an under-tenure sold under the Act shall acquire it free from all incumbrances which may have accrued thereon by any act of any holder of the said under tenure, his representatives, or assignees, unless the right of making such incumbrances shall have been expressly vested in the holder by the written engagement under which the under-tenure was created or by the subsequent written authority of the person who created it, his representatives or assignees. This section has to be read with section 4 which provides that whenever a decree for an arrear of rent, due in respect of an under-tenure saleable under the provisions of section 105 of Act X of 1859, shall have been obtained and an application for the sale of the said under-tenure under the same section shall have been made and allowed, the Collector shall thereupon cause certain notices to be served. This section, therefore, makes it essential, in order that the purchaser may acquire the property free from all incumbrances under section 16 that the decree under execution should be one for arrears of rent due in respect of the under-tenure brought to sale. In the case before us, the decree executed against one-third share of the tenure, the property of Sarobar, was not only for arrears of rent due on account of that share, but also for a sum due in respect of the share of Godadhar, which had finally vested in the landlord himself. Consequently, it is plain, upon a construction of section 105 of Act X of 1859 and sections 4 and 16 of Act VIII of 1865 B. C., that the purchaser has not taken the property free

(1) 27 C. 407; 27 I. A. 33; 4 C. W. N. 533.

from all incumbrances. This view is supported by the terms of section 6 of Act VIII of 1865 B. C., which describes the procedure whereby the sale may be stopped. If the sum due under the decree together with interest to date of payment and all costs of process be paid into Court, at any time before the sale commences, whether by the defaulting holder of the under-tenure or any one on his behalf or any one interested in the protection of the under-tenure, such sale shall not take place, and the provisions of section 13 of Regulation VIII of 1819 for the recovery of sums paid by other than the defaulting holder of the under-tenure to stay the sale of the under-tenure, shall be applicable to all similar payments made under the section. It is fairly clear, therefore, that the payment contemplated by this section is payment of arrears due in respect of the under-tenure sought to be brought to sale. It was never contemplated by the Legislature that the person who seeks relief under section 6 might be called upon to pay the arrears due in respect of not only the tenure sought to be brought to sale but also some other property. To put the matter briefly, if a single decree is obtained for arrears of rent of two distinct tenures, it operates as a decree for money when in execution thereof either tenure is brought to sale; this view is supported by a long series of decisions: *Hridoy Nath Das* v. *Krishna Prosid Sircar* (2), *Baikanta Nath Roy* v. *Thakur Debendro Nath Sahi* (3), *Nanda Lal* v. *Sadhu Charan* (4), *Bipra Das* v. *Rajaram* (5), *Mulluk Chand Das* v. *Satish Chandra Das* (6) and *Rash Mohini Dasi* v. *Debendra Nath Sinha* (7). The contention of the appellant to the contrary is opposed to the fundamental principle that the purchaser at a sale for arrears of rent, under section 16 of Act VIII of 1865, B. C., acquires the property free of all incumbrances, only because the sum sought to be realised forms a first charge on that property. As was observed by Sir Richard Couch, C. J., in the case of *Sham Chand Kundu* v. *Brojonath Pal Chowdhry* (8), the rent is not regarded as due from the person against whom the decree is obtained but is due in respect of the tenure. If, therefore, the landlord seeks to recover by the sale of a tenure, not merely arrears due therefor, but an additional sum not realisable in respect of that tenure, the purchaser at the execution sale does not acquire the special status mentioned in section 16 of Act VIII of 1865, B. C. Consequently, the purchaser in the present case is not entitled to the privileges assigned to a purchaser at a sale in execution of a decree for arrears of rent under that section. We may finally observe that even if the purchaser could claim the status of a purchaser at a sale for arrears of rent, there would still be considerable difficulty in his way, because the incumbrance he seeks to annul by right of his purchase on the 7th April 1902 is not an encumbrance imposed on the property by the defaulter; it is admittedly a *putni* created more than twelve years before on the 16th January 1879 by the superior landlord during the time he was in possession as owner, after his purchase at the sale of the 15th July 1873 and before its partial reversal by this Court.

The result is that the decree of the Subordinate Judge is affirmed and this appeal dismissed with costs.

Appeal dismissed.

(2) 34 C. 298; 6 C. L. J. 153; 11 C. W. N. 497.
(3) 11 C. W. N. 676.
(4) 7 C. L. J. 96.
(5) 13 C. W. N. 650; 36 C. 765; 3 Ind. Cas. 306.
(6) 11 C. L. J. 56; 3 Ind. Cas. 306; 14 C. W. N. 335.
(7) 16 C. W. N. 395; 13 Ind. Cas. 604.
(8) 21 W. R. 94; 12 B. L. R. 484.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1609 OF 1911.

October 7, 1912.

Present:—Mr. Justice Sundara Aiyar and Mr. Justice Sadasiva Aiyar.

NEELAGARA LINGAMMA—APPELLANT

versus

KINNAHAL HAMPIAH—RESPONDENT.

Possessory tittle—Suit for recovery of land—Right of suit against person having no title.

A person, who has merely a possessory title to land, is entitled to a decree for possession against a person who has no title.

Second appeal against the decree of the Subordinate Judge of Bellary, in A. S. No.

219 of 1910, preferred against that of the District Munsif of Bellary, in O. S. No. 159 of 1909.

Mr. *S. Ranganatha Aiyar*, for the Appellant.

Mr. *T. Prakasam*, for the Respondent.

JUDGMENT.—It is first contended that the plaintiff had no title to recover the land at the time of the institution of the suit, and that the subsequent execution of a sale-deed in his favour would not entitle him to maintain the suit. But the plaintiff had an unregistered sale-deed in 1901 and we take the finding of the Subordinate Judge to mean that, after he got that sale-deed, he was in possession of the land by leasing it out to others until dispossessed by the defendant. He had, therefere, a possessory title which was sufficient to entitle him to a decree for possession against the 1st defendant who had no title.

It is next argued that plaintiff ought not to have been allowed to amend his plaint by adding a prayer for possession.

We do not think there are sufficient grounds to interfere with the discretion of the lower Appellate Court in allowing the amendment.

The last point relates to the award of damages to the plaintiff. According to the plaintiff, he was not able to cultivate the land owing to the defendant's obstruction. According to the defendant, he was himself in possession of the land and was cultivating it. In either case, the plaintiff is entitled to damages. We dismiss the second appeal with costs.

Appeal dismissed.

CALCUTTA HIGH COURT.

REGULAR CIVIL APPEALS NOS. 259 TO 262 OF 1905.

March 5, 1907.

Present:—Sir Francis Maclean, KT., Chief Justice, and Mr. Justice Fletcher.

BIPRODAS PAL CHAUDHRI—PATNIDAR, CLAIMANT—APPELLANT

versus

SARAT CHANDRA SINGHA AND OTHERS—ZEMINDARS, CLAIMANTS—RESPONDENTS.

*Land Acquisition—Apportionment of compensation money—*Zemindar *and* patnidar—*No abatement of rent for acquisition of land within* patni *tenure—Compensation, whole of, to go to* patnidar—*Chance of* patni *coming to end, monetary value of.*

Where the terms of a *patni* lease debar the *patnidar* from claiming any abatement of rent on account of diminution of his tenure by reason of compulsory acquisition, he is entitled to the whole compensation money. It is difficult to appreciate the monetary value of the chance of the *patni* lease coming to an end by sale or forfeiture.

Dinendra Narain Roy v. *Sitaram Mukerjee*, 30 C. 801; 7 C. W. N. 810, referred to.

Appeals from the decrees of the District Judge of Nadia, dated the 4th April 1905.

Babu *Amarendra Nath Bose*, for the Appellant.

Babu *Soroshi Charan Mitra*, for the Respondents.

JUDGMENT.

MACLEAN, C. J.—This case arises under the Land Acquisition Act, and the dispute is as to how the compensation money is to be apportioned between the *zemindar* and the *patnidar* whose rent is not liable to enhancement. It appears that under the terms of the *patni pattah*, if any portion of the land comprised in the *pattah* is taken by Government under the Land Acquisition Act, still the *patnidar* is to go on paying the same rent to the *zemindar*. It appears that some 20 *bighas* of land were taken by Government. The *patnidar* used to pay rent for this land at the modest rate of 2 annas a *bigha* which would bring the total rent to something between Rs. 2 and Rs. 3 a year. This rent the *zemindar* still continues to get under the terms of the contract with the *patnidar*: and so, he has lost nothing. In cases like this, the Court has to find out, in making its apportionment, as was pointed out in the case of *Dinendra Narain Roy* v. *Sitaram Mukerjee* (1), what are the respective interests of the *zemindar* on the one hand and of the *patnidar* on the other. As I have pointed out, the *zemindar* here loses nothing by the fact of the land having been taken by Government, as the *patnidar* has still to go on paying the rent. The only thing of which he could be said to have been deprived is the chance of the *patni* lease coming to an end by sale or forfeiture. But there is no evidence as to the pecuniary value of such a chance and for the simplest of all reasons that it is difficult to appreciate what the monetary value would be. In these circumstances, the learned District Judge

(1) 30 C. 801; 7 C. W. N. 810.

has divided the compensation money equally between the *zemindar* and the *patnidar*. That was, as I have already remarked, a somewhat rough and ready method of dealing with the matter which has not met with the approval of subsequent decisions. It seems to me in this matter that the *zemindar* has lost nothing: the property is really the property of the *patnidar* being held upon a permanent lease at a fixed rent not liable to enhancement and the only interest the landlord has now in it is the chance to which I have referred, the monetary value of which it is difficult to appreciate. I think, therefore, that the view of the District Judge is wrong and that the *patnidar* is entitled, in the circumstances, to the whole compensation money.

The decrees of the lower Court must, therefore, be reversed and the *patnidar*, the appellant, be paid the whole compensaction money.

The appellant is entitled to his costs in all the appeals. We assess the hearing fee in No. 259 at three gold *mohurs* and in each of the three other cases at one gold *mohur*.

FLETCHER, J.—I agree.

Appeals allowed.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1074 OF 1911.

August 15, 1912.

Present:—Mr. Justice Sundara Aiyar and Mr. Justice Sadasiva Aiyar.

GOVINDA MUDELEY AND OTHERS—APPELLANTS

versus

R. MUTHUSAWMY PILLAY—RESPONDENT.

Document, execution of—Executant executing document as guardian of another—Liability of person for whom guardian acts—Recital in document as to guardianship, whether necessary.

Where a document is in fact executed by a person for himself and asguardian of another, it is not necessary, to render the latter liable, that the executant should describe himself as the guardian of the person who is sought to be bound by it.

Second appeal against the decree of the Court of the Temporary Subordinate Judge of North Arcot, dated 28th February 1911, in Appeal Suit No. 10 of 1911, presented against that of the Court of the District Munsif of Tirupati, in Original Suit No. 252 of 1908.

FACTS.—This was a suit upon a simple bond executed by the 1st defendant, the undivided father of the 2nd defendant, in favour of one Manonmani Ammal on behalf of her sons, Subramania Pillai and Thangavelu Pillay, then minors. The bond was since assigned over to the plaintiff by Subramania Pillai under Exhibit G aforesaid after he attained his majority, his younger brother, Thangavelu, being of unsound mind.

The District Munsif dismissed the suit holding that the plea of discharge set up by the defendants Nos. 1 and 2 was proved and that the suit was further barred by limitation.

On appeal, the Subordinate Judge reversed the Munsif's decree.

The defendants preferred a second appeal to the High Court.

Mr. *N. Rajagopalachariar*, for the Appellants.

Mr. *A. Krishnaswami Aiyar*, for the Respondents.

JUDGMENT.—The chief question argued in second appeal is that, under Exhibit G the share of Subramania Pillai's insane brother was not transferred to plaintiff. The executant, Subramania Pillai, it is true, does not describe himself as making the transfer as guardian of his brother. The Subordinate Judge has found that, as a matter of fact, he made the transfer both on behalf of himself and on behalf of his brother. This finding is borne out by Exhibit G itself to a certain extent. The bond transferred is referred to; it was in fact in favour of both Subramania Pillay and his brother. Part of the consideration for the transfer is stated to be due by Manonmani Ammal, that is really by both the brothers as the money was due from Manonmani Ammal as guardian of both. The whole amount of the bond due to both the brothers is transferred. No authority has been cited to show that it is necessary that the executant should describe himself as guardian of a person who is sought to be bound by the bond.

It is argued that, in arriving at the finding that the bond was not discharged, the lower Appellate Court omitted to consider Exhibit I and that if that document had been considered the Sub-Judge might not have found

Exhibits IV and V to be forgeries, but we find nothing in Exhibit I that would throw any light on the genuineness or otherwise of Exhibits IV and V. We dismiss the second appeal with costs.

Appeal dismissed.

CALCUTTA HIGH COURT.

REGULAR CIVIL APPEALS NOS. 367, 382 AND 383 OF 1907.

March 1, 1910.

Present:—Mr. Justice Brett and Mr. Justice Sharf-ud-din.

Raja RAM RANJAN CHAKRAVARTI BAHADUR—*Zemindar* CLAIMANT—APPELLANT

versus

BUNWARI LAL MITTER AND OTHERS—*Patnidars* CLAIMANTS—RESPONDENTS.

Land acquisition—Apportionment of compensation money—Zemindar and patnidar—*No abatement of rent for acquisition of land within* patni *tenure—Compensation, whole of, to go to* patnidar.

Where there is no abatement of rent by the landlord to the *patnidar* in respect of lands within the *patni*, acquired by the Government, the landlord is entitled to no portion of the compensation.

Dinendra Narain Roy v. *Sitaram Mukerjee*, 30 C. 801; 7 C. W. N. 810, followed.

Appeals from the decrees of the District Judge of Birbhum, dated the 19th July 1907.

Babus *Sivaprasanna Bhattacharya* and *Joy Gopal Ghosha*, for the Appellant.

Babu *Khetra Mohan Sen*, for the Respondents.

JUDGMENT.—In our opinion, these three appeals must fail. The question which the lower Court had to determine in these cases was what was the proportion in which the landlord and the *patnidar* were entitled to receive the compension money. The lower Court, following the principle, which has been laid down by this Court in the case of *Dinendra Narain Roy* v. *Sitaram Mukerjee* (1), has held that, as there was no abatement of rent by the landlord to the *patnidar* in respect of the land acquired, the landlord is entitled to no portion of the compensation. The learned Pleader for the appellant has invited us to a lengthy discussion of the cases which were fully considered in the case above referred to, but we think that no useful purpose will be served by employing our time in such a consideration. In our opinion, the view taken by the learned Judges in the case on which the District Judge has relied is correct and it has been followed by this Court ever since that judgment was delivered. In these circumstances, we see no reason to hold that the view taken by the lower Court is not correct. We, therefore, dismiss all the three appeals with costs. We assess the hearing fee at three gold *mohurs* in Appeal No. 367 and at one gold *mohur* in each of the two Appeals Nos. 382 and 383.

Appeals dismissed.

(1) 30 C. 801; 7 C. W. N. 810.

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL NO. 586 OF 1911.

July 30, 1912.

Present:—Sir N. G. Chandavarkar, KT., Judge, and Mr. Justice Batchelor.

SHIVRAM NARSINGRAO—APPELLANT

versus

MAHADEV NARAYAN KULKARNI—RESPONDENT.

Hereditary Offices (Vatan) *Act (Bom. Act III of* 1874), *s.* 5—Vatan—*Sale in execution—Collector levying full assessment—Character of land not charged—Right of auction-purchaser—Right of next holder after death of judgment-debtor—Limitation.*

Certain *vatan* land was sold in 1872 in execution of a decree against the holder of the *vatan* and purchased by *A*. Because of the Court-sale, the Collector levied the full assessment and assigned it for remuneration for service:

Held, (1) that the land did not lose its character as *vatan* property merely because the Collector levied full assessment and altered the mode of remuneration;

(2) that *A*. merely took the right, title and interest of his judgment-debtor, and on the death of the latter, his right under the Court-sale ceased;

(3) that, consequently, the next holder of the *vatan* became entitled to the property and could recover it within 12 years from the death of the previous holder.

A *vatan* continues in that character even when the Gordon Settlement has been applied to it and service has ceased to be demanded as a consequence of the Settlement.

Second appeal from the decision of the District Judge of Satara, in Appeal No. 107

of 1910, confirming that passed by the Subordinate Judge of Karas, in Civil Suit No. 141 of 1909.

Mr. *K. N. Koyajee*, for the Appellant.

Mr. *G. S. Rao*, for the Respondent.

JUDGMENT.—The Courts below have held that the land in dispute ceased to be *vatan* after the Collector had levied the full amount of assessment on it and assigned that amount as remuneration for service. But there is no provision in the Vatan Act or any other law to support that view. It has been held by this Court that a *vatan* continues in that character even when the Gordon Settlement has been applied to it and service has ceased to be demanded as a consequence of that Settlement: *Appaji Bapuji* v. *Keshav Shamrav* (1) and *Bhau* v. *Ramchandrarao* (2). In the present case, it is conceded by the learned Pleader for the respondent, and indeed the Courts below have found, that the land in dispute had been *vatan* before in 1872; it was sold by the Court to the defendant in execution of a decree against the person who was then the holder of the *vatan*. The Collector levied the full assessment and assigned it for remuneration for service because of the Court-sale. But the land as *vatan* did not lose its character merely because the Collector altered the mode of remuneration.

If, then, the land continued as *vatan* after the Court-sale in favour of the defendant, he took merely the right, title and interest of his judgment-debtor and on the death of the latter in 1905, his right under the Court-sale ceased. It was then that the plaintiff as the next holder of the *vatan* became entitled to the property and this suit brought within twelve years from 1905 is in time. That is in accordance with *Radhabai* v. *Anantrav Bhagvant Deshpande* (3) and *Ramgauda* bin *Hirgauda* v. *Gopal Sadashiv* (4).

Decree reversed and claim awarded with costs throughout on respondent.

Decree reversed.

(1) 15 B. 13.
(2) 20 B. 423 at p. 427.
(3) 9 B. 198.
(4) (1898) P. J. 30.

CALCUTTA HIGH COURT.

REGULAR CIVIL APPEAL No. 521 OF 1910.

July 24, 1912.

Present:—Sir Ashutosh Mookerjee, Kt., Judge, and Mr. Justice Holmwood.

Rai GANPAT SINGH BAHADUR AND ANOTHER—*Zemindar*, CLAIMANTS—APPELLANTS

versus

MOTI CHAND AND OTHERS—*Patnidar*, CLAIMANTS—RESPONDENTS.

Land Acquisition—Apportionment of compensation—Lands in patni—*Transferee of* patni *tenure—Non-registration of name in* zemindar's *book, effect of—Zemindar not allowing abatement of rent to* patnidar *—Claim to portion of compensation money—Chance of forfeiture of* patni—*Remoteness—If chance may be valued.*

The rights of a transferee of a *patni* are perfected upon the transfer by the *patnidar*, and are not in any way contingent for their validity upon the payment of the fee and the security under section 6, paragraph 1, of the *Patni* Regulation.

Joykrishna Mukhopadhya v. *Sarfannessa*, 15 C. 345 and *Chunder Pershad Roy* v. *Shuvadra Kumari*, 12 C. 622, relied upon.

Luckhinarain Mitter v. *Khettro Pal SinyhRoy*, 20 W.R. 380 (C. P.); 24 W. R. 407 *note*; 13 L. R R. (P. C.) 146, referred to.

The only effect of his failure to secure registration of his name by the payment of the fee and the security, is that the landlord is not bound to recognise his purchase, and may sell up his tenure in execution of a decree for arrears of rent obtained against the registered tenant.

Matangini Choudhurani v. *Sreenath Das*, 7 C. W. N. 552, relied upon.

Mangal Das v. *Dhunput Singh*, 25 W. R. 152, dissented from.

Therefore, where lands included in a *patni* tenure are acquired by the Government, the purchaser of the *patni* tenure is entitled to claim the compensation money even though he has not registered his name in the books of the *zemindar*.

A *zemindar* is not entitled to any share of the compensation money when he has not allowed any abatement of rent to the *patnidar*.

Dinendra Narain Roy v. *Sitaram Mukerjee*, 30 C. 801 at p. 807; 7 C. W.N. 810, relied upon.

Godadhar Dass v. *Dhunput Singh*, 7 C. 585; 9 C. L. R. 227 and *Khetter Kristo Mitter* v. *Dinendra Narain Ray*, 3 C. W. N. 202 not followed.

Raye Kissory Dassee v. *Nilcant Dey*, 20 W. R. 370, *Biprodas Pal Chowdhury* v. *Sarat Chandra Singha*, 11 C. W. N. cli (s. N.); 16 C. L. J. 209; 17 Ind Cas. 168 and *Raja Ram Ranjan Chakrabarty* v. *Bunwari Lal Mitter*, 14 C. W. N. cxxii (s. N.); 16 C. L. J. 211; 17 Ind. Cas. 170, followed.

The chance of forfeiture of the *patni* is very remote and it was held that the *zemindar* in the present case wholly failed to establish the value of this remote chance of possible loss.

Appeal from the decree of the first Sub-Judge of Bhagalpore, dated August 11th, 1910.

GANPAT SINGH BAHADUR *v.* MOTI CHAND.

Babus *Dasarathi Sanyal* and *Debendra Narain Bhattacharji*, for the Appellants.

Babu *Tarakeswar Pal Chowdhury*, for the Respondents.

JUDGMENT.—This is an appeal on behalf of the *zemindars* in proceedings under the Land Acquisition Act for apportionment of compensation money. The dispute is between the *zemindars* and the *patnidars* as to the mode in which the apportionment is to be effected. The Subordinate Judge has awarded the entire compensation money to the *patnidars* on the ground that as the *zemindars* have not allowed any abatement of rent on account of the land acquired, they are not entitled to a share of the compensation money. On behalf of the *zemindars*, it is argued in this Court, *first*, that as the *patnidars* did not get themselves registered in the book of the *zemindars* under the provisions of the Patni Regulation of 1819, their title has not been perfected and they are, consequently, not entitled to claim any portion of the compensation money; and *secondly*, that although no abatment of rent has been allowed by the *zemindars* to the *patnidars*, yet the *zemindars* are entitled to a share of the compensation money. In our opinion, there is no foundation for either of these contentions.

In so far as the first point is concerned, section 3 of the Patni Regulation of 1819 makes a *patni* tenure capable of being transferred by sale, gift or otherwise at the discretion of the holder in the same manner as other real property. Section 5 provides for the registration of the name of the purchaser in the books of the landlords. The landlord may demand a fee and security and he is entitled to refuse to give effect to the transfer till such fee and security have been paid; this is clear from the first paragraph of section 6. But it cannot be maintained that the omission to pay the fee and the security affects in any way the title of the purchaser. His rights are perfected upon the transfer by the *patnidar* and are not in any way contingent for their validity upon the payment of the fee and the security. This view is supported by the cases of *Joykrishna Mukhopadhya* v. *Sarfannessa* (1) and *Chunder Pershad Roy* v. *Shuvadra Kumari Shaheba* (2).

(1) 15 C. 345.
(2) 12 C. 622.

Reference may also be made to the decision of the Judicial Committee in *Luckhi Narain Mitter* v *Khetro Pal Singh Roy* (3). In that case, a *dar-patnidar* had paid money to save the *patni* from sale. He subsequently claimed a refund and the question arose whether the claim was affected by his omission to register his name in the office of the superior landlord. It was ruled by this Court [*Khetter Paul Singh* v. *Luckhee Narain Mitter* (4)] that his title had been perfected and he was entitled to a refund, notwithstanding that his name had not been registered in the office of the superior holder. The only effect of his failure to secure registration of his name is that the landlord is not bound to recognise his purchase and may sell up his tenure in execution of a decree for arrears of rents obtained against the registered tenant. Substantially the same view was taken in the case of a permanent tenure in *Matangini Choudhurani* v. *Sreenath Das* (5) and the contrary opinion, implied in *Gossain Mungal Das* v. *Baboo Roy Dhunput Singh Bahadur* (6), cannot be regarded as good law. In other words, as observed in the case of *Okhoy Coomar Chatterjee* v. *Dhiraj Mahtab Chund, The Maharajah of Burdwan* (7), the status of a *patnidar* or *dar-patnidar* does not depend upon the registration or consent of the *zemindar*. The *patnidars* in the present case are, consequently, entitled to a share in the compensation money.

In so far as the second point is concerned; it has been broadly contended that the *zemindars* are entitled to a share of the compensation money even though they have not allowed any abatement of rent to the *patindars*. In support of this view, reference has been made to the cases of *Gadadhar Dass* v. *Dhunput Singh* (8) and *Khetter Kristo Mitter* v. *Dinendra Narain Roy* (9). In the case of *Dinendra Narain Roy* v. *Sitaram Mukerjee* (10), it was pointed out, however, that the observations of Sir Richard Garth, C. J., in the case of *Gadadhar Dass* v. *Dhunput Singh*

(3) 20 W. R. 380; 24 W. R. 407 *note*; 13 L. R. (P.C.) 146.
(4) 15 W. R. 125.
(5) 7 C. W. N. 522.
(6) 25 W. R. 152.
(7) 22 W. R. 299.
(8) 7 C. 585; 9 C. L. R. 227.
(9) 3 C. W. N. 202.
(10) 30 C. 801 at p. 807; 7 C. W. N. 810.

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(8), which were followed in *Khetter Kristo* v. *Dinendra Narain* (9), were *obiter dicta* and were not binding upon this Court. It has not been seriously questioned that the view that the compensation money should be divided in equal halves between the *zemindars* and *patnidars* notwithstanding the fact that the *zemindars*, have not allowed any abatement of rent to the *patnidars*, cannot be maintained on principle. It has not also been disputed that the view militates against the decisions in *Raye Kissory Dassee* v. *Nilcant Day* (11); *Biprodas Pal Chaudhury* v. *Sarat Chandra Singha* (12) and *Raja Ram Ranjan Chakrabarty* v. *Bunwari Lal Mitter* (13). If we look at the matter as one of principle, it becomes manifest that the claim of the *zemindars* is clearly unfounded. The compensation money in the hand of the Collector represents the value of the land acquired by the State. That sum has to be distributed amongst the holders of interests of different degrees in the land acquired. Each claimant can prove the value of his interest, in other words, the measure of the loss sustained by him by the acquisition, and when he does this, he becomes entitled to a proportionate share of the compensation money. If the *zemindars* allow an abatement of rent to the *patnidars*, the rent abated primarily represents their annual loss, and they may reasonably claim out of the compensation money the capitalised value of that rent. But if they do not allow any abatement of rent, if they recover from the *patnidars* the whole of the original rent, although the latter have lost the income derivable from the acquired portion of the land, what is the measure of their loss? Plainly, they do not suffer any immediate loss by reason of the acquisition. It has been ingeniously suggested, however, that although the rent is not abated, the *zemindars* may in certain events suffer loss; namely, their security for the rent is diminished in value and if the perpetual lease is ever forfeited, they will get back a smaller quantity of land than what was comprised in the original tenancy. This chance of forfeiture is indisputably very remote, indeed. Whether under the terms of the *patni* in the present case it can ever be at all forfeited is by no means certain. But even if it be assumed that there may be a forfeiture of the *patni* in certain contingencies, the *zemindars* have wholly failed to establish the value of this remote chance of possible loss; they are, consequently, not entitled to any share of the compensation money.

The result is that the decree of the Court below is affirmed and this appeal dismissed with costs. We assess the hearing-fee at two gold *mohurs*.

Appeal dismissed.

(11) 20 W. R. 370.
(12) 16 C. L. J. 209; 11 C. W. N. cli; 17 Ind. Cas. 168.
(13) 16 C. L. J. 211; 17 Ind. Cas. 170; 14 C. W. N. cxxii.

CALCUTTA HIGH COURT.
SECOND CIVIL APPEAL NO 47 OF 1893.
March 19, 1894.
Present:—Mr. Justice Norris and Mr. Justice Banerjee.

SREE KANTA PERSHAD HAJARI—PLAINTIFF—APPELLANT
versus
IRSHAD ALI SARKAR—DEFENDANT—RESPONDENT.

Bengal Tenancy Act (VIII of 1885), ss. 52, cl. (c), 74—Abatement of rent—Land left uncultivated for embankment—Payment of rent in full—Abatement to be claimed in subsequent years—Stipulation for presents and free labour besides rent, illegality of—ABWAB.

A claim for abatement of rent does not come within the purview of section 52, clause *(c)*, of the Bengal Tenancy Act, where the remission is claimed not on account of land not found in the possession of the tenant, but on account of land which, though included in his tenure, he was obliged to leave uncultivated on account of the necessity of having to erect embankments to protect other land, and remission for land so left out is provided for in the written contract between the parties.

Prima faice, the tenant is entitled to remission for all the years for which the land had been so left uncultivated. But when the tenant has paid the rent in full without any abatement for a certain period, he is not entitled to remission for that period, but is entitled to abatement only in respect of the subsequent years for which rent has been claimed by the plaintiff.

In a *kabuliat*, the fixed rent mentioned was Rs. 360. Then there was an additional item under the heading of "price of presents and unpaid labour" amounting to Rs. 17-4. These two sums were added together and put

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down as amounting to Rs. 377-4 under the heading of "total rent". The *kabuliat* then provided:—

"Besides, I shall every year, at the time of the Durga Puja, give you four goats as presents and shall supply you labour without wages for five days, which if I fail to do, I shall have no objection to your realising the sum of Rs. 17-4, the price of the said presents and labour, in addition to the amount of rent."

Held, that the sum of Rs. 17-4, which was the money equivalent of the presents and labour, was in the nature of an imposition in addition to the actual rent within the meaning of section 74 of the Bengal Tenancy Act, and could not be recovered.

Appeal from the decree of the District Judge of Chittagong, dated the 5th September 1892, modifying that of the Subordinate Judge of Chittagong, dated the 25th February 1892.

Moulvis *Serajul Islam* and *Mahomed Habibulla*, for the Appellant.

Babus *Hem Chandra Banerjee* and *Akhi Chandra Sen*, for the Respondent.

JUDGMENT.—This was a suit for arrears of rent for the years 1250, 1251 and 1252 Maghi, based on a *kabuliat*. The defence, so far as it is necessary to consider it for the purposes of this appeal, was that the plaintiff was not entitled to recover anything on account of *bhet* and *begar*, that is, presents and labour, as the items claimed under this head were in the nature of *abwabs*; that he was not entitled to claim anything on account of road fund; that he was not entitled to recover anything as damages, and that the defendant was entitled to abatement of rent on account of the area that was occupied by embankments or had to be left out on account of the erection of the embankments.

The first Court allowed some of these objections and decreed the claim of the plaintiff in part. Against the first Court's decree both parties, appealed; and the learned Judge below has modified the decree of the first Court and given the plaintiff a decree in modification of the claim.

Against that decree of the lower Appellate Court, the plaintiff has preferred this appeal, and the defendant has raised certain objections, under section 561 of the Code of Civil Procedure. The points argued on behalf of the plaintiff-appellant are these:—namely, *first*, that the Court of Appeal below ought not to have given any effect to the clause in the *kabuliat* with reference to remission of rent in regard to the years for which rent had been paid in full, but should have limited the effect of that clause to the years for which rent was claimed; *second*, that the Court of Appeal below was wrong in allowing remission on account of an area of 13 *kanis* odd; *third*, that the Court of Appeal below ought to have allowed interest at the rate stipulated for in the *kabuliat*; and *fourth*, that what was claimed on account of road fund should have been allowed: and the objections urged on behalf of the defendant-respondent under section 561 are these, namely, *first*, that the Courts below ought to have disallowed the claim for *bhet* and *begar*, presents and labour, amounting to 17 rupees 4 annas a year; *second*, that the decree of the lower Appellate Court has erroneously allowed the plaintiff damages although the judgment distinctly disallowed the same; and *third*, that the lower Appellate Court ought not to have made the defendant liable for the whole of the *Amin's* costs.

We shall consider the points urged in the plaintiff's appeal first, and then those urged by the defendant by way of cross-objections.

As to the first point urged on behalf of the plaintiff; the learned Judge in his judgment observes: "The wording of section 52 (*b*) of Act VIII of 1885 leads me to believe that the rents for 1249 M. S. and backward having been paid, the reduction is operative for the years in suit and those years only but such a result seems somewhat hard on the defendant in view of the conditions of the tenancy;" and then towards the close of his judgment, he says "the abatement will take effect from 1246 M. S., there being a running account between the parties." We think the learned Judge is wrong in the view that he has taken of this matter. We may observe that the claim for abatement of rent in this case does not come within the purview of section 52, clause (*b*). Remission is here claimed not on account of land not found in the possession of the tenant, but on account of land which, though included in his tenure, he was obliged to leave uncultivated on account of the necessity of having to erect embankments to protect other land, and remission for land so left out is provided for in the written contract between the parties. That being so, *prima facie*, no doubt the defendant was entitled to remission for all the years for which the land had been so left uncultivated; but then it is admitted by the defendant himself in his written statement, paragraph 5, and it has been found by the learned Judge below, that rent for all the

years down to 1249 has been paid; and what the defendant urges in support of his claim for remission is given in these words in the 5th paragraph of his written statement: "The plaintiff, on receiving the rent of the said land from the defendant, promised to remit it afterwards." A special promise to remit rent on account of the years for which rent had been paid in full, is what is here relied upon in the defence; but no such promise has been made out and the learned Judge below does not base his decision upon any such promise. We are of opinion that the only ground urged for having effect given to this stipulation in the *kabuliat* for remission in regard to the years for which rent had been paid in full, has not been made out, and that the defendant was, consequently, entitled to abatement only in respect of the years for which rent has been claimed.

As to the second point urged for the plaintiff; no reason has been shown to us why we should hold that the area in respect of which remission has been allowed was too large.

As to the third point, we observe that no interest was claimed in the plaint at the rate stipulated for in the *kabuliat*. What was claimed in the plaint was damages at the rate of twenty-five per cent., and that the learned Judge disallows, holding that this was certainly not a case where damages could be allowed for rents wilfully withheld. And then as regards the last point urged, the first Court says: "The plaintiff himself, it seems, has not got to pay anything as road fund to Government, and so he cannot realise it from the defendant." That finding does not appear to have been successfully challenged in appeal before the Judge; and we think it is too late for the plaintiff to ask us here to interfere on that point.

The plaintiff's appeal, therefore, succeeds only as to the first point, and the remission that has been allowed for the years 1246 to 1249 should be disallowed and the decree of the lower Appellate Court modified accordingly. Then, as to the defendant's cross-objections, we are of opinion that the first one is entitled to succeed. In the *kabuliat*, we find that the total assessable area given is 15 drones and the *mokrari jama* or fixed rent mentioned, is 360 rupees. Then, there is an additional item under the heading of "Price of presents and unpaid labour," amounting to 17 rupees 4 annas; and these two sums are added together and put down as amounting to 377 rupees 4 annas under the heading of "Total rent"; and it is upon the fact of the entire sum of 377 rupees 4 annas being placed under the heading of "Total rent", that the judgments of the Courts below in favour of the plaintiff are based. But in addition to this fact appearing on the face of the *kabuilat*, there are other parts of the document, which, in our opinion, have a very important bearing on the question before us, and those parts of the document are the following: The tenant first of all stipulates to this effect "that after paying at your *zemindari sherishta* the aforesaid rent from year to year according to the instalments mentioned above, I shall take *dakhilas* for the same. If I become a defaulter by dishonestly omitting to pay the said rent, then I shall not be competent to make any excuse or objection against your realising the rent in arrear together with interest thereon at 2 rupees 8 annas per cent. per mensem as well as costs and damages by sale of this *etmami* under Regulation VIII of 1819, and also by any other means provided by the laws now in force and those that may hereafter be enforced." And then the *kabuliat* goes on to provide: "Besides, I shall every year at the time of the Saradia (Durga) Puja give you four castrated goats as presents and shall supply you labour without wages for five days, which if I fail to do, I shall have no objection to your realising the sum of 17 rupees 4 annas as the price of the said presents and labour in addition to the amount of rent." These provisions of the *kabuliat* go, in our opinion, distinctly to show that what was regarded as the actual rent was the sum of 360 rupees, which, we may observe in passing, bears a clear and definite proportion to the assessable area of 15 drones; and that the sum of 17 rupees 4 annas, which was the money equivalent of the *bhet* and *begar* or presents and labour, was in the nature of an imposition in addition to the actual rent within the meaning of section 74 of the Bengal Tenancy Act and must, therefore, be held to be illegal, and the stipulation for the payment of the same must be held to be void. We may further observe that not only is this distinc-

tion between the actual rent and these additional items made in the *kabuliat*, but it is also observed in the plaint itself, in which the plaintiff says: "The defendant having on 2nd *Pous* 1246 (Maghi) executed an *etmami kabuliat* in favour of the plaintiff, agreeing to pay annually 360 rupees as rent and 17 rupees 4 annas as the value of *bhet* (presents) and *begar* (unpaid labour), is by virtue of *etmami* title in possession of the land contained within the boundaries given below." There is not, therefore, in our opinion, any room for doubt that the sum of 17 rupees 4 annas claimed as part of the rent is really *abwab* and, therefore, not realizable.

The second contention urged on behalf of the defendants, *namely*, that the decree has erroneously allowed damages though the judgment has disallowed that part of the claim, must also succeed; the learned Vakil for the plaintiff-appellant does not question the correctness of the contention of the defendant.

As to the third point urged by the defendant; we think that must fail. It was quite in the discretion of the lower Appellate Court to have apportioned the costs of the *amin* in any way it thought proper, and in the exercise of that discretion the lower Appellate Court has considered it fit to make the defendant liable for it. The part of the judgment we do not think we ought to interfere with on second appeal.

The cross-objections, therefore, succeed in regard to the item of 17 rupees 4 annas, which we disallow as *abwab* and also in regard to the amount of 237 rupees 5 annas 6 pies, which has been erroneously allowed in the decree as damages.

The result then is that both the appeal and the cross-objections succeed in part, and the decree must be modified accordingly; but under the circumstances, we make no order as to the costs of this appeal.

Appeal and cross-objection allowed in part.

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL No. 200 OF 1903.

July 22, 1912.

Present:—Sir N. G. Chandavarkar, KT., Judge, and Mr. Justice Batchelor.

KONDU KANHUJI DHAVDE—APPELLANT

versus

VISHNU MORESHVAR BHAT—RESPONDENT.

Construction of deed—Transfer—Sale—Contract of sale—Registered deed—Transfer of Property Act (IV of 1882), s. 54—Registration Act (III of 1877), ss. 17 (b) (c), 44.

Whether a registered deed has the effect of creating a sale must depend on the circumstances of the case.

Words of conveyance are not absolutely necessary to create a transfer. All depends on the intention and acts of the parties.

Two persons entered into a transaction which they embodied in a deed of sale. The deed was described as a contract of sale but it was registered and it distinctly provided that on certain events happening, the property should be regarded as sold to the vendee. The vendee was put in possession of the property in consequence of the registered deed:

Held, that there was a transfer in consequence and by operation of the registered deed when the conditions of the deed were fulfilled.

Second appeal from the decision of the Joint First Class Subordinate Judge, at Poona, in Appeals Nos. 100 and 107 of 1905, varying that passed by the Subordinate Judge of Poona, in Civil Suit No. 268 of 1903.

Mr. *G. S. Rao*, for the Appellant.

Mr. *B. V. Vidwans*, for the Respondent.

JUDGMENT.—The Transfer of Property Act provides that in the case of a sale of immoveable property of the value of Rs. 100 or more, the transfer shall be only by a registered deed. Whether in any particular case there being a registered deed, that deed has the effect of creating the transfer contemplated by the Legislature must depend upon the circumstances of the case. Words of conveyance, it has been held, are not absolutely necessary to create a transfer. All depends upon the intention and acts of the parties. Now, in the present case, what the parties did was that they entered into a transaction, which they embodied in a deed. That deed, no doubt, is described as a contract of sale, but it was also registered, and it distinctly provided that on certain events happening the property should be regarded as sold to the vendee. And we have on the evidence the fact found

by the Court below that it was in consequence of this registered deed that the vendee was put into possession of the property, so that we have here a registered deed which has, as a matter of fact, taken effect as transfer. The only question is whether it has that effect in law. That is a question of fact and it has been found by the Court below that there was a transfer in consequence and by operation of the registered deed in the case. On these grounds, the decree must be confirmed with costs.

Decree confirmed.

S. N. DAR ... LL. B.,
Vakil High Court,

CALCUTTA HIGH COURT.
SECOND CIVIL APPEAL NO. 2357 OF 1908.
August 1, 1912.

Present:—Sir Ashutosh Mookerjee, Kt., Judge, and Mr. Justice Holmwood.

MATHURA PRASAD AND OTHERS—PLAINTIFFS—APPELLANTS

versus

TOTA SINGH AND OTHERS—DEFENDANTS—RESPONDENTS.

Bengal Tenancy Act (VIII of 1885), *s.* 74—Abwab—*Illegal cess—Construction of* kabulyat—*Claim whether part of rent.*

Whether a sum claimed by the landlord is or is not an illegal cess, must depend upon the construction of the contract before the Court. If upon a fair interpretation of the terms of the contract, the sum claimed can be deemed part of the actual rent, the tenant is bound to pay it; if it can only be regarded as an imposition in addition to the actual rent, the stipulation for its payment is void.

Where throughout a lease, the yearly rent was described a certain sum assessed at a certain sum per *bigha*, upon the area demised, and at the end of the lease, in a clause, entirely distinct from the one wherein the rent was assessed, a provision was made for delivery of certain articles or in default their value:

Held, that the articles or their value were in the nature of an illegal cess and not recoverable from the tenant.

Appeal from the decree of the District Judge of Bhagulpore, dated July 20th, 1908, modifying that of the Sub-Judge of that District, dated April 6th, 1908.

Babu *Jogesh Chandra Dey*, for the Appellants.

Babu *Khetra Mohan Sen*, for the Respondents.

JUDGMENT.—This is an appeal on behalf of the plaintiff in a suit for recovery of arrears of rent. The sole question in controversy is, whether an annual sum of Rs. 40 claimed by the plaintiff falls within the description of an illegal imposition within the meaning of section 74 of the Bengal Tenancy Act. The defendants hold under a lease, dated the 18th September 1877. In this instrument, the area of the land is stated to be 77 *bighas*, 14 *cottahs* and 13 *dhurs*, whereon rent is assessed at the rate of Rs. 3-4 a year per *bigha*; the total rent is stated to be Rs. 252-6-7 to be paid in one instalment in the month of *Baisakh*, and in the event of default of payment, to carry interest at the rate of two per cent. per month. In the concluding portion of the lease, it is further stated that the tenant would deliver annually four cart-loads of husk of wheat and gram, and that if he failed to deliver the husk according to the terms of the contract, he would pay for the price thereof at the rate of Rs. 5 per cart-load. The plaintiff claimed in the Court below the price of the four cart-loads of husk at the present market-rate, namely, Rs. 10 per cart-load. The defendant resisted the claim on the ground that this was an imposition in addition to the actual rent, within the meaning of section 74 of the Bengal Tenancy Act and that, consequently, the stipulation for the payment thereof was void. The Court of first instance negatived the contention of the defendant. Upon appeal, the District Judge has taken the contrary view, on the authority of the decision in *Krishna Chandra Sen* v. *Sushila Soondury Dassee* (1). On the present appeal by the plaintiff, it has been argued that the amount claimed is part of the rent and is not an illegal cess within the meaning of section 74 of the Bengal Tenancy Act. After careful consideration of the arguments addressed to us on both sides, we are of opinion that the appeal ought not to succeed.

The answer to the question, whether the sum claimed by the plaintiff is or is not an illegal cess, must depend upon the construction of the contract before the Court. If, upon a fair interpretation of the terms of the contract, the sum claimed can be deemed part of the actual rent, the tenant is bound to pay it; if, on the other hand, the

(1) 26 C. 611; 3 C. W. N. 608.

sum claimed can only be regarded as an imposition in addition to the actual rent, the stipulation for its payment is void. In the case before us, throughout the lease, the yearly rent is described Rs. 252-6, assessed, as already stated, at the rate of Rs. 3-4 a *bigha*, upon the area demised. It is only at the end of the lease, in a clause entirely distinct from the one wherein the rent is assessed, that provision is made for delivery of the husk, valued at Rs 5 per cart-load. But this additional sum of Rs. 20 is not, expressly or by implication, made part of the rent. Under section 54 of Regulation VIII of 1793, which was in force at the time when this contract was made, in order that an amount of this description might not be deemed an *abwab*, it was essential that it should be consolidated with the *asal jama* into one specified sum; and under section 55, the imposition of a new *abwab* under any pretence whatever, was strictly prohibited. Tested in the light of these principles, the contention of the appellant entirely fails. We may add that the view we take is supported by a series of decisions of this Court. One of the earliest cases in point is *Sonnum Sookul* v. *Shaikh Elahee Buksh* (2), where there was an agreement to deliver a prescribed quantity of molasses on every maund manufactured on the premises; it was held that the article agreed to be delivered was over and above the regular money rent paid for the land, and, consequently, fell within the description of *abwab*. In the case of *Raj Narain Mitra* v. *Panna Chand Singh* (3), the tenant had agreed to pay Rs. 10 annually in lieu of molasses; it was held that this amount could not be recovered, because it was neither stipulated for as part of the rent, nor included in either of the instalments in which the rent was specified to be paid. In the case of *Gayratulla Sardar* v. *Girish Chandra Bhaumik* (4), the tenant had agreed to deliver two goats at the time of the *Saradya Puja* or to pay three rupees as the price thereof. This obviously was a case of *abwab*, because it could not possibly be suggested that the goats formed an integral part of the rent. In the case of *Krishna Chandra Sen* v. *Sushila Soonduri Dassee* (1), the tenant had agreed in addition to a cash payment to deliver jack fruit, bamboos, and fish. This agreement was contained in a clause different from the one in which the rent was assessed, and the Court held that the imposition was an *abwab*. In this case, there was the additional feature, which does not exist in the present litigation, that whereas the rent was payable quarterly, the value of the articles deliverable was payable only annually. The decisions mentioned, thus, all clearly tend to negative the contention of the appellants. Much reliance, however, has been placed in support of the appeal upon the case of *Radha Charan Roy* v. *Golapchandra Ghose* (5). But that case is clearly distinguishable. There the amount sought to be recovered as collection charges was not only expressly made part of the rent and consolidated therewith, but the aggregate amount was distributed into various instalments expressly stated to be payable as instalments of rent. In the case before us, even if there were, upon the terms of the contract, any doubt as to the true nature of the sum sought to be recovered, that doubt would be completely removed upon an examination of the plaint In the fourth paragraph of the plaint, the plaintiff allows a deduction of Rs. 28-6 for unculturable land and seeks to recover arrears at an annual rate of Rs. 231 besides the husk; in the sixth paragraph, he asks for the principal amount of rent with cesses thereon, and the price of the husk. These two paragraphs plainly indicate that, in the opinion of the plaintiff, at any rate, the price of the husk claimed is not an integral part of the rent. The matter, however, is placed beyond all doubt when we find that the plaintiff claims cesses only upon the amount stated to be rent and not upon the amount claimed as price of husk. If the latter amount had borne the character of rent, the plaintiff would have been entitled to claim cesses thereon, and, what is more, he would have been liable to pay to the State cesses on the basis of the rent thus realized. In our opinion, the terms of the contract, as also the interpretation put thereon by the plaintiff himself, leave

(2) 7 W. R. 453.
(3) 7 C. W. N. 203; 30 C. 213.
(4) 12 C. W. N. 175.
(5) 31 C. 834; 8 C. W. N. 529.

no room for serious controversy that the sum claimed as the value of husk does not form part of the consolidated rent, but is an independent item falling within the description of an imposition in addition to the actual rent, though it may not have been specifically described in the contract or claimed in the plaint under the denomination of *abwab*, as was done in some of the cases in the books: [*Tilukdhari Singh* v. *Ghulhan Mahton* (6); *Radha Prosad* v. *Balkowar Roer* (7)]. The view we take is amply supported by the decision in *Sreekanta Pershad* v. *Irshad Ali Sarkar* (8), which has many features in common with the case now before us.

The result is that the decree of the District Judge is affirmed and this appeal dismissed with costs. The cross-objection filed on behalf of the respondent is not pressed, and is, consequently, dismissed without costs.

Appeal and Cross-objection dismissed.

(6) 17 C. 131; 16 I. A. 152.
(7) 17 C. 726.
(8) 16 C. L. J. 225; 17 Ind. Cas. 173.

MADRAS HIGH COURT.
SECOND CIVIL APPEALS NOS. 295 AND 416 OF 1911.
September 30, 1912.
Present:—Mr. Justice Sundara Aiyar and Mr. Justice Sadasiva Aiyar.
IN No. 295.
ITTICHERI EDATHIS SAMANTHAM OTHENAN NAMBIAR AYOTHIA RAMAN KAIMAL—APPELLANT
versus
T. V. ANANDA PISHAROTI AND OTHERS —RESPONDENTS.
IN No. 416.
THEKKEVITTIL ANANDA PISHAROTI —APPELLANT
versus
ETTISHERI EDATHIL SAMANTHAN AND OTHERS—RESPONDENTS.

Hereditary office, claim to - Nature of proof—Long possession—Presumption of right—Proof of creation of right unnecessary

In a claim for a hereditary right, the Court can infer such right from proof of long possession. Though, by itself, long possession is not sufficient to create a hereditary right, yet a presumption in favour of such right is not improper, as in most cases, proof of the creation of a hereditary right at some particular time is not to be expected.

Second appeals against the decree of the District Court of North Malabar. in A. S. No. 166 of 1910, preferred against that of the District Munsif of Cannanore, in O. S. No. 381 of 1909.

The Hon'ble Mr. *J. L. Rosario* (Advocate-General), for Appellant in No. 295.

Mr. *C. V. Ananthakrishna Aiyar*, for Respondent in No. 295.

Mr. *C. V. Ananthakrishna Aiyar*, for Appellant in No. 416.

The Hon'ble Mr. *J. L. Rosario* (Advocate-General), for Respondent in No. 416.

JUDGMENT.—We cannot regard the judgment of the District Judge in this case as satisfactory. The suit is to recover the emoluments of the office of Kazhakam to which the plaintiff alleges his familly has a hereditary right and for certain other sums. The plaintiff was dismissed from the office by the Urallan of the temple. The District Munsif found that the office was hereditary in the plaintiff's family. The District Judge has reversed this finding, but has given a decree for the plaintiff for the whole amount sued for, including the emoluments of the office subsequent to the dismissal. It is quite clear on his finding that the plaintiff was not entitled to a decree for the claim in so far as it related to the emoluments of the Kazhakam office.

We are unable to accept the finding on the question of hereditary right. It appears clearly from Exhibit B that the plaintiff's *tarwad* had been in possession of the office for a period of about three-quarters of a century. There is no evidence as to the original creation of a hereditary right. Such evidence cannot be expected in most cases of claims to inferior offices of the kind in question. Long possession is not in itself sufficient to create a hereditary right; but the Court would be justified in inferring such right from possession for a long time. The District Judge was apparently under the impression that, with regard to a hereditary office, there must be "definite proof." We understand him, by that expression, to mean proof regarding the actual creation of the hereditary office at some particular time.

This is a standard of proof which it would be impossible to comply with, as already stated, in many cases. There is nothing peculiar to a hereditary office which makes a presumption from long possession improper. Exhibit B affords some indication that the office is hereditary in plaintiff's family. It provides, *inter alia*, for payment annually of 540 seers of paddy as interest on a sum of 1760 *fanams* which was found due to a member of the plaintiff's family in the year 1857 on settlement of his accounts relating to the management of the temple for some time. There is no promise to re-pay the amount on any specified date; nor is there a provision that the sum would be re-paid when the family ceased to hold the office. Mr. Sitarama Rao also relies on the fact that it is the family of Thekke Vittu that is stated in Exhibit B to be entitled to the emoluments of the office. He argues that the family, including the women and children, would not be stated to have the right to the emoluments if any particular member of the family was holding it by appointment. We cannot say that this argument is altogether without weight, although it is quite possible that a whole family may be appointed to an office to which it has no hereditary right. We think it is necessary that the question should be decided afresh. If the plaintiff succeeds in establishing that his right to the office is a hereditary one, he would be entitled to a decree for the whole amount claimed, as no attempt was made to justify his dismissal. If the right to a hereditary office is not made out, then the plaintiff cannot be entitled to the emoluments of the office, that is, 540 seers of paddy a year. He would be entitled, however, to the amount of 540 *kuzhams* a year for interest on the sum of 1760 *fanams* which was found due in 1857. The exact nature of the remaining 720 *kuzhams* claimed does not clearly appear. It seems to be claimed on an agreement which was based on certain special services rendered by a member of the plaintiff's *tarwad* to the temple. Whether the services were of such a nature as to justify an agreement binding the temple for ever, and whether there was such consideration moving from the members of the plaintiff's *tarwad* as to justify a promise to pay 720 *kuzhams* for ever, are questions which have not been properly discussed in the judgment of either of the lower Courts. We reverse the decree of the lower Appellate Court and remand the appeal for fresh disposal according to law with reference to the above observations. Both parties may be allowed to adduce fresh evidence on the question of the nature of the claim relating to the 720 *kuzhams* of paddy a year. The costs in this Court will abide the result.

We may point out that the decree to be passed in favour of the plaintiff should be against the temple.

Appeal allowed.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL No. 2031 OF 1909.

June 18, 1912.

Present:—Sir Ashutosh Mookerjee, KT., Judge, and Mr. Justice Beachcroft.

SECRETARY OF STATE FOR INDIA IN COUNCIL—PLAINTIFF—APPELLANT

versus

A. H. FORBES—DEFENDANT—RESPONDENT.

Lease—Covenant for renewal—Permanency—Lease for term of years—Option of renewal—Option exercisable by lessee and his representative—Where no terms stated, lease to be renewed on former terms—Perpetual renewal—Covenant for renewal, if runs with land—Suit in ejectment—Lessee ready to accept renewal on proper terms—Covenant still specifically enforceable—Construction—Grant to be construed in favour of grantee.

A lease recited the prior settlements upon the termination of the last of which the lease was renewed at enhanced rent. It then provided that if the lessee stood in need of constructing any house, he could build on obtaining sanction therefor from the lessor, the Collector. If the lessee failed to pay rent, the Government might realise the arrear under the laws in force, and take possession of the land. The lessee, his heirs and representatives, would have the right to dwell on the land. After the expiry of the term, the Government would have power to re-settle the land with the lessee on a fair rent:

Held, that the last clause was intended to be a covenant for renewal.

A renewal clause in a lease does not necessarily import permanency; but if it did, the clause requiring sanction of the Collector to the erection of a building, is not necessarily inconsistent with the theory of a permanent grant; the object of such sanction may be not so much to prevent the erection of a building as to secure that the building should be of a suitable type from a sanitary or architectural or other similar point of view.

SECRETARY OF STATE *v.* FORBES.

An express covenant to renew in appropriate technical language is not essential, and the *habendum* may be so framed as to amount in substance to a covenant for even perpetual renewal.

Chamber v. *Gaussen*, 2 Jones & La Touche 99; 7 Ir. Eq. R. 575; *Taylor* v. *Pallard*, Lyne on Leases, App. 62 and *Sheppard* v. *Doolan*, 3 Dr. & War. 1; 5 Ir. Eq. R. 6, referred to.

A lease, which creates a tenancy for a term of years, may yet confer on the lessee an option of renewal.

Moss v. *Barton*, L. R. 1 Eq. 174; 35 Beav. 197; 13 L. T. 623, relied upon.

If the lease does not state by whom the option is exercisable, it is exercisable by the lessee only.

Lewis v. *Stephenson*, 67 L. J. Q. B. 296; 78 L. T. 165, referred to.

The option is exercisable not merely by the lessee personally but also by his representative-in-interest.

Buckland v. *Papillon*, 2 Ch. App. 67; 36 L. J. Ch. 81; 12 Jur. (N. S.) 992; 15 L. T. 378; 15 W. R. 92, referred to.

If the option does not state the terms of renewal, the new lease will be for the same period and on the same terms as the original lease, in respect of all the essential conditions thereof, except as to the covenant for renewal itself.

Lewis v. *Stephenson*, 67 L. J. Q. B. 296; 78 L. T. 165; *Austin* v. *Newham*, (1906) 2 K. B. 167; 75 L. J. K. B. 563; 95 L. T. 490; *Price* v. *Assheton*, 1 Y. & C. 82; 41 R. R. 222; 4 L. J. (N. S.) Ex. Eq. 3 and *Rickards* v. *Rickards*, 2 Y. & C. C. C. 419 at p. 427; 7 Jur. 715, referred to.

There is no sort of legal presumption against a right of perpetual renewal. The burden of strict proof is imposed upon a person claiming such a right. It should not be inferred from any equivocal expressions which may fairly be capable of being otherwise interpreted. The intention in that behalf should be clearly shown; otherwise, the agreement is satisfied and exhausted by a single renewal.

Job v. *Banister*, 2 K. & J. 374; 110 R. R. 273; *Hare* v. *Burges*, 4 K. & J. 45; 27 L. J. Ch. 86; 3 Jur. (N. S.) 1294; 6 W. R. 144; 116 R. R. 255; *Davis* v. *Taylor*, 3 Ridgeway P. C. 395; *Moore* v. *Foley*, 6 Ves. 232; 5 R. R. 270, and *Iggulden* v. *May*, 9 Ves. 325; 7 East. 237; 3 Smith 269; 2 Bos. & P. (N. S.) 449; 8 R. R. 623, referred to.

A covenant for renewal runs with the land.

Simpson v. *Clayton*, 4 Bing. (N.S.) 758; 44 R. R. 841; 6 Scott. 469; 1 Arn. 299; 8 L. J. C. P. 59; 2 Jur. 892; *Roe* v. *Hayley*, 12 East. 464; 11 R. R. 465; *Brooke* v. *Bulkeley*, 2 Ves. Sen. 498, referred to.

The position of a lessee, who has been always ready and willing to accept a renewal on proper terms, is the same in equity as if a proper lease had been granted. Where the covenant for renewal was still specifically enforceable at the commencement of a suit for ejectment against the lessee, the position of the lessee in equity is the same as if it had been specifically enforced.

Walsh v. *Lonsdale*, 21 Ch. D. 9; 52 L. J. Ch. 2; 46 L. T. 858; 31 W. R. 109; *Bibi Jawahir Kumari* v. *Chatterput Singh*, 2 C. L. J. 343; *Singhee Ram* v. *Bhagbat Chander Nundi*, 11 C. L. J. 543; 6 Ind. Cas. 63 and *Sarat Chandra* v. *Sham Chand*, 14 Ind. Cas. 701 16 C. L. J. 71; 39 C. 663, relied upon.

Per *Beachcroft, J.*—A meaning must be given to every clause where possible, and if there is ambiguity in a grant, it must be construed in favour of the grantee.

Appeal from the decree of the District Judge of Bhagulpore, dated the 16th July 1909, reversing that of the Sub Judge, Monghyr, dated the 30th November 1908.

Babu *Ram Churn Mitter*, for the Appellant.

Babu *Mahendra Nath Roy* and Moulvi *Mahommed Mustafa Khan*, for the Respondent.

JUDGMENT.

MOOKERJEE, J.—This is an appeal by the Secretary of State for India in Council against a decree of the District Judge in reversal of a decree of the Subordinate Judge, by which an action in ejectment commenced by him against the respondent has been dismissed. On the 11th November 1878, the Collector of Monghyr granted a lease to one John Christian in respect of a parcel of homestead land for a term of 27 years from the 1st April 1876. The lease shows, on the face of it, that this was not the commencement of the tenancy, and it is stated expressly that the grant was made upon the expiry of the term of the former settlement. In 1879, the lessee transferred his interest to one Ambler, who, in the same year, sold the property to Alexander John Forbes, now represented by the defendant. Upon the expiry of the term, the Collector made an offer to the defendant to renew the lease on certain terms specified in a draft. The defendant refused to accept a renewal on the terms proposed and claimed a renewal on the same terms as before, subject to the payment of fair rent. The result was that the negotiations terminated, and the Collector, by a notice served on the 25th September 1906, called upon the defendant to quit the land from the 1st April 1907, and to remove the materials of the house which had been erected thereon. The defendant ignored this demand for possession, and on the 7th September 1907, the Secretary of State commenced this action to eject him as a trespasser. The defendant resisted the claim substantially on the ground that he had acquired a permanent right in the disputed

land and was not liable to be evicted therefrom. The Subordinate Judge overruled this contention and decreed the suit. Upon appeal, the District Judge has reversed that decision, and dismissed the suit on the ground that the defendant had practically a permanent interest in the land as the lease contained a stipulation for renewal. In support of the present appeal, it has been argued on behalf of the Secretary of State that, upon the termination of the lease, the defendant ceased to have any interest in the land and is, consequently, liable to be ejected. On behalf of the respondent, it has been contended, in answer to this argument, that the lease contains a covenant for renewal, that he is entitled to renewal on the same terms as before, subject to the payment of fair rent, that he has always been ready and willing to accept a renewal on this footing, and that, consequently, he is in equity entitled to the same protection as if the lease had been properly renewed in his favour. The questions, therefore, which require consideration are, *first*, whether there is a covenant for renewal in the lease; *secondly*, if there is a renewal clause, was the defendant offered a renewal on proper terms; and, *thirdly*, if the defendant is not to blame, is he protected from ejectment.

In so far as the first of these questions is concerned, the answer must plainly depend upon a true construction of the instrument of the 11th November 1878. It recites, in the first place, the prior settlements upon the termination of the last of which the lease was renewed at enhanced rent. It then provides that the lessee would, upon payment of the rent assessed, peacefully dwell on the land, and if he stood in need of constructing any house, he could build on obtaining sanction therefor from the Collector. If the lessee failed to pay rent, the Government might realise the arrear under the laws in force, and further, take possession of the land. During the continuance of the term, the lessee, his heirs and representatives, would have the right to dwell on the land. After the expiry of the term, the Government would have power to re-settle the land with the lessee on a fair rent. The last clause has been construed by the respondent as a covenant for renewal. This has been repudiated on behalf of the Crown, and our attention has been drawn to the fact that no terms are prescribed on which the lease is to be renewed. It has also been suggested, on behalf of the Crown, that if the clause be interpreted as a covenant for renewal, the lessee would practically have a permanent interest in the land, which is inconsistent with the provision for sanction of the Collector, should the lessee build on the land. After careful consideration of all the terms of the lease, some of which are by no means happily worded, I have arrived at the conclusion that the clause in question was intended to be a covenant for renewal. It has not been explained why a contract of tenancy of this character, executed by one Englishman in favour of another, should have been written in what turns out to be a by no means intelligible Indian Vernacular; but this much is plain that, if we accept the construction suggested by the learned Government Pleader, *viz.*, that the clause was intended merely to reserve liberty to the Collector to make a re-settlement with the lessee on fair rent, it would be entirely superfluous. On the other hand, as will presently appear, a renewal clause in a lease does not necessarily import permanency; but even if it did, the clause which requires sanction of the Collector to the erection of a building is not necessarily inconsistent with the theory of a permanent grant; the object of such sanction may be, not so much to prevent the erection of a building as to secure that the building should be of a suitable type from the sanitary or architectural or other similar point of view. It must again be remembered that the tenancy had apparently continued for many years, had been renewed from time to time, and was intended for dwelling purposes, which would necessarily imply the erection of structures of a more or less substantial character. From this point of view, the insertion of a renewal clause would be appropriate and in perfect harmony with the avowed object of the grant. The construction, therefore, suggested by the respondent is reasonable, and I do not hesitate to accept it, because it is well settled that an express covenant to renew in appropriate technical language is not essential, and the *habendum* may be so framed as to amount in substance to a covenant for even perpetual renewal. Thus

in *Chambers* v. *Gaussen* (1), Sir Edward Sugden, then Lord Chancellor of Ireland, held, upon a construction of all the terms of a lease, that it was a lease for lives, renewable for ever. He referred to the cases of *Taylor* v. *Pollard* (2) and *Sheppard* v. *Doolan* (3), where a similar view had been taken. I hold, therefore, that the clause in question embodies a covenant for renewal.

In so far as the second question is concerned; it has been argued on behalf of the Crown that as the instrument does not specify the terms on which the lease was to be renewed, the lessee could not claim renewal on the same terms as before. This contention, in my opinion, is fallacious. In the first place, a lease which creates a tenancy for a term of years, as in the present case, may yet confer on the lessee an option of renewal: *Moss* v. *Barton* (4). In the second place, if the lease does not state by whom the option is exercisable, it is exercisable by the lessee only; in other words, a covenant for renewal, if informally expressed, is enforced only in favour of the lessee: *Lewis* v. *Stephenson* (5). In the third place, the option is exercisable not merely by the lessee personally, but also by his representative-in-interest, for example, his trustee in bankruptcy: *Buckland* v. *Papillon* (6). In the fourth place, if the option does not state the terms of renewal, the new lease will be for the same period and on the same terms as the original lease, in respect of all the essential conditions thereof, except as to the covenant for renewal itself: *Lewis* v. *Stephenson* (5), *Austin* v. *Newham* (7), *Price* v. *Assheton* (8), *Rickards* v. *Rickards* (9). The exception just mentioned is of some importance, because it negatives the suggestion made on behalf of the Crown that a covenant for renewal practically implies a permanent lease. Lord Macclesfield said in *Hyde* v. *Skinner* (10), that though the lease is to be made on the same covenants, yet that shall not take in a covenant for the renewing of this new lease, for as much as then the lease would never be at an end. To the same effect is the observation of Lord Thurlow in *Tritton* v. *Foote* (11), that a covenant in a lease to renew under the same conditions is exclusive of the covenant of renewal. Similarly, Lord Selborne observed in *Swinburne* v. *Milburn* (12), that though there is no sort of legal presumption against a right of perpetual renewal, yet the authorities certainly do impose upon any one claiming such a right the burden of strict proof and are strongly against inferring it from any equivocal expressions which may fairly be capable of being otherwise interpreted. The substance of the matter, therefore, is that the covenant will not be construed as a covenant for perpetual renewal, unless the intention in that behalf is clearly shown; for instance, when the convenant expressly states that the lease is to be renewed for ever; otherwise, the agreement is satisfied and exhausted by a single renewal: *Job* v. *Banister* (13); *Hare* v. *Burges* (14), *Davis* v. *Taylor* (15); *Moore* v. *Foley* (16), *Igguldan* v. *May* (17). It has accordingly been held that a covenant to receive the construction of perpetual renewal must be plain and distinct and such as to bear no other construction without force and violence done to the words and the context: *Browne* v. *Tighe* (18). In the present case, therefore, the defendant was entitled to a renewal of the lease on the same terms as in the instrument of the 11th November 1878, subject to the payment of fair rent as expressly stated therein; and this right was not affected by the circumstance that he was a transferee from the original lessee, for, as already stated, a covenant for renewal runs

(1) (1844) 2 Jo. and La To. 99; 7 Ir. Eq. R. 575.
(2) (1827) Lyne on Leases App. 62.
(3) (1842) 3 Dr. & War. 1; 5 Ir. Eq. R. 6.
(4) (1866) L. R. 1 Eq. 174; 35 Beav. 197; 13 L. T. 623.
(5) (1898) 67 L. J. Q. B. 296; 78 L. T. 165.
(6) (1866) 2 Ch. App. 67; 36 L. J. Ch. 81; 12 Jur. (N. S.) 992; 15 L. T. 378; 15 W. R. 92.
(7) (1906) 2 K. B. 167; 75 L. J. K. B. 563; 95 L. T. 490.
(8) (1834) 1 Y. & C. 82; 41 R. R. 222; 4 L. J. (N. S.) Ex. Eq. 3.
(9) (1843) 2 Y. & C. C. C. 419 at p. 427; 7 Jur. 715.
(10) (1723) 2 P. W. 196.
(11) (1789) 2 Brown C. C. 636; 2 Cox. 171.
(12) (1884) 9 App. Cas. 844 at p. 850; 54 L. J. Q. B. 6; 52 L. T. 222; 33 W. R. 325.
(13) (1856) 2 Kay & J. 374; 110 R. R. 273.
(14) (1857) 4 Kay & J. 45; 27 L. J. Ch. 86; 3 Jur. (N. S.) 1294; 6 W. R. 144; 116 R. R. 255.
(15) (1736) 3 Ridgeway P. C. 395.
(16) (1801) 6 Ves. 232; 5 R. R. 270.
(17) (1804) 9 Ves. 325; 7 East 237; 3 Smith 269; 8 R. R. 623; 2 Bos. & P. (N. R.) 449
(18) (1834) 2 Cal. & Fin. 396; 8 Bligh (N. S.) 272; 37 R. R. 150.

with the land. *Simpson* v. *Clayton* (19); *Roe* v. *Hayley* (20), *Brooke* v. *Bulkeley* (21). The renewed lease offered to him, however, was on substantially different terms. Covenants had been inserted which involved restraint against alienation without the written permission of the Collector which could be obtained only upon payment of premium, forfeiture for felling timber without leave, forfeiture for addition to or alteration in building without assent of the Collector, and like clauses, more or less calculated to prejudice seriously the position of the lessee. The lessee was, therefore, clearly entitled to refuse to accept a renewal on conditions so essentially different from the terms of the original grant.

In so far as the third question is concerned, it cannot be seriously doubted that the position of the lessee who has been always ready and willing to accept a renewal on proper terms is the same in equity as if a proper lease has been granted. The covenant for renewal was still specifically enforceable at the commencement of the suit, and the position of the defendant in equity is the same as if it had been specifically enforced: *Walsh* v. *Lonsdale* (22); *Bibi Jawahir Kumari* v. *Chatterput Singh* (23), *Singhee Ram* v. *Bhagbat Chander Nundi* (24), and *Sarat Chandra* v. *Sham Chand Singh* (25).

The result, therefore, is that although the reasons assigned by the District Judge may be open to criticism, his decree must be affirmed and this appeal dismissed with costs.

BEACHCROFT, J.—I agree and have little to add. It is conceded that the determination of the question depends on the interpretation to be put on the clause, which has been translated, "after the expiry of the term put down in this deed, the Government shall have power to re-settle the land on a fair *jama*." A more accurate translation of the concluding words would be "the Government shall have the power to bring into operation a new settlement on a fair *jama*."

If this clause gives an option of renewal, the appellant is faced by this difficulty that the option must be taken to include a renewal of the lease on all the old terms, except such as are excluded other, of course, than the renewal clause itself. It is clear the words "on a fair *jama*" would be meaningless if applied to any person other than the respondent, for in a contract between *A* and *B*., it is of no concern to *B*. for *A*. to say, 'I shall have power to renew the contract with *C*. on a fair rent."

Any difficulty which there is in the case arises from the fact that the lease is loosely worded. It contains other provisions which are unnecessary, *e.g.*, the passage which, after giving Government power to take *seer* possession in case of default of payment of rent, goes on to give Government authority to keep the property *seer* or to lease it to some one else. If the clause "after the expiry of the term, Government shall have power to bring into operation a new lease on a fair *jama*," were merely a clause emphasizing the fact that the termination of the lease in 1902 was to end the contract between the parties, the appellant must succeed. But a meaning must be given to every clause where possible, and if there is ambiguity in a grant, it must be construed in favour of the grantee. Now, if the contract between the parties entirely terminated in 1902, it was quite unnecessary to reserve to Government the power to make a new settlement. Therefore, the reservation of that power to Government appears to indicate that it was considered that the respondent had some right which it was intended to qualify by this clause. And on the terms of the clause that right could only be a right to renewal. This view is borne out by the fact that previous renewals were recited in the *patta*. And the suggestion that Government had a right to settle the land with any one without giving to respondent the refusal of a lease does not appear to have been the suggestion, at any rate, in the Court of Appeal, for the judgment of the learned District Judge seems to proceed on the lines that there was an option of renewal and that the Government Pleader's contention was not that there was no option, but that the terms of the lease could be varied.

(19) (1838) 4 Bingham (N. S.) 758; 44 R. R. 841; 6 Scott 469; 1 Arn. 299; 8 L. J., C. P. 59; 2 Jur. 892.
(20) (1810) 12 East 464; 11 R. R. 465.
(21) (1754) 2 Ves. Sen. 498.
(22) (1882) 21 Ch. D. 9; 52 L. J., Ch. 2; 46 L. T. 858; 31 W. R. 109.
(23) 2 C. L. J. 343.
(24) 11 C. L. J. 543; 6 Ind. Cas. 632.
(25) 16 C. L. J. 71; 39 C. 663; 14 Ind. Cas. 701.

Therefore, we must take it that an option was reserved to the respondent. That being so, it must be taken that the terms not mentioned as liable to variation were to be renewed. Government was, therefore, entitled only to alter the rent on renewal.

I agree in dismissing the appeal with costs.

Appeal dismissed.

MADRAS HIGH COURT.

APPEAL AGAINST ORDER No. 54 OF 1912.

October 7, 1912.

Present:—Mr. Justice Sundara Aiyar and Mr Justice Sadasiva Aiyar.

KOTAGIRI VENKATARAMARAYANIM AND OTHERS—APPELLANTS

versus

PATIBANDA BASAWAYYA—RESPONDENT.

Limitation Act (IX of 1908), Sch. I, Arts. 29, 36, 62, 120—Attachment of land and standing crops—Suit to declare attachment illegal—Subsequent suit for damages for loss of crops—Limitation—General Clauses Act (X of 1897).

Per *Sundara Aiyar, J.*, (confirming the judgment of the lower Court)—A suit for damages for the value of standing crops cut and appropriated by the defendant, while such crops were under attachment in execution of decree, brought after the termination of a suit to declare such attachment as illegal, is, for the purposes of limitation, governed either by Article 62 or Article 120 of the Limitation Act, and the cause of action arises on the termination of the suit declaring the attachment to be illegal.

Per *Sadasiva Aiyar*, J.—The period of limitation for such a suit is contained in Article 29 or Article 36 of the Limitation Act, and the cause of action arises on the date of the attachment.

Per *Curiam.*—Standing crops are "immoveable property," according to the General Clauses Act, 1897.

Appeal against the order of the Temporary Subordinate Judge of Masulipatam in A. S. No. 177 of 1911, presented against that of the District Munsif of Bezwada, in O. S. No. 588 of 1909.

FACTS.—The facts are clear from the following judgment of the District Munsif:—

"Claim for Rs. 596-9-0, being the value of paddy.

"It is alleged in the plaint that the defendants, in execution of their decree against Maddali Pitchamma in S C. No. 897 of 1906, attached the suit land and the crops thereon on 13th December 1906; that subsequently the attachment of crops alone was kept in force: that the plaintiff on his failure in claim petition brought Original Suit No. 521 of 1907 (Original Suit No. 259 of 1909, Additional District Munsif's Court, Bezwada) for the establishment of his right to the suit land and the crops thereon; that the suit was decreed in his favour; that owing to negligence of the defendants during the time of attachment in force, the crops though well grown became spoiled; that the defendants appropriated the sale-proceeds of the remainder of the crops. Hence the suit.

"The defendants contend that the suit is barred by limitation; that there was no negligence at all on their part during the time of attachment; that the value claimed by the plaintiff is excessive.

"*Issues*:—

(*i*) Whether the suit is within time?

(*ii*) Whether the plaintiff has sustained any and what damages owing to the negligence of the defendants?

(*iii*) To what relief is plaintiff entitled?

"*First issue.*—The facts of the case are very simple. This is a suit by a defeated claimant in respect of the value of crops whose out-turn was poor owing to the alleged negligence on the part of the defendants in not harvesting the crops at the proper time. Defendants contend, *inter alia*, that the suit is barred by limitation as the present suit was brought more than one year from the date of attachment.

"The question for determination in the suit is whether the suit is within time. Admittedly, the suit property was attached on 13th December 1906. The plaintiff put in a claim petition in respect of the paddy crops which was thrown out. Subsequently, plaintiff brought Original Suit No. 521 of 1907 (Original Suit No. 217 of 1909, Additional Munsif's Court) under section 283 of the old Civil Procedure Code now Order XXI, rule 63, to establish his right to the suit land and the crops thereon. The later suit was decreed in his favour. In the meantime, the crops were harvested and the paddy sold and the proceeds distributed to defendants. Plaintiff gives 13th

KOTAGIRI VENKATARAMARAYANIM v. PATIBANDA BASAWAYYA.

December 1906, date of attachment and 22nd September 1909, date of Additional District Munsif's Court decree as the cause of action. The simple question, therefore, is whether the cause of action dated from 13th December 1906, the date of attachment and if so, is the suit barred by time? Defendants' Pleader contends that the cause of action is 13th December 1906 and that as the suit was brought more than one year from the latter date, the suit must be held to have been barred by time. In support of his contention, he relies upon the decision reported in *Samaraju Narasimha Rao* v. *Thadinada Gangaraju* (1). I am of opinion that the contention of the defendant's Pleader must prevail. The cause of action arose on 13th December 1906, the date of the seizure of the property. The Article of the Limitation Act applicable to the cases of this kind is 29. Plaintiff's Pleader ingeniously argues that the standing crops are immoveable property and that the Article is not applicable. Even conceding for argument's sake that his contention is a valid one, the standing crops cannot remain the selfsame thing through a number of years. Being perishable article, they were cut and distributed under the legal process. The moment they were cut, they become moveable property. The decision reported as *Damaraju Narasimha Rao* v. *Thadinada Gangaraju* (1) is applicable on all fours with the present case.

"Besides, the wording of Article 11, Schedule I of the Limitation Act is quite clear on the point. The only things prescribed in the Code are these (Order XXI, rule 63) :—There must be an attachment. There must be a claim petition preferred. Then there must be an investigation and an order thereon. The Article applicable to cases of the kind is clearly Article 11 of Schedule II of the Limitation Act which prescribes a period of one year. This is a special provision made in the Limitation Act in respect of cases of the kind.

"I, therefore, find the point against the plaintiff.

"In the view I have taken of the first issue, it is unnecessary for me to go into the other issue.

(1) 31 M. 431; 4 M. L. T. 271.

"In the result, I dismiss plaintiff's suit with costs to the defendants."

On appeal by the plaintiff, the Subordinate Judge passed the following judgment :—

"The point for determination is whether the suit is barred under Article 29 of Schedule II of the Limitation Act.

"The Article 29 clearly applies to a case of moveable property wrongfully attached. The facts of the case quoted by the District Munsif show that the property attached was undisputedly treated as moveable property. In the present case, what was attached is land with standing crops thereon. The attachment was raised as regards the land, and the plaintiff had to file a suit for a declaration that the standing crops were his. Standing crops are defined as immoveable property in the General Clauses Act of 1868, *vide Pandah Gazi* v. *Jennuddi* (2); *Chunilal Fulchand* v. *Mangaldas Govardhandas* (3); *Madayya* v. *Venkata* (4) and *Cheda Lal* v. *Mul Chand* (5).

"The plaintiff's case is that he sustained loss by reason of the illegal attachment made at the instance of the defendants of the standing crops as the property of their judgment-debtor. The Article applicable is Article 109 of Schedule II of the Limitation Act, if Article 30 of the same Schedule does not apply. In either case, the suit is not barred by limitation. The decree of the lower Court is not sustainable, and it is set aside, and the suit is remanded to be restored to its original file and disposed of on merits. The Court-fee paid in respect of the memo. of appeal will be refunded to the appellant."

"The costs will abide the result."

The defendant appealed to the High Court.

Mr. *V. Ramadoss*, for the Appellant.

Mr. *T. Prakasam*, for the Respondent.

JUDGMENT.

SUNDARA AIYAR, J.—According to the General Clauses Act, 1897, which was in force at the time when the land and the crops were attached, standing crops would be immoveable property. It is urged for the respondent that this would make Article

(2) 4 C. 665; 2 C. L. R. 526.
(3) 6 B. 592.
(4) 11 M. 193.
(5) 14 A. 30; A. W. N. (1891) 174.

29 of the Indian Limitation Act not applicable. According to the view that I have taken in *Yellammal* v. *Aiyappa Naick* (6), the plaintiff's cause of action for the value of crops did not arise until his suit establishing his right to the land was decided on 22nd September 1909 and this suit was instituted on the 22nd November 1909. I am of opinion, for the reasons stated in my judgment in *Yellammal* v. *Aiyappa Naick* (6), that the proper Article applicable is 62 or 120. I must hold, therefore, that the Subordinate Judge was right in his view that the suit was not barred by limitation. I would, therefore, dismiss the appeal with costs.

SADASIVA AIYAR, J.—If Article 29 or 36 applies, the cause of action arose on 13th December 1906, the date of attachment of the property. According to the view I have taken in *Yellammal* v. *Aiyappa Naick* (6), I would reverse the judgment of the Subordinate Judge and restore that of the Munsif.

SUNDARA AIYAR, J.—The result is that the appeal is dismissed with costs.

Appeal dismissed.

(6) 12 M. L. T. 458; 23 M. L. J. 519; 16 Ind. Cas. 914.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL NO. 1033 OF 1910.

November 11, 1912.

Present:—Sir Arthur Reid, KT., Chief Judge, and Mr. Justice Rattigan.

Musammat ZAINAB BIBI AND OTHERS—DEFENDANTS—APPELLANTS

versus

BADAR-UD-DIN—PLAINTIFF—RESPONDENT.

*Custom—Succession—*Arains *of Tahsil Sharkpur, District Lahore - Self-acquired property of nephew—Nephew's daughter preferred to his paternal uncle.*

Among *Arains* of Tahsil Sharkpur, District Lahore, a paternal uncle has no right to the self-acquired property of his nephew in preference to that nephew's daughter.

Second appeal from the order of the Divisional Judge, Lahore, dated 10th June 1910, reversing that of the Subordinate Judge, 1st class, Lahore, dated 28th July 1908, dismissing plaintiff's claim.

Mian *Muhammad Shah Nawaz*, for the Appellants.

Khawaja *Zia-ud-din*, for the Respondent.

JUDGMENT.—The question for consideration is whether the plaintiff, who is paternal uncle of the last male owner of land in the Sharakpur Tahsil of Lahore, is entitled to possession of that land in preference to the last owner's daughter.

The parties are *Arains* and it is admitted that the daughter of an *Arain* of the Lahore Tahsil inherits all property of her father in preference to any collateral.

The Record of Rights of 1856, which has been cited in the judgment dated the 16th January 1909 of the lower Appellate Court, provides that where the owner leaves a daughter, she inherits, if a gift has been made to her, but that in the absence of a gift, a near collateral will exclude her.

The *Riwaj-i-am* of 1867 records that the near collaterals inherit, and that it is their duty to provide for the marriage of the daughter.

On page 10 of the Customary Law of the Lahore District, compiled by the Settlement Officer in 1894, the answer recorded to question C, is that *Arains* say that a daughter or sister succeeds to the property if there is no male collateral nearer related than in the fifth generation.

No specification of ancestral or self-acquired property is made in these records. In the lower Appellate Court, it was assumed that the property in suit was ancestral, but both Courts below found, on remand by this Court, that it was self-acquired, and this finding has not been contested.

In *Jaikarn* v. *Lakhu* (1), printed as a foot-note to the case of *Daya Ram* v. *Sohel Singh* (2), the following passage occurs, at page 421 :—

"That collaterals have ordinarily no preferential claim to daughters and their issue where the land is not ancestral but is the acquired property of the last owners seems to be a well established proposition of Customary Law. Sir William Rattigan lays this down in paragraph 23 (2) of his Digest, 6th Edition and remark (2) under it. He quotes the decisions relied on by the appellant except *Ichhri* v. *Jowahira* (3), in support of his position but it was the same in the 4th Edition which was issued before the earliest of them was pub-

(1) 110 P. R. 1906 *note* at p. 414.

(2) 110 P. R. 1906 (F. B.); 31 P. L. R. 1907; 59 P. W. R. 1907.

(3) 18 P. R. 1896.

lished and in the previous editions. Thus, it would seem that this eminent expert in Customary Law did not understand that any new or startling departure from the rule previously understood about the respective rights of agnates and daughters of a deceased proprietor in respect of his acquired land was made by *Lokha* v. *Hari* (4)."

The burden of establishing rights superior to those of daughters was, therefore, on the plaintiff-respondent.

Dilsukh Ram v. *Nathu Singh* (5); *Masta* v. *Pohlu* (6); *Sham Ram* v. *Musammat Hem Bai* (7); *Ghulam Mohy-ud-din* v. *Faiz Bakhsh* (8); *Maha Ram* v. *Ram Mahar* (9); *Muhamad Umar* v. *Kirpal Singh* (10); *Allah Ditta* v. *Shahna* (11); *Sawan* v. *Sahib Khatun* (12) and *Amir* v. *Musammat Sharf Nur* (13) have been cited on the question of the evidential value of the *Riwaj-i am* and Records of Rights.

Chiragh Din v. *Mamman* (14), cited for the plaintiff-respondent, deals specifically with ancestral property, and in connection with the difference between the custom of the Lahore Tahsil and Sharakpur Tahsil the following passage occurs, at page 151:—

"The *Wajib-ul-arz* suggests that the custom in the village as to daughter's rights in respect to ancestral land is behind that of the Tahsil generally as recorded in the *Riwaj-i-am*; it does not suggest that, having been on a level with that recorded for the Tahsil, the village has adopted some special custom of its own. On the contrary, the Sharakpur *Riwaj-i-am* suggests that the *Arains* in conclave assembled have thought it expedient to adopt a positive rule from the Muhammadan Law for the settlement of a moot point as to what share the daughter ought to receive. It is significant that this provision has not been corroborated by instances."

In Article 23 (2) of Rattigan's Digest of Customary Law, it is laid down that "in regard to the acquired property of her father, the daughter is preferred to collaterals." In remark 2, on page 33 of the 7th Edition, referred to in *Jaikarn* v. *Lakhu* (1), cited above, authorities for this rule are collected.

The greater part of the agricultural land dealt with by the Revenue Records is ancestral, and, having regard to the authorities cited above, we are not satisfied that the provisions of the *Riwaj-i-am* and the Record of Rights cited apply to self-acquired property, while the oral evidence dealt within the judgment of the Court of first instance is against the contention that the rules for the devolution of self-acquired land are those above cited from the Revenue Records. The plaintiff-respondent has not discharged the burden of proof which lay on him of establishing his right to the self-acquired property of his nephew in preference to that nephew's daughter and we decree the appeal with costs.

Appeal allowed.

(4) 64 P. R. 1893.
(5) 98 P. R. 1894 (F. B.).
(6) 52 P. R. 1896.
(7) 73 P. R. 1896.
(8) 97 P. R. 1902; 121 P. L. R. 1902.
(9) 65 P. R. 1903; 139 P. L. R. 1903.
(10) 78 P. R. 1904.
(11) 12 P. R. 1908; 22 P. W. R. 1908; 175 P. L. R. 1908.
(12) 44 P. R. 1909; 67 P. L. R. 1909; 69 P. W. R. 1909; 2 Ind. Cas. 71.
(13) 49 P. R. 1910; 6 Ind. Cas. 929; 87 P. W. R. 1910; 137 P. L. R. 1910.
(14) 28 P. R. 1893.

CALCUTTA HIGH COURT.

ORDINARY ORIGINAL CIVIL SUIT No. 357 OF 1910.

July 8, 1912.

Present:—Mr. Justice Chaudhuri.

W. STEWART—PLAINTIFF

versus

NEW ZEALAND INSURANCE Co. LD.—DEFENDANTS.

Insurance—Marine insurance—Policy—Perils of the sea, meaning of—Ordinary action of wind and waves—Wear and tear.

The term "perils of the seas" refers only to fortuitous accidents or casualties of the sea. It does not include the ordinary action of the wind and waves. It is not every loss or damage of which the sea is the immediate cause, that is covered by these words. They do not protect against the natural and inevitable action of the winds and waves, which result in what may be described as wear and tear. There must be some casualty, something which could not be foreseen, as one of the necessary accidents of adventure.

The Xantho, 12 App. Cas. 503 and *Hamilton* v. *Pandorf*, 12 App. Cas. 518, relied upon.

Anderson v. *Morice*, 10 Com. Pleas 58 and

STEWART v. NEW ZEALAND INSURANCE CO. LD.

Blackbury v. *Liverpool and Brazil River Plate Steam Navigation Co.* (1902) 1 K. B. 290, distinguished.

An insured boat sank suddenly in fair weather and smooth water, without any assignable cause.

It was not proved that the boat had been deliberately scuttled. The boat was in water tight condition up to the night of accident. It appeared that bottom plates had corroded through natural causes, that is, in consequence of ordinary wear and tear:

Held, that the loss was not caused by perils of the sea under the terms of the policy.

Messrs. *Langford James*, and *Pankridge* instructed by Messrs. *Chunder, Law & Co.*, Solicitors, for the Plaintiff.

Messers. *B. C. Mitter*, *L. P. E. Pugh* and *H. G. Pearson*, instructed by Messrs. *Pugh & Co.*, for the Defendants.

JUDGMENT.—The plaintiff is the owner of a Steam Launch named *The Fox*. It was an old Government boat which the plaintiff purchased. He had it repaired and eventually chartered it to a firm in Chittagong. It was sent to Chittagong where there was some difficulty with the charterers whose creditors appeared to have attached the boat. After some considerable trouble, the plaintiff succeeded in getting the boat away. It apparently started back some time after July 1910 and arrived at Port Canning. The plaintiff states that it met with rough weather on the return voyage and lost two water tanks and a jolly boat, but no damage was done to the boat itself. He himself took charge of the boat at Matla and came to Calcutta on the 8th or 10th October 1909. The delay was due to the crew and want of coal. The boat had been insured for the return voyage with the defendant Company, but when it arrived at Port Canning, the plaintiff wrote to them that having regard to the delay which had taken place, further insurance was necessary. At last, an insurance was effected with the defendant Company on the 17th of September 1909, for one year, for Rs. 15,000, the amount of the policy in suit. Out of the premium payable to the defendant Company, a sum of Rs. 187-8-0 had been paid before the loss of the boat and Rs. 562-8-0 remained unpaid.

The plaintiff alleges that the boat has been totally lost to him. It sank on the other side of the river near Shibpur, and was a total wreck and he claimed the amount of the insurance Rs. 15,000 less the amount of the premium due. He claimed this amount as covered by his insurance as against "perils of the seas."

It appears that after the boat was brought to the Shalimar side, opposite Shibpur, there was a gale on the 17th of October; the ship broke loose and drifted to the Calcutta side. It was towed back by the Port Commissioners to the Shibpur side on the 18th of October. The plaintiff states that no damage was done to the boat except that some portion of the wood work had been washed away. He says he intended to beach the boat in order to give it a coat of paint, and that he left orders with the *secunny* for that purpose, but his orders were not carried out. The *secunny* is said to have made various excuses and at last wanted a *dinghy* to carry ropes from the vesssel to the shore, for the purpose of beaching it and the plaintiff eventually engaged a *dinghy* two or three days before the accident took place. Even then, his orders were not carried out, upon which he sent his son, Donald Stewart, to the vessel on the 22nd of October to see that it was beached. A friend of this young man of the name of West accompanied him. They went at night and West's account is that they went to sleep, Donald Stewart leaving orders that the men were to wake him up at 3 or 4 o'clock in the morning in order to beach the boat. They went to sleep in the same cabin. They were, however, suddenly roused about day dawn on being told that the ship was filling with water. They came down and had just time to get into a *dinghy*, when the vessel sank. It sank in fair weather and smooth water. According to the plaintiff, there are only two theories possible, namely, that either the boat was deliberately scuttled, or that the bottom plate had corroded and sprung a leak. He said that simple corrosion of the bottom plate would not account for the leak, if any, but there must have been bumps superadded to start the plate leaking, and he stated that he had heard from his son that on the night of the occurrence, he had distinctly felt a bump of what he thought was a country boat. His explanation was that it was possibly due to this collusion, added to the fact that the bottom plate had probably corroded which had started a leak and in consequence of which the vessel

sank. He stated that all the plates of this boat had been renewed three years before the accident, except the bottom plates which could not be renewed without the boiler being lifted, and as that involved much expense, they were not changed. Unfortunately, we have not got the evidence of Donald Stewart, who had died since the accident, but the statement of the plaintiff finds no corroboration from that of the *secunny*. The plaintiff stated that the *secunny* had corroborated his son shortly after the accident. The *secunny*, however, stated in the witness-box that he knew nothing of any boat bumping that night. Therefore, so far as the collision theory is concerned, I must reject it as without evidence. It was never suggested at the earlier stages of the case, and seems to have been an after thought. The evidence is that the boat was in a water-tight condition up to the night of the accident and suddenly sank in smooth water and fair weather.

The boat, as I have said, sank in the morning of the 23rd of October. No intimation was given by the plaintiff to the Insurance Company that day or the next. He says 23rd October was a close holiday, 24th October was a Sunday, and he received a letter on the morning of the 25th from the Insurance Company calling his attention to the fact that his boat had sunk. He immediately sent a reply. He promised to see Mr. Legatt of the Insurance Company on the 28th, but did not go to him before the 30th. His explanation is that inasmuch as the *secunny* was ill, he could get no information from him. So far as the statement of the illness is concerned, it is not supported by the *secunny*. He was not ill. He was somewhat fatigued and distressed according to his own account. But the plaintiff's description of the illness was somewhat graphic. When stating that the *secunny* was ill, the plaintiff showed how he shook with fever when he came to him. The *secunny* denies that he had fever. This seems to be an invention on the part of the plaintiff. There was no protest made by the *secunny* until the 23rd of November 1909 and it is important to see what is stated there. The *secunny's* statement on that occasion was that the boat had started a leak in the forehold and in consequence gone down. Now, the plaintiff says the boat could not have started a leak in the forehold. The plates had been changed, and he says it was the *secunny's* mistake. The leak must have started according to him in the engine hold, which is the centre hold, somewhere under the ash-plate of the boiler. The water must have rushed into the middle hold through the bottom plate and from there forced its way into the forehold, and he stated, as his ground for so saying, that the boat had sunk stern foremost. It is difficult to accept a theory of that kind, when the man who was actually on the boat states that the leak must have sprung in the forehold. The protest also suggests that some of the rivets must have got loose during the storm on the 17th of October. This is not supported by the plaintiff at all. He does not suggest it, the *secunny* also does not support it, and the statements made in the protest are contradicted by the evidence which has been given. The plaintiff denies he knew what the *secunny* was going to say in the protest, but the language used does not seem to be the *secunny's*. He, no doubt, made his statement in Bengali but the way the protest puts the case, I doubt, if the *secunny* could have put it.

There was considerable evidence given about the finding of a plug, a gland attached to the plug, and some pins. The plug is said to belong to one of the sea-cocks. If the plug was removed from the sea-cock, it is conceded that the boat would have made water and sunk. The evidence of the defendant Company is this, that one Captain Haines was employed by them to raise the boat. The boat was raised on or about the 18th December. On the morning of the 19th, a man of the name of Metcalfe, who was employed on the boat, was there, Captain Haines was there and a coolie who was working on the boat brought up from the bottom of the boat a plug and a gland, the same as produced. At that time, one Mathieson, a Chief Engineer of the River Steam Navigation Company, was there also. These things were brought up in their presence from the hold of the boat. We have the evidence of Captain Haines on this point: Mathieson has been examined and Metcalfe also. So far as Captain Haines is concerned, he was examined on commission. When application was made

for the issue of a commission, it was strenuously opposed by the plaintiff on the ground that it would be impossible for him to join in it, as he could not afford the expense, but the learned Judge who heard the matter and ordered the commission, thought that no sufficient ground had been shown by the plaintiff against its issue. Counsel for the plaintiff protested at that time as he said it practically prevented his client from cross-examining Captain Haines. He further stated that his client was not going to join in the commission; but, subsequently, the plaintiff did join in the Commission. His Attorney wrote to the Registrar asking for leave to join in the Commission and such leave was given, and the Commission was sent out to Moulmein on the 23rd of January. The practice in this Court is that when a Commission issues in this way, the parties have to appear before the Commissioner and get a date fixed for the examination of the witness. It appears that a summons in this case was issued on Captain Haines on the 15th of February at the instance of the defendants' lawyers. The plaintiff did not appear on that occasion, or on any other. He was not present, nor was he represented. He made no attempt to appear before the Commissioner. He did not even communicate with him. The examination was fixed for the 19th February and the Commission was returned on the 28th of February 1912. During this time; no attempt was made by the plaintiff to take any steps for the cross-examination of the witness, and although the case was not heard till long afterwards, no application was made by him, either for the purpose of being allowed to cross examine Captain Haines, or for getting an order that his evidence could not be used, as he alleged he had no notice when the Commission had issued. He had joined in the Commission and it was incumbent upon him to communicate with the Commissioner if he intended to appear. I think that the plaintiff allowed this witness to go un-cross-examined in the hope of getting his evidence rejected by not appearing at Moulmein. Having regard to the case, *Gregory* v. *Dooley Chana*(1), in which it was held that the opposing party had a right to notice of every proceeding held under a Commission, I was at first inclined not to admit this evidence, but having regard to the facts subsequently elicited, I have allowed it. My conviction is that it was a deliberate omission on the part of the plaintiff not to take any steps for the cross-examination of Captain Haines. The evidence of Captain Haines, if accepted, is almost conclusive. He speaks about the discovery of the plug, and the conclusion one must draw from the facts stated by him is that the boat must have been scuttled. The plug must have been deliberately removed, it could not have been forced out of its place by the water coming in But, although I have admitted the evidence of Captain Haines, I do not think it is safe to rely upon it without corroboration. It is un-cross-examined testimony. I have, therefore, to consider the evidence of Metcalfe and Mathieson. Metcalfe speaks about finding the plug, and I do not see any reason why he should be disbelieved. His account is very clear. He mentions who the persons were who were present on that occasion and how the plug was found and the only ground suggested for disbelieving this witness is the allegation that Captain Haines has some improper relationship with this man's sister, a married sister, with whom he does not correspond. I think it is a cruel suggestion to make, and not at all a worthy one. There is no evidence in support of it except a statement by the plaintiff that Captain Haines at one time lived in a room, which belonged to Mrs. Elder, Metcalfe's sister, in a house which the plaintiff was occupying. With regard to Mathieson also, I see no reason for disbelieving him. His recollection is not quite clear as regards the things found on the occasion he says he was present. He spoke about a spanner, a gland, a plug, etc., being found. His impression is that all the things were found at the same time, one after the other. This does not agree with the version of Metcalfe who speaks to the plug being found in his presence, and the other things later. No reason has been suggested why Mathieson should be disbelieved. He holds a respectable position, under a well known firm in Calcutta and appears to be an independent witness. Except for this discrepancy as to the time when all these articles were found, there is nothing against his evidence. A pencil entry in his log-book is also challenged as suspicious.

(1) 14 W. R. 17.

He says that he wanted to keep a record of what happened, but as it was not official, he made a note in pencil. As to the note, I am not inclined to give it much weight, but I see no reason to doubt his veracity. There is also the evidence of Captain Stewart who did not see any leaks or cracks in the plate, and speaks to the hold being water-tight. Taking all this evidence together, I hold the plug was out of its place, that it was found in the bottom of the boat and had been removed and that the removal of the plug caused the boat to sink. As against this evidence, we have the evidence of a man of the name of Domingo. He was a very unsatisfactory witness, and although he did not show any signs of being drunk, it was suggested by the plaintiff's Counsel in his reply that he must have been drunk. He was for a considerable time in the witness-box and appeared to me to be entirely unreliable and untruthful. He said that he was asked by Captain Haines to find a plug and gland, as they would be necessary for the Insurance Company, suggesting by that, that he had been asked by Captain Haines to remove these things and that they were going to be utilised for making a case that the sea-cocks had been left deliberately open. He says that when he was cleaning the mud out of the boat, after it had been raised, he saw these things in their place. He mentioned the matter to Captain Haines, but to his astonishment next morning these things had disappeared. He informed Captain Haines that they were gone, which made Captain Haines very angry. He stated that he believed that Captain Haines had deliberately caused the disappearance of these things. He subsequently withdrew from that, but came back to it again, and charged Captain Haines with having engineered this incident. It appears to me that the plaintiff felt that some answer should be given about the plug not being found in its proper place and that Domingo was put forward to supply that evidence. He was discovered by a man of the name of Murray who stated that he had at one time been a partner of Captain Haines. His evidence was simply that he went to see this boat after it had been raised, and found Domingo working there. He did not go on the boat, and knew nothing about its condition. One day Domingo casually met him, long after the date of his visit to the boat. Murray took him home, and had a talk with him about the accident and thought that his evidence would be useful for the plaintiff. He sent Domingo with a letter to the plaintiff and the plaintiff sent him on to his Attorney to make a statement. On Domingo being asked if he had mentioned any of the facts stated by him in the witness-box to Murray, he at first said "No," but within a minute afterwards he said he had made a complete statement to Murray. I entirely disbelieve the evidence of Domingo as regards the charges made against Captain Haines and the way he says the plug disappeared from its place.

Upon this evidence, I am inclined to believe that the plaintiff knew how the plug had been removed. It is unnecessary for me to deal with this matter at any length, as I consider that the case is not covered by the terms of the policy. It is an insurance against perils of the seas, and there is abundant authority for holding that a boat sinking under these circumstances in fair weather and smooth water did not sink by a peril of the sea. The term "perils of the seas" refers only to fortuitous accidents or casualties of the sea. It does not include the ordinary action of the wind and waves. It is well settled that it is not every loss or damage of which the sea is the immediate cause, that is covered by these words. They do not protect, for example, against the natural and inevitable action of the winds and waves, which result in what may be described as wear and tear. There must be some casualty, something which could not be foreseen, as one of the necessary accidents of adventure. See Lord Herschell's judgment in *The Xantho* (2).

Reference was made to the case of *Anderson* v. *Morice* (3) and also to the case of *Gibson* v. *Small* (4), *Thompson* v. *Hopper* (5), *Fawcus* v. *Sarsfield* (6) in support of the proposition that there is no implied warranty of seaworthiness in Time policies.

In *Anderson* v. *Morice* (3), the boat went

(2) (1887) 12 A. C. 503 at p. 509.

(3) (1874) 10 Com. Pleas. 58.

(4) (1853) 4 H. L. C. 353; 1 C. L. R. 363; 17 Jur. 1131; 94 R. R. 138.

(5) (1856) 6 El. & Bl. 172; 25 L. J. Q. B. 240; 2 Jur. (N. S.) 608; 4 W. R. 360; 26 L. T. (o. s.) 308; 106 R. R. 547.

(6) (1856) 6 El. & Bl. 192; 25 L. J. Q. B. 249; 2 Jur. (N. S.) 665; 26 L. T. (o. s.) 323; 106 R. R. 559.

down in fine weather, but there was a large body of evidence given as to the cause of the accident, and upon that evidence, the Jury came to the conclusion that it was covered by the terms of the policy.

It is unnecessary to deal with the other cases, which were referred to during argument, except *Blackburn* v. *The Liverpool and Brazil River Plate Steam Navigation Company* (7). That was a case of injury to goods which were insured. A plug had been left open and water came in, and damaged the goods. The case depended on what is known as the "negligence clause." Lord Halsbury held upon the facts that the injury was covered by the words "perils of the seas." He, however, affirmed the principle laid down in *Hamilton* v. *Pandorf* (8), that there must be something fortuitous and unexpected, that wear and tear did not come within the words "perils of the seas.' If the boat was not deliberately scuttled, the only other explanation offered is that the bottom plate had corroded through natural causes.

I hold that the plaintiff's suit fails and dismiss it with costs on scale No. 2.

(7) (1901) 1 K. B. 290; 71 L. J. K. B. 177; 50 W. R. 272; 85 L. T. 783; 18 T. L. R. 121; 7 Com. Cas. 10; 9 Asp. M. C. 263.

(8) (1887) 12 A. C. 518; 57 L. J. Q. B. 24; 57 L. T. 726; 36 W. R. 369; 52 J. P. 196; 6 Asp. M. C. 212.

BOMBAY HIGH COURT.

CIVIL APPEAL No. 37 OF 1911.

SUIT No. 167 OF 1906.

January 11, 1912.

Present:—Sir Basil Scott, KT., Chief Justice, and MR. Justice Russell.

LALJI NENSEY LUDHA—APPELLANT

versus

KESHOWJI PUNJA—RESPONDENT.

Parties—Hindu Law—Joint family business—Suit on business contracts—Necessary parties—Minor members—Plaint—Amendment—Development of original cause of action—Date of institution of suit.

It is not necessary, in the case of a Hindu family, to join in a suit upon a business contract the minor members of the family who in fact take no share in the business which is carried on on behalf of the family.

The only necessary parties are those who actually contracted with the defendant.

Where the allegations introduced in a plaint by amendment are mere development of plaintiff's position and original cause of action and do not introduce any new cause of action, the suit must be taken to have been instituted on the date of the original plaint.

Mr. *Strangman*, Advocate-General, (with him Mr. *Inverarity*), for the Appellant.

Mr. *Raikes*, (with him Mr. *Bahadurji*), for the Respondent.

JUDGMENT.—This is an appeal from the dismissal by Mr. Justice Beaman of a suit filed by the plaintiff, as the sole surviving partner of a firm carried on by himself and his father Nensey Ludha in the year 1903, in which year the defendants incurred certain obligations to that firm. The plaintiff alleged that his father died on the 4th of February 1905 and that the plaintiff then became the sole owner of the firm. The defendants put in a written statement in the year 1906, putting in issue the allegation that the present plaintiff was a partner with his father, Nensey Ludha.

The suit came on for hearing on the 8th July 1911, and the first issue raised was whether the plaintiff was a partner with his father, Nensey Ludha, in the firm of that name. Certain evidence was recorded. The plaintiff alleged a partnership and he was cross-examined, and as a result of the hearing on the first day, it was apparently suggested that the plaintiff could not succeed unless the plaint was amended; and on the 15th July, in spite of the objection of the defendants, an amendment was allowed whereby the plaintiff altered his plaint in certain respects. The learned Judge states the circumstances, under which the amendment was allowed, as follows:—"This suit was originally instituted by the plaintiff as the surviving partner in a firm. An objection was taken that the firm, alleged to consist of the plaintiff and his father, was in no real sense a partnership, and the suit as framed was bad on that account. Issues were raised and some evidence was gone into, at the close of which it certainly did appear that the

plaintiff would have little chance of establishing the alleged partnership. He was granted an adjournment to amend the plaint. This has now been done and the plaintiff sues as the surviving member of a joint Hindu family originally consisting of his father and himself alone, but at the present day consisting of himself and his two minor children, born after the filing of the suit, and his mother." The amendments in the plaint are as follows:—The first para. as it originally stood was: "In the year 1903 the plaintiff and his late father Nensey Ludha were carrying on business as grocers in Bombay in partnership with each other in the name of firm of Nensey Ludha." By the amendment the words "in partnership with each other" were struck out and the following sentence was added, namely: "The said business was an asset of a joint and undivided Hindu family, the only male members of which were the plaintiff and his said father." In the fourth para. instead of the words, "the plaintiff is now the sole owner of the said firm of Nensey Ludha" is substituted, "the plaintiff thereupon became the sole owner of the said firm of Nensey Ludha by survivorship." And para. 9 (*a*) was added stating as follows:—"since the filing of this suit, the plaintiff has had two sons born to him. The plaintiff is the manager of the joint and undivided Hindu family consisting of himself, his said two sons and his mother."

There is, therefore, no allegation that the liability of the defendants was incurred to a firm or a business which at that time was being carried on by the plaintiff as manager on behalf of his minor sons. According to the plaint, they were not in existence at the date of the cause of action or at the date of the filing of the plaint. It has been contended on behalf of the respondents that the effect of the amendment of the plaint is to delete the allegation that the plaintiff and his father carried on business in partnership and to substitute a claim based upon the right of the plaintiff to sue on behalf of himself and his minor children as members of a joint Hindu family possessed of a cause of action in which they are all equally entitled, and it is contended that upon that footing, the plaintiff cannot sue alone, and that if his minor sons should be joined, which they have not been, the suit would be barred by limitation. The learned Judge in the lower Court acceded to that argument and, considering himself to be bound by the decision of this Court in *Naranji* v. *Mohi Govanji* (1), held that there was a rule that all members of a joint Hindu family in existence at the date of the filing of the plaint were necessary parties and that the same rule extended to the members of a joint family born between the filing of the plaint and the decree.

Now, the report of the case of *Naranji* v. *Mohi Govanji* (1) shows clearly, we think, that the *ratio decidendi* was that the debt sued for was joint family property and, treating the case from that point of view alone, that a minor who was born after the date of the filing of the suit ought to be joined with his co-parceners in the suit. No reference is made in the judgment to the question whether the parties to the suit ought to be regulated according to the parties to the contract at the time the contract was made. It appears to us that this case should be decided with reference to the question who were the parties to the contract and that it is not necessary in the case of a Hindu family to join in a suit upon a business contract minor members of the family who in fact take no share in the business which is carried on on behalf of the family. The cases of *Ramsebuk* v. *Ramlall Koondoo* (2) and *Kalidas Kevaldas* v. *Nathu Bhagvan* (3) show that those who actually were contracting parties with the defendant must, in the case of a suit by members of a Hindu family, all be joined, but neither of those cases shows that minor members of the family, who take no part in the family business, should be joined in suing for business debts. The contrary has in fact been held by Mr. Justice Sale in *Lutchmanen Chetty* v. *Siva Prokasa Modaliar* (4), a case which unfortunately does not appear to have been cited to the learned Judge in the Court below. Mr. Justice Sale had before him a case the facts of which were as follows:—The only original partners of a firm in whose name the note in suit

(1) 9 Bom. L. R. 1126.
(2) 6 C. 815; 8 C. L. R. 457.
(3) 7 B. 217.
(4) 26 C. 349; 3 C. W. N. 190.

was given were the plaintiff and his brother Ramanathen Chetty, and upon the death of the latter and at the date of the note, the plaintiff was the sole surviving partner of the firm. But it was proved that he had four sons living, the eldest of whom was nine or nine and a half, while the youngest was born since the institution of the suit, and the son of the deceased brother Ramanathen Chetty died after the institution of the suit leaving only a daughter. None of the plaintiff's sons were in existence at the time the dealings with the defendent commenced. At the date of the execution of the note in suit, the plaintiff's eldest son was probably in existence, and the plaintiff's brother's son was also in existence, but it did not appear when he was born and the defendant relied mainly in bar of the suit on the plea that all necessary parties to the suit had not been joined as plaintiffs. Mr. Justice Sale, after referring to *Ramsebuk's* case (2), said: "No authority has been cited to show that infant members of a Hindu co-parcenary must be joined as co-plaintiffs in suits to recover claims arising out of a joint family business managed by adult members of the family. A debtor of a firm carrying on a joint family business is, no doubt, entitled to insist that all his co-contractors should join as plaintiffs in a suit instituted to recover the debt, but on what principle can it be said that infants, possibly of tender years as in this case, who are not shown to have been admitted into the trading partnership or to have taken any part in the business or exercised any control therein, are in any sense co-contractors of the debtor? A trade, like other personal property, is descendible amongst Hindus, but it does not follow that a Hindu infant, who by birth or inheritance becomes entitled to an interest in a joint family business, becomes at the same time a member of the trading partnership which carries on the business." He then refers to the case of *Petumdoss* v. *Ramdhone Doss* (5). In that case, it was held that a minor son of a Hindu father could not join in a claim upon a mercantile contract for non-delivery of goods, and the Chief Justice said: "The son is proved to be only three years of age, and it appears that there are other sons of the father. The witness, who said that they were partners, appears to us to have drawn that conclusion merely from the use of the child's name in the firm. The law of joinder of parties is a law of procedure, and is governed by the *lex fori*. It is desirable that it should be uniform. If we were to decide in this case that the infant son may be joined, it would be equivalent to a decision that he and others, situated as he is, must be joined in all cases as co-plaintiffs, and as this could only proceed on the ground of a real partnership evidenced by the mere use of a name, it would be really equivalent to deciding that such infants might be joined as defendants at the pleasure of a plaintiff." That case was referred to in the earliest of the Bombay cases upon the law relating to infants interested in family businesses: *Ramlal Thakursidas* v. *Lakhmichand Muniram* (6). It is also pointed out by Mr. Justice Sale that a dormant partner in England may join in a suit as plaintiff but never need do so. That is stated in Lindley on Partnership, page 313; and in Dicey on Parties, page 151, it is said: "A dormant partner is a person who does not appear to be a partner, but is so, and occupies the position of an undisclosed principal, and, therefore, always may, and never need, join in an action on a contract made with the firm." The case of *Ramsebuk* v. *Ramlall Koondoo* (2) has lately been discussed by their Lordships of the Judicial Committee in *Kishen Parshad* v. *Har Narain Singh* (7) and from that judgment it appears that a man can only claim to be sued by the people with whom he contracted.

It appears to us that upon amendment, the plaint has a two-fold aspect. It is based on the allegation that a firm was carried on for the purpose of a grocery business between the plaintiff and his deceased father, of which the plaintiff is the sole surviving partner and also upon the allegation that the plaintiff and his father were joint and that as a necessary consequence, the sons of the plaintiffs born after the institution of the suit are joint with the plaintiff in the family property. It does not follow from that, however, that the defendants can insist upon those sons being joined.

(5) (1848) Taylor 279.

(6) 1 B. H. C. R. App. 51.

(7) 38 I. A. 45 at p. 53; 13 Bom. L. R. 359; 15 C. W. N. 321; 8 A. L. J. 256; 9 M. L. T. 343; 15 C. L. J. 345; 21 M. L. J. 378.

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We are of opinion that the allegations introduced in the plaint by amendment are mere developments of the plaintiff's position and they do not introduce any new cause of action which can be defeated by applying the law of limitation. The amendments only develop the original cause of action.

We set aside the decree of the lower Court and remand the case for trial to a conclusion. Costs costs in the cause.

Decree set aside.

Attorneys for the Plaintiff: Messrs. *Ardeshir, Hormusji, Dinsha & Co.*

Attorneys for the Defendants: Messrs. *Wadia, Gandhi & Co.*

PUNJAB CHIEF COURT.

FIRST CIVIL APPEAL No. 645 OF 1912.

November 9, 1912.

Present:—Mr. Justice Robertson and Mr. Justice Chevis.

KALLU MAL—DECREE-HOLDER—APPELLANT

versus

SHAMS-UD-DIN AND OTHERS—PLAINTIFFS AND *Musammat* MALKA JAN AND ANOTHER—JUDGMENT-DEBTORS—RESPONDENTS

Declaratory suit—Suit against decree-holder and judgment-debtor that attached property is not liable to attachment—Judgment-debtor also made defendant but not appearing, disputing or admitting plaintiff's claim—Jurisdiction—Value of suit—Value of property.

In execution of his decree, a decree-holder had the property in dispute attached as that of his judgment-debtor. The plaintiff filed an objection against the attachment but without success. Thereupon he brought this regular suit praying for a declaration that the property was his and not of the judgment-debtor. The decree-holder as well as the judgment-debtor were both impleaded as defendants but the latter did not appear and, therefore, so far as he was concerned, there was neither admission nor denial of the plaintiff's claim:

Held, that, as the judgment-debtor was made a party to the suit, the jurisdiction value of the suit was the value of the property, it being quite immaterial that the judgment-debtor did not appear and dispute or admit the claim.

Bishnu Singh v. *Lal Singh*, 55 P. R. 1906; 71 P. L. R. 1906 and *Zorawar Singh* v. *Deva*, 142 P. R. 1906, considered.

Dwarka Das v. *Kameshar Prasad*, 17 A. 69 and *Sher Ali Shah* v. *Lachman Das*, 94 P. R. 1908; 74 P. W. R. 1908, followed.

First appeal from the order of the Subordinate Judge, 1st class, Delhi, dated the 15th April 1910, decreeing the claim.

The Hon'ble Mr. *Shadi Lal*, for the Appellant.

Mr. *Fazl Ilahi* for *Lala Chuni Lal*, and Lala *Gopal Chand*, for the Respondents.

JUDGMENT.—In execution of his decree against *Musammat* Malka Jan and *Musammat* Hiro Jan, Kallu Mal had the property in suit attached and applied for it to be sold. The plaintiffs, having filed an objection without success, brought this regular suit, urging that the property was their own and that *Musammat* Malka Jan and *Musammat* Hiro Jan had no power to mortgage it. The lower Court, having given the plaintiffs a decree in part, Kallu Mal appeals to this Court urging that the suit should be dismissed *in toto*.

A preliminary objection is raised on behalf of the plaintiffs-respondents that the value of the suit is less than Rs. 5,000 and that appeal lies to the Divisional Court. It is admitted that the value of the property in question is over Rs. 5,000 and that the value of the decree, including costs, is under Rs. 5,000. It may also be noted that *Musammat* Malka Jan and *Musammat* Hiro Jan, though made defendants in the present suit, have not appeared in Court, and so there is neither admission nor denial of the plaintiffs' claim on the record so far as these two defendants are concerned.

For the plaintiffs-respondents, reliance is placed on *Bishnu Singh* v. *Lal Singh* (1) and *Zorawar Singh* v. *Deva* (2), while for the appellant *Dwarka Das* v. *Kameshar Prasad* (3) is quoted. The Full Bench ruling of this Court, *Sher Ali Shah* v. *Lachman Das*(4), has also to be considered.

In *Bishnu Singh* v. *Lal Singh* (1), it is held that in such cases where there is no dispute between the plaintiff and the judgment-debtor, the value of the suit is the value of the decree sought to be realized and not the value of the property. In *Zorawar Singh* v. *Deva* (2), the same is held. We have called for the records of these cases and find that in both cases the judgment-debtor (or his representative) was a party. In both cases, however, it would appear that the judgment-debtor was siding with, and not opposing, the plaintiff. In fact, as pointed out in *Sher Ali Shah* v. *Lachman Das* (4), the judgment-debtor in

(1) 55 P. R. 1906; 71 P. L. R. 1906.
(2) 142 P. R. 1906.
(3) 17 A. 69; A. W. N. (1895) 3.
(4) 94 P. R. 1908; 74 P. W. R. 1908.

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Zorawar Singh v. *Dewa* (2) actually gave evidence in favour of the plaintiff. In *Dwarka Das* v. *Kameshar Prasad* (3), the test laid down as the criterion in such cases is the making of the judgment-debtor a party to the suit. It is held that where he is not made a party, the value of the suit is the value of the decree sought to be enforced, but that where he is impleaded, the value of the suit is the value of the property. The reason given for the distinction is that when the judgment-debtor is made a party, the decision arrived at is *res judicata* between him and the plaintiff and so covers the whole of the property and not merely so much of the property as may be sufficient to satisfy the decree. Nothing is here said as to the judgment-debtor disputing the claim of the plaintiff or admitting it; this is a matter which is evidently regarded as immaterial.

We now turn to *Sher Ali Shah* v. *Lachman Das* (4). The order referring the case to a Full Bench is one in which the learned Judge divides suits into three classes,

(*a*) when property attached has been released on objection, and the decree-holder sues for a declaration that the property is liable to attachment,

(*b*) when property attached has not been released, the objection being disallowed, and a suit is brought by the objector *against the decree-holder* to declare the property not liable, the judgment-debtor siding with the objector and not claiming the property as his,

(*c*) when property attached has not been released, the objection being disallowed and the objector brings a suit *against the decree-holder and the judgment debtor* to declare the property not liable, the judgment-debtor resisting the suit and claiming the property as his, and the plaint asserting that this is the judgment-debtor's attitude.

With class (*a*) we are not concerned. The learned Judge held that in class (*b*), the subject-matter of the suit was *probably* the decretal amount. This, however, was not a definitely expressed opinion. It appears also to us extremely doubtful if the learned Judge intended to include in class (*b*) any suits brought by the objector against the decree-holder *and the judgment-debtor*. The case then before the Court was one falling under class (*c*). After reviewing several reported cases, the learned Judge concludes by citing with approval the ruling of *Dwarka Das* v. *Kameshar Prasad* (3) pointing out what was the test applied in that case, and saying "the learned Judges make use of arguments that have my entire assent, pointing out, among other things, that the title to the whole of the property in the case put, which is similar to my class (*c*) above, will become *res judicata* as between all the parties to the suit." [It may here be noted that in the Allahabad case (3) the representative of the judgment-debtor did *not* defend the suit].

The judgment of the Full Bench was simply:—"For the reasons given in the referring order, we hold that the proper valuation of this case for purposes of jurisdiction is the value of the property attached and not the decretal amount."

After duly considering the above judgment, we think that the learned Judge who wrote the referring order meant to make a distinction between cases in which the plaintiff sues the decree-holder alone and cases in which the plaintiff joins the judgment-debtor as a co-defendant, and that this judgment cannot be quoted as authority for saying that, unless the judgment-debtor actually contests the claim, the value of the suit must be regarded as the value of the decree sought to be enforced, regardless of the question whether the judgment-debtor is added as a party or not. We take it that the Full Bench of this Court has followed, and in no way dissented from, the Allahabad ruling (3).

In the present case, the judgment-debtors have been made defendants to the suit, and, following the Allahabad ruling (3) and the Full Bench ruling of this Court (4), as we understand it, we hold that the value of the present suit is the value of the property. It follows that the value of the suit is over Rs. 5,000 and that appeal has rightly been preferred to this Court.

[*Note.*—The rest of the judgment is omitted, as it is not necessary for the purpose of this report—*Ed.*]

ZULEKABAI *v.* EBRAHIM.

BOMBAY HIGH COURT.
ORIGINAL CIVIL SUIT NO. 332 OF 1910.
August 17, 1912.
Present:—Sir Dinshaw D. Davar, KT., Judge.
ZULEKABAI—APPELLANT
versus
EBRAHIM HAJI VYEDINA—RESPONDENT.

Letters Patent (Bombay), cl. 12—High Court—Jurisdiction—"Suit for land"—Suit for recovery of title-deeds of immoveable property at Mauritius—Nature of suit.

A suit for the recovery of title-deeds of immoveable properties situate at Mauritius is not triable on the Original Side of the Bombay High Court.

In order to ascertain the true nature of a suit, a Court is bound to look further than the four corners of the plaint.

The words "suit for land" do not mean only suits for the *recovery* of land. The words include a suit which, having regard to the real object of the suit and the rights and contentions of the respective parties, is substantially a claim in respect of land.

A suit for recovery of title-deeds of land is substantially a suit for land and is in effect and in reality a suit for establishing title to that land and the recovery of possession thereof.

Mr. *Bahadurji* (with him Mr. *Kanga*), for the Plaintiff.

Mr. *Jardine*, acting Advocate-General, (with him Mr. *Jinnah*), for Defendant No. 2.

JUDGMENT.—Haji Oomer Ebrahim, a Cutchi Memon, died about twenty-eight years ago leaving him surviving his widow Zulekabai, the plaintiff herein, two sons, named Elias and Oomer, and a daughter, named Asibai, also called Amibai. At the time of his death, he was possessed of two immoveable properties situated at Mauritius. Two years after the death of Haji Oomer, his son Elias died and the other son Oomer died in 1899. They were both minors and unmarried at the time of their death. Oomer's daughter Asibai was married to Kaderdina *alias* Kadu Vyedina, a brother of the defendants herein. Asibai died on the 31st of January 1909 childless and intestate and Kaderdina died on the 26th of December 1908. The plaintiff claims that on the deaths of both her sons, she became entitled to the Mauritius properties "for a Hindu mother's interest therein." She has filed this suit praying, amongst other things, "that the defendants may be ordered to deliver to the plaintiff forthwith the title-deeds of the Mauritius properties."

All the three defendants have filed their written statements. The first defendant did not appear at the hearing. The third defendant appeared in person. Evidently, they have left the fight in the hands of the second defendant, who is admittedly in possession of the title-deeds relating to the Mauritius properties. All the written statements run on very much the same lines except for one or two small differences in details. I propose to confine my attention to the second defendant's written statement. With regard to the Mauritius properties, he denies that the plaintiff took a Hindu mother's interest therein. He says that succession to those properties is governed not by Hindu law but by Muhammadan Law, and contends that on the death of Haji Oomer, the Mauritius properties devolved on his heirs, namely, his widow, his two sons and his daughter, and that on the respective deaths of those two sons, the widow and the daughter of Haji Oomer got by inheritance additions to their original shares in the said properties. He further sets up an agreement between the plaintiff and her daughter Amibai whereby the plaintiff agreed to sell her interest in the Mauritius properties to her daughter Amibai for Rs. 1,062. As one of the heirs of Amibai, he says he is ready and willing to pay to the plaintiff Rs. 1,062 and counter-claims that on payment of this sum to the plaintiff, she may be ordered to execute the necessary conveyance. He has added two of his remaining brothers as parties to the counter-claim.

On behalf of the second defendant, the first two issues raised by the learned Advocate-General are:—

(1) Whether if this suit be regarded as suit for land, this Court has jurisdiction to entertain it as the land in question is situated at Mauritius; and

(2) whether if it be not so regarded, the suit is maintainable so far as it claims possession of title-deeds of the said land?

As these issues raised purely a question of law, they were first argued before me and I reserved judgment. The question involved in the trial of these issues is: Is this a "suit for land or other immoveable property" in so far as it prays that the defendants may be ordered to deliver up the title-deeds of the Mauritius properties to the plaintiff? Clause 12 of the Amended Letters

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Patent deals with the Ordinary Original Civil Jurisdiction of this Court. It enacts that: "The High Court of Judicature at Bombay, in the exercise of its Ordinary Original Civil Jurisdiction, shall be empowered to receive, try and determine suits of every description if in the case of suits for land or other immoveable property, such land or property shall be situated within the local limits of the Ordinary Original Civil Jurisdiction of the said High Court."

In this suit, there is no question that the immoveable properties are situated beyond the local limits of the Ordinary Original Civil Jurisdiction of this Court. The main contention of the learned Counsel for the plaintiff is that this is not a suit for land or other immoveable property within the language and meaning of clause 12. It is true that the plaint asks for no direct relief so far as the properties themselves are concerned, but is that enough to establish that this suit is not for land or other immoveable property? It is transparent on the reading of the plaint that the learned Counsel who drew the plaint was conscious of the difficulty of including the relief in respect of these properties in a suit in the Bombay High Court and he has, therefore, very adroitly left out the proper and necessary prayers which would, and ought to, have been there in order, if possible, to steer clear of the question of jurisdiction. Paragraph 10 of the plaint specifically states that:—

"The defendants have set up the false case that the said properties at Mauritius belonged absolutely to the said Asibai. The plaintiff discovered that the said Kadoo Vyedina when he went to Mauritius had appointed one Mokhi Moosa to recover the rents in future on her own account and had put forward his wife as the owner of the said Mauritius properties."

This establishes that Asibai in her lifetime claimed to be the owner of these properties. Asibai and her husband went to Mauritius in 1906. Plaintiff herself went to Mecca in 1907. According to her own statement in her plaint, she had been trying to recover the accumulated rent which her daughter and son-in-law recovered at Mauritius and the title-deeds which were in their possession ever since her return from Mecca. She has not been in possession of these properties or in the enjoyment of the rents and profits thereof any how since 1906. Under these circumstances, what would one expect in a plaint drawn in the ordinary way? Even an unexperienced draftsman could not omit to pray first that it may be declared that plaintiff is the owner of the properties in question, that she has a Hindu mother's estate in the said properties, that the defendants have no interest in the same, and that she is entitled to receive the rents and profits thereof. The next prayer would be that the defendants may be ordered to hand over possession of the properties to the plaintiff and account to her for the rents and profits received and recovered by them and then would follow the prayer for handing over the title-deeds of the said properties to the plaintiff. The prayer for title-deeds would be merely ancillary to the main prayers for declaration of ownership and for possession of the properties. Prayers such as I have set out would necessarily have been in the plaint if the property in question had been within the jurisdiction of this Court. The plaint is drawn by a member of the Bar whose experience in drafting pleadings is second to none in Bombay, and it appears to me that the learned draftsman has deliberately omitted them in order to steer clear of the difficulties consequent on the properties being outside the jurisdiction of the Court. However that may be, in order to ascertain the true nature of the suit, the Court is bound to look further than the four corners of the plaint. Does a suit fall out of the category of a "suit for land or other immoveable property" because the plaint is so drawn as to enable the plaintiff to say: "I am not suing for the recovery of the land—I am only asking for the delivery to me of title-deeds relating to that land?" The defendants say:—"Plaintiff is not the owner. She had a very small share which she has agreed to sell to the party through whom we claim. We are prepared to carry out the agreement and she is not entitled to the possession or custody of the title-deeds." I cannot decide the question as to who is entitled to the possession of those title-deeds without deciding to whom the properties at the date of the suit belonged. This

necessarily involves the investigation of the title to those properties amongst rival claimants. Before I could order the defendants to deliver up the title-deeds to the plaintiffs, I must hold that the devolution of the properties at Mauritius is governed by Hindu law as the plaintiff asserts and not by Muhammadan Law as the defendants contend and ascertain who is now entitled to the ownership and possession thereof. I was told that a Commisson had been issued in this suit and the Commission evidence leads to a third alternative that the devolution of immoveable property in Mauritius takes place according to French Civil Law. Does the clause of the Charter which governs and settles the Ordinary Original Civil Jurisdistion permit of my going into these questions when the lands lie in a foreign country?

There has been very considerable conflict of opinion as to the meaning and construction of the words "suits for land and other immoveable property." The Calcutta and other High Courts have taken very different views to those taken by the Bombay High Court till the year 1905. The Bombay High Court in its Ordinary Original Civil Jurisdiction has given to the words in clause 12 of the Letters Patent a very limited and restricted meaning and has for many years entertained suits of all kinds relating to land only stopping short where the suit related directly and specifically to the recovery or disposal of immoveable property outside its jurisdiction. For this, we have the high authority of the judgment of Sir Charles Sargent, Chief Justice, who, sitting with Mr. Justice Scott, held, in the case of *Yashvantrav Holkar* v. *Dadabhai Cursetji* (1), that the Court had jurisdiction to try a suit for specific performance of an agreement relating to land situated outside the Ordinary Original Civil Jurisdiction of this Court. We have decisions very much to the same effect in earlier cases but the judgment of Sir Charles Sargent settled the practice of entertaining suits for a variety of purposes relating to land outside the Ordinary Original Civil Jurisdiction of this Court and this case was followed by Mr. Justice Strachey in *Sorabji* v. *Rattonji* (2), though not without great doubt and hesitation, in a suit for foreclosure of land outside the jurisdiction of the Court. Although the Calcutta and Madras High Courts took different views, the decision of Sir Charles Sargent was followed by our Courts till we come to the judgment of Sir Lawrence Jenkins in *Vaghoji* v. *Camaji* (3). In that case, the Chief Justice, Sir Lawrence Jenkins, in a considered judgment, sitting with Mr. Justice Batchelor, has reviewed all the authorities and pronounced judgment by which, in the words of Sir R. S. Benson, Chief Justice, Madras, in *Sundara Bai Saheba* v. *Thirumal Rao Sahib* (4), the authority of the decision in *Yashvantrav Holkar* v. *Dadabhai Cursetji* (1) "is considerably shaken, if not overruled."

I think it would be here useful to consider some of the leading cases on this subject decided by the other High Courts. In *The Delhi and London Bank* v. *Wordie* (5), the Chief Justice, Sir Richard Garth, after discussing several English cases as to the jurisdiction of Equity Courts, makes some observations which are very pertinent to the question I am now considering. He says:—

"But those cases are all more or less distinguishable from the present, which depends not so much upon the jurisdiction generally exercised by Courts of Equity, as upon whether this suit is brought *substantially* 'for land'; that is, for the purpose of acquiring title to, control over, land within the meaning of a particular clause in the Charter; and, we think, having regard to what is the *real object of the suit*, and to what are the rights and contentions of the respective parties, it is impossible to say that this is not substantially a suit for land."

In *Hara Lall Banerjee* v. *Nitambini Debi* (6), which was a suit for construction of a Will and the administration of the testator's estate and wherein possession of properties outside the limits of the Ordinay Original Civil Jurisdiction of the Calcutta High Court was one of the prayers, it was held that that was a suit for land within the meaning of clause 12 of the Letters Patent and the suit was dismissed.

Ebrahim Ismail Timol v. *Provas Chandra Mitter* (7) was a case wherein the plaintiff

(1) 14 B. 353.
(2) 22 B. 701.
(3) 29 B 249;6 Bom. L. R. 958.
(4) 33 M. 131; 6 M. L. T. 263; 20 M. L. J. 108; 3 Ind. Cas. 930.
(5) 1 C. 249 at p. 263; 25 W. R. 272.
(6) 29 C. 315.
(7) 36 C. 59; 1 Ind. Cas. 472.

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sought to recover rents and profits pending termination of the lease of land beyond the jurisdiction of the Court. The learned Judge hearing the suit, in the course of his judgment at page 65, makes these observations:—

"What the plaintiff is seeking to do is to do something which will directly affect the property, namely, to obtain possession of it by receipt of rent. Under these circumstances, I hold that this is a suit for land outside the jurisdiction of this Court and, consequently, that it cannot be brought as far as prayers 3 and 4 are concerned."

In *Nalum Lakshimikantham* v. *Krishnasawmy Mudaliar* (8), Mr. Justice Moore goes further and says:—

"I would indeed be prepared to go further and to hold that the phrase 'suit for land or other immoveable property' as used in clause 12 of the Letters Patent includes all suits mentioned in clauses (*a*), (*b*), (*c*), (*d*), (*e*) and (*f*) in section 16 of the present Code of Civil Procedure."

In the case of *Sundara Bai Saheba* v. *Tirumal Rao Sahib* (4), to which I have already referred above, the Chief Justice and Mr. Justice Sankaran Nair held that a suit for maintenance by a widow praying that it may be a charge on a specified immoveable property would be a suit for that immoveable property as the decree would operate directly on the land.

The decision of our Court in *Vaghoji* v. *Camaji* (3) is in harmony with the decisions of the Calcutta and Madras High Courts to which I have referred, and whether it overrules the decision in *Holkar* v. *Dadabhai* (1) or merely distinguishes the case which Sir Lawrence Jenkins had in hand from that case, it is not for me to say, but it lays down in very clear and explicit language that the words "suit for land" do not mean only suits for the recovery of land. Whatever may have been the doubts and difficulties in other cases, it seems to me, however, quite clear that this suit, so far as it relates to the title-deeds of the Mauritius properties, though ostensibly a suit for the recovery of the title-deeds alone is not only substantially a suit for land but is in effect and in reality a suit for establishing title to that land and the recovery of the possession of that land.

(8) 27 M. 157 at p. 161.

The third issue raised by the Advocate-General is whether, in any event, the plaintiff is entitled to possession of the title-deeds as against the second defendant. If I find on the first two issues in favour of the plaintiff, I would have to enter into an inquiry as to what law governs the devolution of immoveable property of a Cutchi Memon situated in Mauritius, whether the title-deeds changed hands in 1906 under the circumstances alleged by the plaintiff or by virtue of the agreement set up by the defendants, who is the present owner of these properties and who is interested in the rents and profits thereof and who is entitled to the present possession of the said properties. Under the guise of a claim to title-deeds, the suit clearly involves the trial of questions of title to land and seeks the recovery of that land. That land is beyond the Ordinary Original Civil Jurisdiction of this Court and, under clause 12 of the Letters Patent, I have no jurisdiction to entertain the suit so far as it relates to the title-deeds of the Mauritius properties.

I find the first issue in the negative and for the defendants. In view of this finding, it is unnecessary to find on the second issue.

I will deal with costs of the trial of these issues when I dispose of the rest of the suit.

Suit to be on Board this day week as at part-heard case for hearing on the other issues.

[The suit was subsequently placed on Board and with the plaintiff's consent dismissed with costs.]

Attorneys for the Plaintiff: Messrs. *Ardeshir Hormusji, Dinshaw & Co.*

Attorneys for the Defendant: Messrs. *Jehangir & Seervai.*

EASTERN MORTGAGE AND AGENCY CO. LD. *v.* RAKEA KHATUN.

CALCUTTA HIGH COURT.

MISCELLANEOUS CIVIL APPEALS NOS. 355 AND 356 OF 1912 WITH CIVIL RULE NO. 4031 OF 1912.

August 5, 1912.

Present:—Sir Cecil Brett, KT., Judge, and Mr. Justice Chapman.

EASTERN MORTGAGE AND AGENCY CO. LD.—PLAINTIFFS—APPELLANTS

versus

RAKEA KHATUN AND OTHERS—DEFENDANTS—RESPONDENTS.

Receiver—Appointment pendente lite—*Discretion of Court—Appointment on application of mortgagee in mortgage suit—Interest left in arrear—Right to nominate Receiver, to whom belongs—Appointment to be made in interests of both mortgagee and mortgagor—Civil Procedure Code (Act V of 1908), s. 94 (d), O. XL, r. 1*

Though the appointment of a Receiver *pendente lite* is a matter entirely within the discretion of the Court, it must, in the exercise of that discretion, be guided by the circumstances of each particular case. As a general rule, the appointment of a Receiver will be made as a matter of course on the application of a mortgagee, if the interest payable under the security is in arrear.

As a general rule, the right to propose a person for the appointment of Receiver belongs to the party interested in obtaining the appointment, and effect will be given to his nomination. If the Court appoints a Receiver at the instance of a mortgagee, then the Court exercises its discretion as to who shall be appointed Receiver, and appoints the Receiver, whom, having regard to the interests of both the mortgagee and mortgagor, the Court considers the best person,

Appeals from the order of the first Sub-Judge of Backergunge, dated June 10th, 1912.

Mr. *B. C. Mitter*, Babus *Provash Chunder Mitter* and *Ambica Pada Chowdhury*, for the Appellants.

Babus *Jogesh Chander Roy* and *Gunada Charan Sen*, for the Respondents.

JUDGMENT.—These two Appeals, Nos. 355 and 356 of 1912, are directed against two orders passed by the Subordinate Judge of Backergunge in two mortgage suits brought by the present appellants, the Eastern Mortgage and Agency Company, Limited, against the defendants-respondents, Rokea Khatun, widow of the late Tajamal Ali Choudhury, and others to recover the principal and interest due on two mortgage bonds executed by Tajamal Ali Choudhury and others on the 18th September 1896 and the 9th September 1897 respectively. The former bond covered a loan of Rs. 8,800 and the latter a loan of Rs. 3,50,000 and contained a proviso that Rs. 1,00,000 should be afterwards lent if the conditions under which original loan was made were complied with. One of the conditions imposed in the mortgage-deeds was that Messrs. Garth and Weatherall were to be appointed managers on behalf of the mortgagors of the mortgaged properties and that they were to pay off the mortgage-debt with interest out of the profits of the mortgaged properties and also to take their own commission. These two gentlemen were duly appointed managers and the additional Rs. 1,00,000 was afterwards advanced. Obstruction to the management is said to have been offered by the mortgagors with the result that the managers were unable to collect the rents from the mortgaged properties or to pay to the mortgagees any portion of the mortgage-debt or of the interest.

Meanwhile, in consequence of quarrels between the mortgagors and their co-sharers in the properties covered by the mortgages as well as in other properties belonging to the family, on the 14th December 1901, Messrs. Garth and Weatherall applied to the Collector of Backergunge asking that steps should be taken to prevent a breach of the peace and to enable them to obtain possession of the properties covered by the mortgages. The Collector sent on the application to the District Judge in whose Court it was numbered as Miscellaneous Case No. 74 of 1901. The result of the proceedings taken on this application in the Court of the District Judge was that on 27th March 1902, he called on the co-owners in the estate to appoint a common manager. They failed to do so and, on the 1st May 1902, the District Judge passed an order under section 95, clause 2 of the Bengal Tenancy Act directing that the management of the estate should be taken over by the Court of Wards; and as a temporary arrangement, he appointed, on the 12th August 1902, Abdul Ali Chowdhury as common manager of the estate. On the 23rd December 1902, the Court of Wards declined to take over the management and Abdul Ali Chowdhury was allowed to remain on as common manager. On the 8th May 1903, the District Judge removed Abdul Ali Chowdhury from the managership as his management was not satisfactory and as he

was related to some of the co-owners. The Judge, on the application of Messrs. Garth and Weatherall, then appointed Babu Nibaran Charan Dass as common manager but, on the 9th September 1903, another application was made by Messrs. Garth and Weatherall that the estate should be placed under the management of the Court of Wards.

On the 16th September 1903, the Court of Wards agreed to take over the management subject to the condition that the Eastern Mortgage and Agency Company, Limited, would remit the sum of Rs. 1,50,000 from their debt subject to the condition that the loan was paid off within a certain time. This was agreed to and the estate was under the management of the Court of Wards from the 17th September 1903 to the 15th May 1912. The Court of Wards on the 15th March 1912 gave notice that they would give up the management on that date.

Meanwhile, on the 11th September 1911, no payments having been made up to that date in discharge of the mortgage-debt or the interest, the Eastern Mortgage and Agency Company, Limited, instituted the two suits to recover the whole sum due on the mortgage-bonds with interest to date and also another suit on a promissory-note for money advanced by the Company to pay the Government revenue which had fallen due on the mortgaged properties.

After receipt from the Court of Wards of the intimation that it proposed to give up the management on the 15th May 1912, notices were issued by the District Judge to the co-owners of the estate to show cause why a common manager should not be appointed and no cause having been shown, the District Judge, on the 7th May 1912, appointed Babu Debendra Nath Dutt, a Pleader of his Court, as common manager of the Estate.

On the 5th June 1912, application was made by the Eastern Mortgage and Agency Company, Limited, to the District Judge to set aside the order appointing the manager on the ground that it had been made without notice to them though they were co-proprietors having purchased 87 items of property in the estate but on the same date, the District Judge passed an order refusing the application.

On the 28th June 1912, a Rule was obtained from this Court on the mortgagors and other co-owners of the estate to show cause why the order of the District Judge of the 5th June should not be set aside on the ground that it appeared to have been passed without sufficient evidence and without any notice to the petitioners. This Rule is Rule No. 4081 of 1912.

On the 5th June 1912, applications were made to the District Judge in both of the suits (Nos. 442 and 444 of 1911) brought on the mortgages, for the appointment of a Receiver pending the disposal of the two suits. These applications were disallowed by the Subordinate Judge in a long order, recorded on the 10th June 1912.

Appeals from Orders Nos. 355 and 356 of 1912 are against these two orders.

At the request of the parties, the hearing of these two appeals and of the Rule No. 4081 of 1912 has been expedited and all these will be disposed of in this judgment.

Dealing first with the two appeals, we are of opinion that the grounds given by the Subordinate Judge in his order of the 10th June 1912 are not sound and cannot be maintained. It appears from the statements of the learned Counsel for the appellants that the original mortgage-debt of Rs. 4,50,000 has trebled and has now risen to over Rs. 12,00,000. Meanwhile, no interest whatever appears to have been paid to the mortgagees and on the contrary the mortgagees appear to have been compelled to advance money to pay the Government revenue on the mortgaged properties in order to save them from sale for arrears, and to recover the sums so advanced they have been compelled to bring another suit on the promissory-note.

Though the appointment of a Receiver *pendente lite* is a matter entirely within the discretion of the Court, it must, in the exercise of that discretion, be guided by the circumstances of each particular case; and it has been laid down as a general rule that the appointment of a Receiver will be made as a matter of course on the application of a mortgagee, if the interest payable under the security is in arrear (see Coote's Law of Mortgages, page 946, and the leading cases referred to therein).

Dis-agreeing, therefore, with the Subordinate Judge we hold that in the case of the

applications with regard to which these two appeals have been brought, the mortgagees are entitled to have a Receiver of the properties covered by the mortgage appointed pending the disposal of the two suits.

We understand that the Subordinate Judge, who recorded the judgment in which the order was passed disallowing the application, has retired. It is, therefore, not necessary for us to express at any length our opinion on the language and substance of his judgment. We need only observe that the learned Pleader for the respondent has not attempted to support the grounds on which the Subordinate Judge has based his order and, in our opinion, they are altogether insufficient, and many of the suggestions made in his judgment appear to have no foundation in any facts.

We, therefore, decree both the appeals and set aside the order passed by the Subordinate Judge refusing the applications made by the mortgagees.

As to the selection of a Receiver; the parties before us have differed in opinion. Dealing with this question, we have to observe that as a general rule, the right to propose a person for the appointment of a Receiver belongs to the party interested in obtaining the appointment, and effect will be given to his nomination. Also if the Court appoints a Receiver at the instance of a mortgagee, the mortgagee not having, without the assistance of the Court, power to appoint a Receiver, then the Court exercises its discretion as to who shall be appointed Receiver, and appoints the Receiver whom it thinks best to appoint for the interest of the mortgagee and of the mortgagor, a person whom having regard to the interests of both, the Court considers the best person—(Coote, Law of Mortgage, page 958).

Before us, both parties are agreed that it is desirable that the gentleman appointed as Receiver should be one fully acquainted with and experienced in the management of Estates, and that the selection of a member of the Bar who has no such experience or knowledge should not be approved. They are also agreed that in the interest of both parties, it is much to be desired that the offices of common manager and Receiver should be united in one individual.

The learned Counsel for the appellant has suggested on behalf of his clients that Mr. Thomas Cunliffe Tweadie, who has considerable experience and knowledge of *zemindari* management, should be selected as Receiver of the properties covered by the mortgages, and from the testimonials which have been filed we agree that that gentleman would be a suitable selection.

On behalf of the mortgagors exception to his appointment is taken on the ground that Mr. Tweadie is managing other Estates on behalf of the mortgagees. This, however, does not appear to us to constitute any valid objection to his being appointed as Receiver in the present suits. Certainly, he would be the person best suited for the appointment in the interest of the mortgagees and in these suits the interests of both parties are in fact identical, namely, to secure a careful and firm management of the property and a proper collection and appropriation of the profits.

In our opinion, therefore, the application of the mortgagees should be granted and Mr. Tweadie should be appointed Receiver of the properties covered by the mortgage-bonds pending the disposal of the suits.

We have now to deal with the Rule No. 4081 of 1912, which is directed against the order of the District Judge appointing Babu Debendra Nath Dutt as common manager. Neither party have expressed any opinion against the character and probity of this gentleman but both are agreed that it is desirable in the interests of the Estate that a gentleman, having greater knowledge and experience of the management of Estates than he has, should be appointed as common manager. In these circumstances, we think that the Rule should be made absolute and the order of the District Judge appointing him as common manager should be set aside. We have received from the learned Pleader who represents the respondents in Appeal No. 356 of 1912, a list containing the names of four gentlemen who are suggested for the appointment of common manager. They are M. Najimuddin Ahmed, Babus Benoy Bhusan Gupta, Upendra Nath Sen, Basanta Kumar Guha.

The learned Counsel for the appellants has not offered any objection to the second-named. It must, however, be left to the District Judge to make his own selection from these gentlemen and Mr. Tweadie; and

in doing so, we think he should endeavour to make such an appointment as will be best for the interests of the Estate and of both parties.

The appellants are entitled to their costs in these two appeals. We fix the hearing-fees at three gold *mohurs* in each. Each party will bear their own costs in the Rule.

Let the records be sent down to the lower Court without delay.

Appeals allowed.

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL NO. 595 OF 1911.

July 5, 1912.

Present:—Sir N. G. Chandavarkar, Kt., Ag. Chief Justice, and Mr. Justice Batchelor.

SHANKAR VISHNU GOKHALE—APPELLANT

versus

RAGHUNATH HARI DHARAP—RESPONDENT.

Res judicata—*Joint decree—Rights* inter se *of plaintiffs not adjudicated upon—Rights adjusted in subsequent suit—Recovery of share of first decree—Suit by person entitled to this money under second decree—Recovery of money by person with knowledge of cessation of right.*

In 1899, *A.*, claiming to be the sole proprietor of a trading firm, sued *C.* for the recovery of a debt due to the firm. *A.* joined his uncle *B.* as a *pro forma* co-defendant in the suit.

The Court found that *A.* & *B.* were co-partners and thus *B.* was joined as co plaintiff and a joint decree was passed against *C.*

In 1900, *B.* sued *A.* for partition of the joint properties. It was found in this suit that *B.* was not entitled to any share in the partnership in respect of which the debt was claimed in the previous suit. Two years after the adjudication in the second suit, *B.* recovered his half share of the decretal debt due from *C.* *A.* sued to recover this money on the ground that *B.*'s interest in the first decree had ceased to exist by virtue of the second decree :

Held, per *Chandavarkar, Ag. C.J.*,

(1) that the finding in the first suit that *A.* & *B.* were jointly entitled to a decree was arrived at only for the purpose of the defendant sued in that litigation ;

(2) that the Court was not called upon in the first suit to decide finally what the respective interests of *A.* & *B* were in the decretal debt ;

(3) that the finding in the second suit that *B.* was not entitled to any share in the partnership must be regarded as the final and decisive finding governing the jural relation of the parties;

(*a*) *first*, because it settled the interest between *A.* and *B.* which the judgment in the first suit had left undecided;

(*b*) *secondly*, even assuming that that judgment had settled what those interests were, *B.* having failed to plead that settlement as *res judicata* in the second suit, it was the adjudication in the second suit that must prevail as finally deciding the issue of title as between *A.* & *B.*;

(4) that *B.* having recovered the money while the decree in the second suit against him had come into existence, was liable to restore the money recovered by him knowing that he had no right to it.

Held, per *Batchelor, J.*—

(*i*) that there was no real inconsistency between the two decrees, because the later decree and that alone decided the question as to what interest, if any, *B.* had in the partnership;

(*ii*) that even supposing that the decision in the second suit could only be arrived at by overriding what was decided in the first suit, the later decision must prevail to govern the present rights of the parties.

The rule laid down in *Marriot* v. *Hampton*, 7 T. R. 269, that money recovered under a judgment or decree cannot be recovered back in a fresh suit or action whilst the decree or judgment under which it was recovered remains in force, rests on the ground that the original decree or judgment must be taken to be subsisting and valid until it has been reversed or superseded by some ulterior proceeding. If it has been so reversed or superseded, the money recovered under it ought certainly to be refunded.

Shama Pershad Roy Chowdhry v. *Hurro Pershad Roy Chowdhry*, 10 M. I. A. 223 at p. 211; 3 W. R. (P.C.), 11, and *Jogesh Chunder Dutt* v. *Kali Churn Dutt*, 3 C. 30; 1 C. L. R. 5, relied upon.

In order to bring the principle of the rule mentioned above into force, there must be *bona fides* on the part of the party, who has got the benefit of his opponent's payment. If a person enforcing a payment under legal process has therein taken an unfair advantage or acted unconscientiously, knowing that he had no right to the money, the principle cannot prevent the other party from recovering the money back.

Second appeal from the decision of the first class Subordinate Judge, at Thana, confirming that passed by the Subordinate Judge at Mahad, in Civil Suit No. 501 of 1908.

Mr. *Coyajee* (with him Mr. *V. B. Virkar*), for the Appellant.

Mr. *Nadkarni* (with him Mr. *P. P. Khare*), for the Respondent.

JUDGMENT.

CHANDAVARKAR, AG. C. J.—In the suit of 1899, there was, no doubt, an issue framed, raising the question whether the present respondent Hari, who was plaintiff therein,

could sue alone to recover the debt in dispute from the defendant in that suit. And the Court trying it found that he could not sue alone and that Damodar, father of respondents Nos. 2 to 5, who was defendant No. 2 in that suit, had the right to be co-plaintiff therein. That finding was recorded upon the ground that the debt sued for was a debt due to a partnership of which Hari, and Damodar were co-partners. That finding, however, was arrived at only for the purpose of the defendant sued in that litigation. But the Court did not, indeed was not, called upon to decide finally what the respective interests of Hari and Damodar *inter se* were as to the amount recovered from the debtor of the partnership and whether either Hari or Damodar was entitled as between themselves to the whole or any portion of the decretal debt. In the second suit, which was brought in 1900 for partition by Damodar against Hari, the question left undecided in the previous suit was raised in respect of the same partnership and it was found that Damodar was not entitled to any share in the partnership which formed part of the properties alleged by Damodar to be the joint properties of himself and Hari. No doubt, the ground on which the adjudication in the second suit went was that Damodar was not a co-partner of Hari because he was not a co-parcener. This finding must be regarded as the final and decisive finding governing the jural relations of the parties for two reasons: *first*, it settled the interest between Damodar and Hari, which the judgment in the suit of 1899 had left undecided, and, *secondly*, even, assuming that that judgment had settled what those interests were, Damodar having failed to plead that settlement as *res judicata* in the second suit, it is the adjudication in the second suit that must prevail as finally deciding the issue of title as between the parties. From whichever point of view we look at the question, Damodar was not entitled to recover any share in the money paid by the defendant in the suit of 1899 in execution of the decree therein. And having recovered it under compulsion of law, while the decree in the second suit against him had come into existence, he is liable to restore the money recovered by him knowing that he had no right to it.

The decree must, therefore, be confirmed with costs.

BATCHELOR, J.—I am of the same opinion. It is to be observed that the only point which was decided in Suit No. 694 of 1899 was that Damodar was entitled to be brought on the record as a plaintiff. It may be that, for the purpose of deciding that point, the question was entered upon and considered whether Damodar had any interest in the partnership. But the only decision as to what interest Damodar had in the partnership is the decision contained in the decree in the later Suit No. 71 which is a decision that Damodar has no such rights at all. It may be pointed out that this later decision was subsisting, had in fact been subsisting for nearly two years, when this application for execution was made. In the view, therefore, which I take of these two decrees, it would not appear that there is any real inconsistency between them, because the later decree and that alone decided the question now in issue as to what interest, if any, Damodar had in the partnership. But, even supposing that that decision could only be arrived at by overriding what was decided in Suit No. 694, I should still be of opinion that the later decision must prevail to govern the present rights of the parties. Upon this point, the appellant relied upon the case of *Marriott* v. *Hampton* (1), which is authority for the position that money recovered under compulsion of legal process cannot ordinarily be recovered back. This case and the extent of its authority in India were noticed by the Privy Council in *Shama Pershad Roy Chowdhry* v. *Hurro Pershad Roy Chowdhry* (2). Their Lordships there say:—"There is no doubt that, according to the law of this country—and their Lordships see no reason for holding that it is otherwise in India—money recovered under a decree or judgment cannot be recovered back in a fresh suit or action whilst the decree or judgment under which it was recovered remains in force; but this rule of law rests, as their Lordships apprehend, upon this ground, that the original decree or judgment must be taken to be subsisting and valid until it has been reversed or superseded by some ulterior proceeding. If it has been so reversed or superseded, the money recovered under it ought certainly to be refunded....."

It appears to me that those words are perfectly applicable to the present facts if

(1) (1797) 7 T. R. 269; 2 Esp. 546; 4 R. R. 439.
(2) 10 M. I. A. 203 at p. 211; 3 W. R. (P.C.) 11.

we suppose that the decree in the later suit had the effect of setting aside or superseding the decision in the earlier suit.

Reference may be made also to the case of *Jogesh Chunder Dutt* v. *Kali Churn Dutt* (3), where the majority of the Full Bench took a similar view of the effect and operation of *Marriott* v. *Hampton* (1) and *Ward & Co.* v. *Wallis* (4) is further authority for limiting the extent of the applicability of this latter case. There Mr. Justice Kennedy says :—" that there must be *bona fides* on the part of the party who has got the benefit of his opponent's payment in order to bring the principle laid down in that case into force, and that if the person enforcing a payment under legal process has therein taken an unfair advantage or acted unconscientiously, knowing that he had no right to the money, the principle laid down in *Marriott* v. *Hampton* (1) may not prevent the defendant from recovering the money back."

It seems to me that these words are of application to the present facts where, as I have noticed, the decree denying Damodar any rights in this co-parcenary had been existing for about two years when this application to execute was instituted.

In fine, I base my decision on the view that, whatever authority was by the earlier decree conferred on the appellant for the recovery of the money, was obliterated and superseded by the later decree, which was in force when this application for execution was made.

Decree confirmed.

(3) 3 C. 30; 1 C. L. R. 5.
(4) (1900) 1 Q. B. 675 at p. 678; 69 L. J. Q. B. 423; 82 L. T. 261.

CALCUTTA HIGH COURT.
CIVIL RULE No. 4601 OF 1911.
May 20, 1912.

Present:—Sir Cecil Brett, Kt., Judge, and Mr. Justice Sharfuddin.

MR. K. B. DUTT AND ANOTHER—DECREE-HOLDERS—PETITIONERS

versus

GOSTHA BEHARY BHUIYA AND OTHERS—JUDGMENT-DEBTORS—OPPOSITE PARTY.

Limitation—Decree for rent obtained by co-sharer landlord without joining co-sharers—Money-decree—Execution—Special limitation, if applicable—Bengal Tenancy Act (VIII of 1885), ss. 148A, 158A, Sch. III, Art. 6.

A decree obtained by a co-sharer landlord for his share of the rent in a suit, not brought under section 148A or section 158A of the Bengal Tenancy Act, and in which the other co-sharers are not joined as parties, is a simple money-decree.

Consequently, to an application for the execution of such a decree, the special limitation prescribed by Article 6 of Schedule III of the Bengal Tenancy Act does not apply.

Rule against the order of the District Judge of Hooghly, dated April 26th, 1911, affirming that of the Munsif of Uluberiah, dated September 3rd, 1910.

Mr. *S. P. Sinha* and Babus *Provash Chandra Mittra* and *Norendra Chandra Bose*, for the Petitioners.

JUDGMENT.—No one appearing to oppose the Rule, we are of opinion that it should be made absolute and for the reason that the suit in which the decree was obtained by the petitioners was a suit to which the provisions of the Bengal Tenancy Act did not apply. The suit was not one brought by the present petitioners as co sharer landlords under the provisions of section 148A or section 158B of the Bengal Tenancy Act and, in such circumstances, the decree which they obtained was a simple money-decree and, so far as we can ascertain from the materials before us, there is nothing to indicate that, in that decree, the petitioners invoked the application of the provisions of any section of the Tenancy Act. In our opinion, the present case is distinguishable from the case of *Thakurmani Dasi* v. *Mohendra Nath Dey Sarkar* (1), on which the lower Courts relied, so that, even if we were prepared to follow the decision in that case, as to which it is not necessary for us in this case to express any opinion, it would not, in our opinion, be applicable to the facts of the present case. The result, therefore, is that we make the Rule absolute, set aside the orders of the lower Courts and direct that the execution do proceed according to law. As there has been no appearance on the part of the opposite party in this Court, we make no order as to the costs of this Rule; but in the lower Courts, the petitioners will be entitled to recover their costs from the opposite party.

Rule made absolute.

(1) 10 C. L. J. 463; 3 Ind. Cas. 389.

ABDUL KARIM *v.* ALLAH BAKHSH.

PUNJAB CHIEF COURT.
SECOND CIVIL APPEAL NO. 1043 OF 1910.
July 31, 1912.
Present:—Mr Justice Shah Din and Mr. Justice Beadon.
ABDUL KARIM AND OTHERS—DEFENDANTS—APPELLANTS
versus
Haji ALLAH BAKHSH AND OTHERS—PLAINTIFFS——RESPONDENTS.

Landlord and tenant—Ground rent—Permanent tenancy—Evidence—Non-liability for enhancement of rent—Rights of permanent tenants—Buildings.

Long possession at uniform rent, erection of expensive buildings without interference for many years by the landlord, transfers by sale, gift, mortgage and succession, execution of several receipts of rent in which it is described as *dawami* or permanent, are indications to show that the tenure was permanent from the first.

Caspersz v. *Kader Nath Sarbadhikari*, 28 C. 738; 5 C. W. N. 858, relied upon.

Prosunno Coomaree Debea v. *Sheikh Rutton Bepary*, 3 C. 696; 1 C. L. R. 557; *Secretary of State for India in Council* v. *Luchmeswar Singh*, 16 C. 223; 16 I. A. 6; *Beni Ram* v. *Kundan Lal*, 21 A. 496 (P. C.); 26 I. A. 58; 3 C. W. N. 502, distinguished.

In the case of a permanent tenancy at a fixed-rate of rent, no enhancement can be allowed.

Permanent tenants of sites, which are let for building purposes, cannot be restrained from building or re-building their houses thereon in the absence of any express conditions to the contrary.

Second appeal from the order of the Divisional Judge, Delhi, dated 27th June 1910, modifying that of the Subordinate Judge, 1st class, Delhi, dated 20th December 1909, dismissing plaintiffs' suit.

Khan Sahib Pestonji Dadabhoy and Mr. *Prem Lal*, for the Appellants.

The Hon'ble Mr. *Muhammad Shafi*, and the Hon'ble Mr. *Shadi Lal*, for the Respondents.

JUDGMENT.—These connected suits (Nos. 48, 49 and 51 of 1908), which were tried together by the Subordinate Judge at Delhi, were the subject of three appeals to the Divisional Court and are now the subject of five further appeals.

This Appeal No. 1043 and Appeal No. 1049 of 1910 are cross-appeals relating to Suit No. 49. Appeals Nos. 1044 and 1048 of 1910 are cross-appeals relating to Suit No. 51 and Appeal No. 1047 relates to Suit No. 48. These five appeals can conveniently be considered together. The plaintiffs, who are the same in all three suits, are the ground landlords of a part of the suburbs of Delhi known as Kishenganj, in which the houses of each set of defendants are situate.

The suits are for ejectment of the defendants from the land occupied by their houses and for recovery of arrears of rent. In case ejectment is not granted, plaintiffs in Suits Nos. 49 and 51 ask for enhancement of rent and in Suit No. 48 they ask for an injunction restraining defendants from re-building.

The first Court held that the defendants in all three cases are permanent tenants—that notices were not properly served on them—and that plaintiffs are not entitled either to eject them or enhance the rent. It accordingly decreed only arrears of rent at the old rate.

The lower Appellate Court has maintained the first Court's decree in Suit No. 48—but in the other two suits, it has allowed enhancement of rent to double the old rate to take effect from the dates on which the suits were instituted.

The first and chief point for decision is whether the defendants are permanent tenants or tenants-at-will.

It appears that in or about 1859, after the Mutiny, certain Punjabis had to vacate their *Katra* which was situate on the site of the present Railway Station. At that time, the land which is now the site of Kishenganj, was waste land and the then owner, Ladli Das, seeing an opportunity of turning the land to profit, let the land to the Punjabis for building sites at a ground rent of 8 annas per 100 square yards. The tenants duly built upon the land—and they and their successors-in-interest have been in occupation ever since. It is probable that the original houses were *kachcha* but without objection or protest on the part of the ground landlord, the houses (or at any rate most of them) have been converted into *pukka* houses of considerable value.

The approximate date of the commencement of the tenancies and the rate of rent then fixed are undisputed facts, but the other conditions are disputed and must be determined chiefly from the conduct of the parties.

According to the defendant's witness, Ghulam Jalani, one Mamur Bakhsh, now dead, acted on behalf of the tenants and obtained a written agreement from Ladli Das. This agreement is not forthcoming and

it is urged that this is a good ground for presuming that the agreement did not grant permanent tenure.

If, however, the agreement was reduced to writing, it seems hardly probable that the ground landlord would not have himself taken a document from the tenants, and though Ghulam Jalani may have thought that a document was executed, he has no personal knowledge of the existence of such a document.

In 1883, a tenant named Kalu sued to have it declared that he was neither liable to ejectment nor to have his rent enhanced—and that, if ejected, he was entitled to receive the value of his building.

In this suit, an alleged copy of an agreement was relied on, but, though admitted by the first Court, it was held by the Appellate Court not to have been proved. In second appeal to this Court, the suit was dismissed on the ground that it did not lie, and it was remarked that "all inquiry into the merits of the case is, of course, mere surplusage."

Thus, in the suit of 1883, the agreement was not proved and as no evidence in proof of this document has been produced in the present cases, the document on the record of the suit of 1883 is useless.

In 27 suits decided by Mr. O'Brien, Munsif, 1st class, in 1897, for ejectment of tenants, two related to tenants holding under separate leases—but the remaining 25 suits failed on the ground that the tenants were permanent tenants not liable to ejectment. It is true that these suits related to a quarter known as Shishmahal but Ladli Das, who owned the Kishenganj land and settled tenants on it, was the man who also owned the Shishmahal land and settled tenants thereon—and it may fairly be presumed that in both cases the land was granted on much the same terms.

Receipts for rent have been produced in which the rent is described as "*dawami*" or permanent. It is alleged that four of these have been tempered with, but, even assuming that there may be ground for suspicion in regard to these, the other receipts relating to other houses do not appear to be open to suspicion and the existence of a permanent rate of rent is an indication of permanent tenure.

In 1883, Allah Bakhsh, plaintiff, who was then an *amladar*, sold his house to Muhammad Hussain (Exhibit D 4) and it is a significant fact that the word "*dawami*" appears in this deed.

The rent of the sites in dispute has never been enhanced. There have been transfers by mortgage, gift and sale. In Suit No. 51, at least, *Musammat* Latifan obtained the house by inheritance—and throughout the tenant's long possession since 1859; the ground landlord has in no way interfered with the erection of *pukka* buildings. In *Prosunno Coomaree Debea* v *Sheikh Rutton Bepary* (1), it was held that a holding-at-will, from year to year, or for a term of years, would not be converted into a permanent tenure merely because the tenant, without any arrangement with his landlord, builds a dwelling house upon the land.

In *Secretary of State for India in Council* v. *Luchmeswar Singh* (2), the original purpose of the tenancy was for a stud and the stud having been given up, the land was used for ordinary agricultural purposes. It was held that long possession at a uniform rent was insufficient to establish a permanent tenure.

In *Beni Ram* v. *Kundan Lal* (3), a piece of land had been let for a specified period at a specified rent for the construction thereon of a salt-petre factory. It was held that the lessor could evict the tenant after the term of the lease had expired, notwithstanding that the tenant had erected permanent structures without interference on the part of the landlord.

In Civil Appeal No. 1125 of 1905, Exhibit P. 17 C., the rent had been enhanced from time to time and the buildings had been erected only a few years before suit and it was held that the tenancy was not permanent.

The above authorities are relied on by plaintiff's Counsel, but they are distinguishable from the present cases. The defendants do not contend that a holding-at-will has been converted into a permanent tenancy merely by the erection of buildings—or merely by long possession at a uniform rent. The contention is that the land was let originally on a permanent tenure for building purposes—and long possession at a uniform rent, erection of expensive buildings without interference, and transfers by sale, gift and mort-

(1) 3 C. 696; 1 C. L. R. 577.
(2) 16 C. 223; 16 I. A. 6.
(3) 21 A. 496 (P. C.); 26 I. A. 58; 3 C. W. N. 502.

gage and by succession, are put forward as indications that from the first the tenure was permanent. It is, we think, beyond doubt that in making his vacant land into the settlement of Kishenganj, Ladli Das intended that the settlers should build their own houses and settle permanently.

The present cases, if not on all fours with *A. Caspersz* v. *Kader Nath Sarbhadikari* (4), are very similar to it, and we agree with the lower Courts in finding that the defendants are permanent tenants.

The next point for decision has reference to the claim for enhancement of rent—and in this connection we have been referred to section 22 of the Punjab Tenancy Act. The case of occupancy-tenants of agricultural land does not appear to be analogous to that of owners of houses in a town who are permanent tenants of the sites of their houses. Agricultural land is subject to the payment of land revenue of which the amount is altered from time to time—and the rent payable by the occupancy-tenant is regulated by the amount of the land revenue.

It is, of course, possible that a houses in a Municipality may be subject to house-tax, but presumably such a tax would be paid by the owner of the house on the estimated rental of the house and not by the ground landlord. At all events, it has not been shown in the present cases either that the houses in dispute are subject to a tax or that there has been any variation in the rate of rent dependent on a variation in the amount of taxes. Moreover, the plaintiffs have not claimed enhancement of rent on the ground of enhancement of taxation.

No doubt, the rent of a tenant from year to year or for a fixed term, can be enhanced at the end of the year or term—but when the tenancy is for a specified term, the rent cannot be enhanced during that term.

In the present cases, there was a permanent tenancy at a fixed-rate of rent and it is difficult to see how that rate can be enhanced.

No doubt, the land has increased in value but, in securing permanent tenants, the ground landlord fixed the rent for better or worse and if the land had decreased in value, that is no reason to suppose that he would have accepted a lower rate of rent. If the ground landlord could enhance the rent at will, he might enhance it to an extent which would force the tenant to vacate, and hence the enhancement of rent is inconsistent with the permanent nature of the tenancy.

We find, therefore, that the rent cannot be enhanced and, as it has been also held that the defendants are not liable to ejectment, it is unnecessary to consider whether the notices were duly served or not.

There remains the question whether defendants in Suit No. 48 can be restrained from re-building—and our decision on this point follows the decision in respect of the nature of the tenancy. Defendants are permanent tenants of the sites which were let for building purposes and they have a right to re-construct their houses.

The result is that the appeals by the planitiffs, Nos. 1047, 1048 and 1049, fail and that the appeals by defendant in Suit Nos. 49 and 51 (*i. e.*, appeals Nos. 1043 and 1044) must be accepted.

We accordingly accept this appeal No. 1043 and, setting aside the decree of the lower Appellate Court, we restore the decree of the first Court.

Plaintiffs-respondents will pay defendants-appellants' costs in the lower Appellate Court and in this Court.

Tenants' appeals accepted—
those of landlords rejected.

(4) 28 C. 738; 5 C. W. N. 858.

BOMBAY HIGH COURT.
FIRST CIVIL APPEAL No. 105 OF 1911.
July 16 1912.
Present:—Sir N. G. Chandavarkar, KT., Judge, and Mr. Justice Batchelor.
BANDO KRISHNA KANBARGI—APPELLANT
versus
NARSINHA KONHER DESHPANDE—RESPONDENT.

Limitation Act (XV of 1877), Sch. II, Art. 179 (4)—"Applying in accordance with law"—Execution of decree—Application when in accordance with law—Relief sought outside decree—Omission to file inventories.

All that Article 179, Schedule II of the Limitation Act, 1877, requires the Court to see, for the purposes of limitation, is whether the *darkhast* itself, whatever its merits on the evidence, is an application made in due conformity with the requirements of the law relating to execution.

BANDO KRISHNA KANBARGI *v.* NARSINHA KONHER DESHPANDE.

An application for execution would not be bad in itself even if it seeks relief not strictly claimable.

If a person other than one entitled to apply applies for execution, or if the person entitled applies for execution in a mode and for a relief outside the decree, the application is not in accordance with law for the plain reason that the decree of which execution is sought is not in reality the decree to which the application professes to relate but some other decree, one not existing and, therefore, incapable of execution according to law.

Where, on the other hand, a decree gives certain reliefs, and the application for execution seeks some or all of them, it may be that, after going into the merits of the application, and considering on evidence all the circumstances and equities of the case, the Court comes to the conclusion that the particular relief or reliefs shall not be granted. Such a decision, however, cannot affect the application for the purposes of the question whether it is by itself in accordance with law, provided it meets in substance the requirements of the Code of Civil Procedure or any other law relating to execution.

Because a decree-holder does not ask by his application for execution for that relief to which he is entitled under the decree in a certain event, and asks for a relief given by the decree until the happening of that event, it does not follow that he has applied for relief outside the decree.

The omission to file inventories with the *darkhasts* is a purely technical defect, which cannot affect the question whether the *darkhast* itself is substantially in accordance with law.

Per Batchelor, J.—The words "in accordance with law" have no reference to the likelihood of the application succeeding or to the Court's competency to grant any particular relief which has been prayed.

The words are merely an adverbial qualification of the word "applying", and look only to the form or procedure of the application.

If the applying complies with the forms and procedure prescribed in that behalf, the applying is in accordance with law, and not the less so, because, on the merits of the application, whether for one reason or another, the application had to be refused.

First appeal from the decision of the first class Subordinate Judge of Belgaum, in *Darkhast* No. 443 of 1908.

Mr. *Coyajee*, (with him Mr. *C. A. Rele*), for the Appellant.

Mr. *G. S. Rao*, for Respondent No. 2.

Mr. *Nilkanth Atmaram*, for Respondent No. 1.

JUDGMENT.

CHANDAVARKAR, J.—This is an appeal from the decision of the Subordinate Judge, first class, Belgaum, rejecting *Darkhast* No. 443 of 1908, presented by the appellant for execution of the decree in Suit No. 434 of 1897. The ground of rejection is that the *darkhast* is barred by time, inasmuch as the previous five *darkhasts* were not in accordance with law, having each claimed relief or reliefs which it was not competent for the Court to grant.

The decree of which execution was sought by the *darkhast* in question had been passed originally on the 17th of November 1897; but it was amended on the 20th of January 1899. The amount payable under it was split up into four items. The *first* was a sum of Rs. 575 for costs made payable at once. The *second* consisted of two sums of Rs. 6,000 each; the first sum was directed to be paid by the end of January 1908; in case of such non-payment, interest at $4\frac{1}{2}$ per cent. was made to run on the sum from the 1st of November 1897 up to the date of payment. As to the second sum of Rs. 6,000, the decree directed that interest should run at 4 per cent. from its date to the date of payment. The *third* item of the decree was a sum of Rs. 44,000, with Rs. 1,980, as interest thereon. The decree made Rs. 44,000 payable in forty-four years by instalments each of Rs. 1,000 a year. For satisfaction of Rs. 1,980, the judgment-debtor was directed to put the decree-holder in possession of certain lands; and it was provided that should the profits thereof fall short of the amount payable, the judgment-debtor should make up the deficiency by payment in cash. It was also provided in the decree that if the judgment-debtor should put the decree-holder in possession of only part of the lands, instead of the whole, the former should place the latter in possession of other lands so as to enable the decree-holder to obtain the full amount of interest. The decree then wound up with a final clause, making the whole of the mortgaged property therein mentioned security for the whole of the decretal amount.

The first *darkhast* for execution was presented on the 18th of June 1898; the second on the 4th of January 1901; the third on the 13th of August 1901; the fourth on the 4th of August 1904; the fifth on the 26th of July 1907. These were all *prima facie* sufficient in law to keep the decree alive, because every application after the first was within three years of the last preceding application. And the present *darkhast*, having been presented on the 2nd of December 1909, is also *prima facie* in time, being within three years of its imme-

diate predecessor, the *darkhast* of the 26th of July 1907.

But the Subordinate Judge has disallowed the *darkhast* now in dispute on the ground that all the previous *darkhasts* were not "in accordance with law." And they are not "in accordance with law," in the opinion of the Subordinate Judge, because every one of them sought relief or reliefs which, on considering the merits of the *darkhast*, the Court could not have granted.

In so construing the words "applying in accordance with law to the proper Court for execution," the learned Subordinate Judge has put upon them a construction not warranted by their plain meaning. To apply for the execution of a decree in accordance with law is to apply in the manner provided for by the law relating to execution of decrees. And that law is embodied in the Code of Civil Procedure, which is for its purposes an exhaustive Code. Chapter XIX of the Code of 1882, which was in force when the first five *darkhasts* in the present case were presented, deals in sub division B of the Chapter with "Application for Execution." The provisions therein point out, *first*, who may apply for execution, and against whom the application may be made; *secondly*, what the contents of the application should be; and *thirdly*, what should accompany the application and in what cases. These are specific provisions and they must be the guide in determining whether, under Article 179 of Schedule II to the Limitation Act, a *darkhast* is "in accordance with law." Section 235 clause (*j*) requires the application for execution to state "the mode in which the assistance of the Code is required." The last words of the clause "as the nature of the relief sought may require" show that even if the application seek relief not strictly claimable, yet the application would not be bad in itself. In the present Code (Act V of 1908), for "sought" we have "granted," *i. e.*, granted by the decree. If a person other than one entitled to apply applies for execution, or if the person entitled applies for execution in a mode and for a relief outside the decree, the application is not in accordance with law, for the plain reason that the decree of which execution is sought is not in reality the decree to which the application professes to relate but some other decree, one not existing and, therefore, incapable of execution according to law. The decree in such a case not existing, the application made as to it shares its fate and is treated as non-existent. Where, on the other hand, a decree gives certain reliefs, and the application for execution seeks some or all of them, it may be that, after going into the merits of the application and considering on evidence all the circumstances and equities of the case, the Court comes to the conclusion that the particular relief or reliefs sought shall not be granted. But that decision of the Court on the merits cannot affect the application for the purposes of the question whether it is by itself in accordance with law, provided it meets in substance the requirements of the Code of Civil Procedure or any other law relating to execution.

Where, again, the application asks partly for reliefs granted by the decree and partly for reliefs totally outside the decree, the application may be void as to the latter, but all the same it is good in law as to the former and, therefore, "in accordance with law."

In the present case, the fallacy of the Subordinate Judge's reasoning is that he has held every previous *darkhast* to be not in accordance with law after examination of the merits and surrounding circumstances of the *darkhast*. That is going outside the *darkhast*, whereas all that the law (Article 179 of the Limitation Act) requires the Court to see for the purposes of limitation is whether the *darkhast* itself, whatever its merits on the evidence, is an application made in due conformity with the requirements of the law relating to execution.

According to the Subordinate Judge, the 2nd *darkhast* is not in accordance with law because at that point of time the only relief which the decree holder could claim *under the decree* was to bring the mortgaged property to sale, whereas, instead of seeking that relief, the decree-holder prayed for payment of Rs. 12,575. That might or might not be; that was a question to be determined on a consideration of the circumstances extrinsic to the decree and depending on questions of default, and waiver. But because a decree-holder does not ask by his application for execution for that relief to which he is entitled under the decree in a

certain event, and asks for a relief given by the decree until the happening of that event, it does not follow that he has applied for relief outside the decree and that, therefore, his application is not in accordance with law. It is this view which has substantially affected the Subordinate Judge's judgment with reference to each of the *darkhasts*. In the case of some of them, he has assigned the additional ground that the *darkhasts* were not accompanied by inventories—a purely technical defect which could not affect the question whether the *darkhast* itself was substantially in accordance with law.

Each of the first five *darkhasts* in the present case claimed relief granted by and, therefore, within the decree. Whether on a consideration of all the facts, the Court could, in the events that had happened, grant the relief was a question for trial on the merits. But each application by itself was in order in that it sought relief which was in the decree.

Hence it was "in accordance with law."

On these grounds, the decree appealed from must be reversed and the *darkhast* remanded to the lower Court for disposal on the merits according to law. The appellant must have the costs of this appeal from the respondent; other costs to be costs in the *darkhast*. At the fresh hearing in the Court below, it will be open to the respondents to object to execution on any ground such, for instance, as that all or any of the items in the decree are time-barred. Parties will be at liberty to adduce evidence.

BATCHELOR, J.—The question before us is whether limitation in this case is saved by certain previous *darkhasts* under clause 4 of Article 179 of the Limitation Act (XV of 1877). That clause provides a period of three years from the date of applying in accordance with law to the proper Court for execution. The only question before us is whether the earlier *darkhasts* were cases of applying in accordance with law or not. If they were cases of applying in accordance with law, then, admittedly, the present *darkhast* is saved. If I were free to decide the present question solely upon the authority of the words of the Statute, I should be inclined to think that those words had no reference to the application's likelihood of success, or to the Court's competency to award any particular relief which had been prayed. As I understand the words, they are merely an adverbial qualification of the word "applying," and they seem to me to look only to the form or procedure of the application. I should think, moreover, that the words as they stand receive ample meaning by reference to sections 235 and 236 of the Code of Civil Procedure of 1882, which sections prescribe the particulars to be furnished with an application for execution. It is worthy of remark that the critical words qualify the word "applying." It is not even an application, but it is the applying which must be in accordance with law, and the meaning seems to me to be wholly distinct from what would be conveyed if the words ran "applying for execution in accordance with law."

On the other hand, if it is to be said that a decree-holder is not applying in accordance with law merely because he asks for something which under the decree the Court cannot grant him, we are, I think, confronted, at least in all cases where the decree is complicated or intricate, with this difficulty that the question whether an applying is made according to law can only be decided by an adjudication of the application on its merits. I venture respectfully to doubt whether that is intended. If the applying complies with the forms and the procedure prescribed in that behalf, I should be disposed to say that the applying was in accordance with law, and not the less so because, on the merits of the application, whether for one reason or another, the application had to be refused; nor do I think that the difficulty which I have mentioned is satisfactorily removed by any distinction between what appears on the face of the application and of the decree and what appears by a more careful consideration of those documents; for, in practice, I should doubt whether it would be possible to maintain any such distinction. If, however, the decisions of this Court oblige us to reject this view of the meaning of the words in clause 4 of Article 179, then, I am of opinion that in this particular case, the appeal should be allowed on the other ground that, as explained in my learned colleague's judgment, the former applications asked for reliefs which were not wholly outside the decree.

Decree reversed.

SAHIB JAN *v.* AMIRAN.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 985 OF 1910.

July 15, 1912.

Present:—Mr. Justice Shah Din and Mr. Justice Beadon.

Musammat SAHIB JAN AND OTHERS—PLAINTIFFS—APPELLANTS

versus

Musammat AMIRAN AND OTHERS—DEFENDANTS—RESPONDENTS.

Custom—Muhammadan Law—Family custom—Succession—Right of representation—Daughter of daughter who died during life-time of her mother—Kanjars *of Jagadhari town, Ambala District.*

Kanjars of Jagadhri in the Ambala District are not governed by Agricultural Customary Law, nor do they follow strict Muhammadan Law in matters of succession. The right of representation exists among these people.

Second appeal from the decree of the Divisional Judge, Ambala Division, dated the 14th June 1910, reversing that of the Subordinate Judge, 2nd class, Ambala, dated the 18th December 1909, decreeing the claim.

Mr. *Fazal Ellahi*, for the Appellants.

Mr. *Gokal Chand Narang*, for the Respondents.

JUDGMENT.—The dispute in this case relates to one-sixth share of certain property which belonged to *Musammat* Taman by caste *kanjar*, and is situate at Jagadhri in the Ambala District.

Plaintiffs-appellants, five in number, are sons and daughter of *Musammat* Taman.

Musammat Amiran, defendantr-espondent No. 1, is daughter of *Musammat* Allahdi, who was also a child of *Musammat* Taman, but pre-deceased her mother.

Musammat Taman died in September 1904, and as far as her land was concerned, mutation was effected in the names of the five plaintiffs and *Musammat* Amiran in six equal shares on 8th June 1905.

In July 1909, *Musammat* Amiran mortgaged one-sixth of the property in the share which she purports to have inherited to defendant-respondent No. 2 for Rs. 500.

The plaintiffs-appellants then brought the present suit in which they deny *Musammat* Amiran had any share in the property, and claim a declaration that they are exclusive owners in possession.

The first Court found that *Musammat* Amiran was not entitled to a share, that plaintiffs by their conduct had led the mortgagees to believe that she had a share, and that consequently the plaintiffs must be held liable to the mortgagee for the actual money advanced which was fixed at Rs. 300.

The lower Appellate Court also held that *Musammat* Amiran was not entitled to a share as heir, but dismissed the suit on the ground that plaintiffs were estopped from denying the title which the mortgagee had derived from her.

It is obvious that this family is not governed by agricultural Customary Law; but, on the other hand, it is equally obvious that the family does not follow strict Muhammadan Law, as among the plaintiffs-appellants themselves strict Muhammadan Law has not been followed as the daughters have admittedly succeeded equally with the sons.

If the personal law has been modified by a custom allowing an equal right of succession to sons and daughters, it is probable that there has been the further modification (which is not uncommon in the Punjab) giving the right of representation—and, in our opinion, the conduct of the plaintiffs-appellants clearly shows that this right of representation exists in the family.

Plaintiffs-appellants not only did not dispute the mutation by which the land went in six equal shares to themselves and *Musammat* Amiran but they actually consented to this mutation by putting their thumb marks to the entry made by the *Patwari* in the mutation register; and they allowed the mutation to be sanctioned without protest. They must have known that *Musammat* Amiran was entitled to a share, otherwise they would not have acquiesced in this mutation.

For these reasons, we find that under the rule of inheritance applicable to the family, *Musammat* Amiran became owner of one-sixth share of her mother's estate, and it is unnecessary for us to consider any question of estoppel.

Under the circumstances, too, the amount of the mortgage charge is a question with which the defendants alone are concerned, and it need not be considered in the present case.

We maintain the decree of the lower Appellate Court dismissing the suit, and we dismiss the appeal with costs.

Appeal dismissed.

A. MOUNA v. J. E. MOUNA.

BOMBAY HIGH COURT.
CIVIL REFERENCE No. 1 OF 1912.
July 23, 1912.
Present:—Sir N. G. Chandavarkar, KT., Judge, and Mr. Justice Batchelor.
A. MOUNA—APPELLANT
versus
J. E. MOUNA—RESPONDENT.

Divorce Act (IV of 1869), s. 3—Jurisdiction—Divorce suits—Resident at Aden—District Judge—Aden Courts Act (II of 1864), s. 3.

The Resident at Aden is not a 'District Judge' as defined in section 3 of the Divorce Act, as he has not been appointed a "Commissioner of a Division."

Consequently, the Resident has no jurisdiction to try and pass decrees in cases under the Divorce Act.

Civil Reference made by the Political Resident, Aden, in Civil Suit No. 21 of 1912.

Mr. *Ratanlal Ranchhoddas*, *amicus curiæ*, for the Plaintiff.

Mr. *N. K. Mehta*, *amicus curiæ*, for the Defendant.

JUDGMENT.

CHANDAVARKAR, J.—We are indebted to each of the learned Pleaders, Mr. Ratanlal and Mr. N. K. Mehta, for having assisted us with his arguments as *amicus curiæ* in this reference. The question is whether the Resident at Aden has jurisdiction to try and pass decrees in cases of divorce under the Indian Divorce Act (IV of 1869). Section 3 of the Aden Act (Bom. Act II of 1864), which is an Act to provide for the administration of Civil and Criminal justice at Aden, enacts that the Resident may hear and determine, in the first instance, all cases instituted in his Court, of whatever nature and whatever may be the amount or value of the property in dispute.

The Resident in making this reference has expressed his opinion that under this section his Court has jurisdiction to try suits under the Indian Divorce Act. But that interpretation of the section gives it a wider effect than could have been intended by the Legislature. The section in substance means that the Resident has jurisdiction to try suits only where he has jurisdiction given to him by law. For instance, if the words "all cases instituted in the Court of Resident" were construed to mean in their literal sense, all suits instituted, without any regard to the question of the jurisdiction of the Resident determinable from extraneous considerations, a suit for property in Bombay might also fall within the jurisdiction of the Resident if instituted in his Court. That would reduce the section to an absurdity. Therefore, the section in question must have a restricted meaning given to it, and that is, that the Resident has jurisdiction over any suit, where the jurisdiction is conferred upon him by any law relating to that suit.

Now, suits under the Indian Divoce Act are triable under a special law. Section 3 of the Indian Divorce Act provides that suits instituted under it shall be tried by the District Judge. 'District Judge' is defined to mean, in the non-regulation Provinces, other than Sindh and Burma, a Commissioner of a Division. Aden is a non-regulation Province, and, therefore, a suit instituted under this Act, (IV of 1869), can be tried only by a Commissioner of a Division, if such an authority exists there. But from information supplied to us by Government, it appears that there is no officer there with that designation. It may be that the Legislature was not aware of the requirements of the Courts in Aden when it enacted Act IV of 1869. The omission of the Resident from the Indian Divorce Act may be due purely to inadvertence on the part of the Legislature. We must hold it is a *casus omissus*, the rule as to which is that the particular case thus left unprovided for can in no case be supplied by a Court of law, for that would be to make laws. Our decision cannot lead to any practical difficulty because Government can appoint the Resident Commissioner of a Division so as to give him jurisdiction to try suits under the Indian Divorce Act. On these grounds, we must hold that the Resident at Aden has no jurisdiction to try this suit, and, therefore, with this answer the reference must be returned to him.

BATCHELOR, J.—I am of the same opinion. It seems to me no answer to our view to contend that the Resident at Aden is a Commissioner for the purposes of revenue or for any other purposes whatever. He may be a Commissioner in many senses, but he is not a "Commissioner of a Division," and under the Indian Divorce Act, only a "Commissioner of a Division" is given, in non-regulation Provinces, such as Aden, jurisdiction to entertain a suit for divorce.

Answer accordingly.

RAJA RAM *v.* FATTEH CHAND.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 569 OF 1911.

July 26, 1912.

Present:—Sir Arthur Ried, KT, Chief Judge, and Mr. Justice Robertson.

RAJA RAM AND OTHERS—DEFENDANTS—APPELLANTS

versus

Mahta FATTEH CHAND AND OTHERS—PLAINTIFFS—RESPONDENTS.

Hindu Law—Joint family—Benami *purchase—Burden of proof—Shifting of burden—Statement of person as to his rights in property—Not to be lightly set aside.*

Where the head of a Hindu joint family makes a purchase in the name of another member of the family, the *onus* of proving that the purchase was not *benami* lies upon the person who makes the assertion.

Gopeekrist Gosain v. *Ganga Persaud Gosain*, 6 M. I. A. 53, followed.

In a particular case, however, there may be other considerations which would shift the burden of proof in regard to the nature of the transaction. Thus, where a transaction is shown to be in the nature of a distribution of property amongst various members of a family, or for the advancement in life of one of them, the initial presumption may cease to exist.

Nawab Azimut Ali Khan v. *Hardwari Mull*, 13 M. I. A. 395; 14 W. R. (P. C.) 14, referred to.

The statements of a person, who is in the best position of all to know about his property, ought not to be lightly set aside on the mere ground that they were made with a fraudulent purpose. If the heir or representative of such a person alleges that these statements were incorrect, the burden of proving that this is so lies very heavily upon him. The idea that false statements may be lightly made at one time, for the advantage of the person who makes them, and then lightly repudiated when they appear to be to his disadvantage or to the disadvantage of his successor's title, ought not to be encouraged.

Second appeal from the order of the Divisional Judge, Jullundur Division, dated the 1st February 1911, reversing that of the Subordinate Judge, 1st class, Jullundur, dated the 14th November 1910, dismissing the plaintiffs' claim.

Rai Sahib Pandit *Sheo Narain*, for the Appellants.

The Hon'ble Mr. *Shadi Lal*, for Plaintiffs-Respondents.

JUDGMENT.—This is one of a class of cases which are exceedingly common in the Province. The appellants in this case before us obtained a decree in this Court for Rs. 4,000 against *Musammat* Durga Devi, widow of one Amar Nath, recoverable only from such property of Amar Nath as came to his widow at his death. In execution, the decree-holders sought to attach certain houses and shops. Fateh Chand, brother of Amar Nath, made an objection that the property in fact belonged to him. His objection was rejected. He brought a suit and that suit was rejected by the first Court. On appeal to the lower Appellate Court, the claim was accepted and the property declared to be not liable to attachment.

The sole question before us is, whether the property attached was or was not in fact the property of Amar Nath. This property was purchased by Pandit Bhag Ram, C.I.E., a resident of Jullundur City, who had been in the employment of several Native States, retired on a good pension and had accumulated considerable property. The property was purchased in the name of Amar Nath, son of Bhag Ram.

Great stress has been laid upon the question upon whom did the *onus* lay of showing that this purchase was or was not *benami*. It has been laid down clearly that in the case of purchases by the head of a joint Hindu family in the name of some other member of the family, the *onus* of proving that the purchase was not purely *benami*, lies upon the person making that assertion. This is laid down by the Privy Council in *Gopeekristo Gosain* v. *Ganga Persaud Gosain* (1), and may be taken as settled law.

We note, in the first place, that there is no definite decision here by the learned Divisional Judge that the family was a joint Hindu family, although we find in the decision of the first Court, S. Asad Jan, at page 6 of the paper-book, line 23: "The evidence, and particularly the statement of Rai Bhag Ram in the Income-tax papers, are clear as to the family not being a joint one. The father had clearly stated there that he had distributed his assets among his sons. Thus, if there was a joint family when the disruption took place, the presumption of Hindu Law does not apply. With this finding I dispose of this issue against the plaintiff,"—the issue being, did Amar Nath form a joint Hindu family with his father? We notice that the learned Divisional Judge has nowhere found that that finding of fact was incorrect, and if it is correct, the

(1) 6 M. I. A. 53.

arguments used as to the burden of proof are not in point. Even assuming the family to have been a joint Hindu one and the initial presumption was, undoubtedly, in favour of that condition of affairs, as is pointed out in *Nawab Azimut Ali Khan* v. *Hurdwaree Mull* (2), other considerations may come in which would shift the burden of proof in regard to the nature of the alleged *benami* transaction, and, as the later judgment points out, where the transaction is shown to be of the nature of a distribution of property amongst various members of the family, or for the advancement in life of one of them, the initial presumption may cease to exist.

It is admitted in this case that the money came from Bhag Ram. It appears that in 1901, Bhag Ram started several shops in Jullundur. One was started under the name of Amar Nath. It appears that Amar Nath was not a very satisfactory man of business and was a somewhat wild young man. The learned Divisional Judge has found that Amar Nath never really controlled the business, but that he was entirely subordinate to his father. He finds that in December 1901, Bhag Ram drew up certain rules with his own hand. Amar Nath was merely to prepare accounts, and was to make no loan without security, except with his (Bhag Ram's) permission. Amar Nath was not to take money from the business without his permission. If there were differences between Amar Nath and Arjan Mal, the *munim*, Bhag Ram would decide them, and so on.

In March 1903, the Divisional Judge finds, Bhag Ram changed the rules. All the house expenses would be defrayed by Bhag Ram, and Amar Nath would get Rs. 100 per mensem from the profits of the business. The *munim* was to inform Bhag Ram of any delinquencies on the part of Amar Nath.

In another entry, dated the 24th May 1901, Bhag Ram remarked on the dishonest removal of money by Amar Nath. He ordered the *munim* to tell the world at large that Amar Nath had no connection with the shop. He also noted his intention of changing the name of the shop when an auspicious occasion arose.

(2) 13 M. I. A. 395; 14 W. R. (P. C.) 14.

In August 1904, (the Divisional Judge has given a wrong date), he did actually change the name of the shop to his own name, but it was not till August 1906, that he published a notice in *The Tribune* disowning Amar Nath.

It is now contested in appeal by the learned Advocate for the appellant that these entries, which have been accepted as quite genuine by the learned Divisional Judge, have not been shown to have been made at the time when they purport to have been made, and it is contended, further, that the statement of Amar Nath himself during the Income-tax proceedings shows that they cannot have been made till a much later date. It would appear from the facts of the case, even as put forward by the respondent, that had the assets of the firm been in question, it would have been very difficult to contend that Amar Nath had not, at any rate, been held out to the public as a partner in the firm which bore his own name only. The property in question, however, is not claimed to be the property of the firm, but to have been the property of Bhag Ram himself and not of Amar Nath in whose possession it was, and in regard to this, the learned Advocate for the appellant contends that the matter is absolutely concluded by the statement made by Bhag Ram himself in the grounds of his appeal to the Commissioner during the Income-tax proceedings and dated the 28th November 1903. It appears that Bhag Ram had been assessed by the Collector at a sum which he considered much in excess of what was correct. He made certain objections to the Collector in which he stated that the proceeds of the shop which stood in the name of Amar Nath belonged to Amar Nath, but that the capital belonged to him (Bhag Ram). In his appeal, however, to the Commissioner against the assessment by the Collector, he is very explicit. He begins by saying (para. 1) that owing to machinations of his enemies caused by religious and sectarian differences, his assets have been enormously over-estimated as will be shown from the following facts :—

Para. (2). That the house said to have been built at a cost of Rs. 50,000 is hardly worth Rs. 8,000. It is a small house, which has been built for appellant's younger son,

Pandit Amar Nath, who is carrying on business in the City of Jullundur and is paying a sum of Rs. 130 as income-tax already. The additions now in progress are being made by the aforesaid Pandit Amar Nath at his own expense, *vide* enclosure 1 A." The enclosure, we may note here, shows an expenditure of Rs. 12,577-15-9. Below this is a note of Bhag Ram himself to the effect that "the above amount has been spent by Amar Nath out of his own capital and I have no concern with it."

The petition then goes to recite, under clause (*b*) of para. 2, that the petitioner advanced a loan of Rs. 26,000 only, and not Rs. 60,000, to Kunj Lal and Company, on the 3rd January 1902, out of the amount settled by him on his son Pandit Amar Nath and that after a month and 11 days, the said amount together with Rs. 170 on account of interest, etc., was re-paid into Pandit Amar Nath's shop as part of the capital assigned to him. The transaction was practically one carried on by Pandit Amar Nath on his own account and is duly borne on his books (*vide* extract from Pandit Amar Nath's books, enclosure No. 2, and certificate bearing the signature of the borrowers).

The petition goes on to say that the petitioner did not advance any loans to the mercantile community of Jullundur, as will be seen from the enclosed certificate.

Then, further, in paragraph 4 of the petition we have it stated that the petitioner's account, as has been repeatedly stated by him, is shown in a separate ledger in the account books of his son Pandit Amar Nath, while petty pawns are recorded in a book in the hands of the pawnors themselves. "In his written statement to the assessing officers, petitioner referred to this statement and asked for its examination, but unfortunately he was asked to produce his separate accounts of the large transactions said to have been carried on by him. Petitioner invites attention to the fact that he was merely asked to do an impossibility. Where one has never advanced any loans to the mercantile community it is impossible for him to keep accounts. The Collector was prayed to examine the account in Pandit Amar Nath's books, and the book above-mentioned, but petitioner's Counsel was apparently misunderstood and his request was refused."

Further on he says, that he (Bhag Ram) has made a disposition of his assets between his two sons giving the younger (Pandit Amar Nath) Rs. 50,000 and house property in Jullundur and to the elder Pandit Fateh Chand, who is a practising Barrister in Ajmer, Rs. 23,000, and has kept a small reserve for his personal benefit.

In regard to these very clear statements under Bhag Ram's own signature, the learned Divisional Judge summarily remarks: "They were made with a special object, and all that they show, in my opinion, is that Pandit Bhag Ram was not willing to make false statements to Government regarding his property."

The learned Counsel for the respondent argues that he is entitled to show that these statements were incorrect and quotes a judgment of the Privy Council to the effect that too much stress must not be laid on the mere omission of certain assets from the statement regarding the liability to the payment of Income-tax, *Ali Khan Bahadur* v. *Indar Parshad* (3). We do not say that statements of this kind can never be shown to have been erroneous. The statements of Bhag Ram, a person in the best position of all to know about his property, cannot, however, be lightly set aside on the mere ground that they were made with a fraudulent purpose. Fateh Chand succeeds as an heir of Bhag Ram and, without going so far as to say that he was not competent to show that these statements made by his predecessor-in-title were incorrect, false and fraudulent, we certainly do think that the burden of proving them to be so, and of showing that these statements of fact made by the person most competent to know, are false, lies very heavily upon the respondent. Nor do we think it desirable to encourage the idea that false statements may be lightly made at one time, for the advantage of the person making them, and then lightly repudiated when they appear to be to his disadvantage or to the disadvantage of his successor-in-title. In this case we consider Bhag Ram's statement of fact made explicitly and in detail on the 28th November 1903, to be very strong evidence indeed that the house in question was the property of Amar Nath and we do not think that the respondent has succeeded in rebutting that evidence. We accordingly

(3) 23 C. 950; 23 I. A. 92.

accept the appeal, set aside the judgment and decree of the learned Divisional Judge and restore those of the first Court. Costs against the respondent throughout.

Appeal accepted.

MADRAS HIGH COURT.

CIVIL MISCELLANEOUS PETITIONS NOS. 671 AND 936 OF 1912.

May 3, 1912.

Present:—Mr. Justice Sundara Aiyar.

VATHIAR RAMANUJA AIYANGAR AND OTHERS—PETITONERS

versus

P. R. AIYANACHARIAR AND OTHERS—RESPONDENTS.

Civil Procedure Code(Act V of 1908), *O. XXXIX, r.* 1, *O. XLI, rr.* 5 & 6—*Stay of execution, reasons for—Annoyance to feelings, whether a ground for stay—Injunction, when to be granted.*

In an application for a stay of execution, the Court has to be satisfied that the appellant is likely to sustain substantial injury by execution being allowed to take place before the disposal of the appeal. It is not usual for the Court to grant stay of execution if the appeal itself does not raise fairly arguable questions. Where no pecuniary or tangible loss is shown, it would not be right to grant stay of execution merely on the ground of annoyance to feelings.

In an application for a temporary injunction, the Court will have to be satisfied that the applicant has a *prima facie* case and further that the protection of his interest requires that an injunction should issue temporarily.

Quære—Whether when a party goes to Court claiming an injunction against his opponent to restrain him from doing something wrongful, the opponent should have the right, as a matter of interlocutory relief, to restrain him from doing the very act which he claims to be entitled to do and which he asks the Court to be allowed to be done without obstruction from his opponent?

C. M. P. No. 671 of 1912.

Petition praying for a temporary injunction restraining the respondents from taking the idol of Vedantha Desikar or any other through the Uttra, Chitra or Adayavalanjan Street within the seven enclosures of the Srirangam temple in pursuance of the decree of the District Court of Trichinopoly, in Appeal Suit No. 499 of 1911, pending disposal of the Second Appeal No. 451 of 1912, preferred therefrom to the High Court.

C. M. P. No. 936 of 1912.

Petition for suspension of the injunction granted by the District Court of Trichinopoly, in Appeal No. 499 of 1911 (O. S. No. 366 of 1909 on the file of the District Munsif's Court of Srirangam), restraining the petitioners from interfering with the respondents carrying Desikar through any of the said three Streets within the seven enclosures of the Srirangam temple.

Messsrs. *T. R. Ramachandra Aiyar* and *T. Rangachariar*, for the Petitioners in C. M. P. No. 671 of 1912, with Mr *K. Parthasarathi Iyengar*, in C. M. P. No. 936 of 1912.

Messrs. *K. Srinivas Aiyengar* and *C. Padhmanabha Aiyengar*, for the Respondants in C. M. P. No. 671 of 1912.

Mr. *C. Padhmanabha Aiyengar*, for Respondents in C. M. P. No. 936 of 1912.

ORDER.—There are two applications before me for disposal. Civil Miscellaneous Petition No. 671 of 1912 is an application by the appellants in the second appeal pending in this Court for a temporary injunction to restrain the respondents from carrying the idol of Desikar in procession through any of the streets within the seven *prakarams* of the Srirangam temple. Civil Miscellaneous Petition No. 926 of 1912 is an application by the appellants to suspend the injunction granted by the lower Courts restraining them from interfering with the Vadagalais carrying Desikar in procession through streets. The Vadagalais of Srirangam instituted a suit against the trustees of the temple and the Thengalais for a declaration of their right to carry the idol of Desikar, which they have apparently recently made, in procession through any of the 5, 6, and the 7th *prakarams* of the Srirangam temple and for an injunction restraining the defendants from interfering with their right to do so. Their case was that the streets were public, streets and that as members of the public they had the right they claimed. The defendants denied that the streets were public streets and contended that they belonged to the temple. They alleged also that even if the public had the right of passage through the streets, such right was a restricted one, and that it was also contrary to the local usage that the Vadagalais should carry the Desikar idol in procession through the streets. Both the lower Courts held that the Vadagalais had the right to carry the idol in procession. With respect

to Civil Miscellaneous Petition No. 671, I have had considerable doubts whether this Court has jurisdiction to give the appellant an injunction of the sort they claim. The application would admittedly not come within the purview of rule 1, Order XXXIX. The appellants' contention is that it would be allowable under the provisions of rule 1 of Order XXXIX and that, apart from that rule, this Court has inherent jurisdiction to give such an injunction for the protection of the right of a party in a matter in controversy before the Court. It is pretty clear to my mind that the language of the rule would not allow an application of this kind. It cannot be said that there is any proceeding before this Court in which the appellants claim to restrain the respondents from doing a wrongful act, and that till the matter is tried, it is necessary to give an interim relief of the kind which the appellants seek as the result of their appeal. It does also look to me somewhat extraordinary that, when a party goes to Court claiming an injunction against his opponent to restrain him from doing something wrongful, the opponent should have the right, as a matter of interlocutory relief, to restrain him from doing the very act which he claims to be entitled to do and which he asks the Court to be allowed to be done without obstruction from his opponent. No case was cited in which an application of this kind has been allowed nor am I aware of any. I do not wish, however, to express a definite opinion on this point as, in the view I take of the merits of the application, it is not necessary to do so.

The trustees of the temple were defendants in the suit in the Court of first instance. They have not appealed against the decision of the District Court. The appellants here are the representatives of the Thengalai community. Excepting the question of the jurisdiction of the Court, the question for decision in both the petitions may be taken to be substantially the same, though I do not say it would be precisely the same. In an application for a stay of execution, the Court has to be satisfied that the appellant is likely to sustain substantial injury by execution being allowed to take place before the disposal of the appeal. In an application for a temporary injuncaion, the Court will have to be satisfied that the applicant has a *prima facie* case, and further that the protection of his interests requires that an injunction should issue temporarily. It is not usual for the Court to grant stay of execution if the appeal itself does not raise fairly arguable questions, so that, after all, there is not very much difference between the questions to be decided in either petition. Now, in this case, the lower Courts have both found that the public have a right of way for carrying processions as well as for passing to and fro. I do not wish to express any definite opinion on the question whether the finding may not be open to legal objection. I observe that the District Munsif found that, prior to the introduction of the Municipal Act of 1871, the temple was exercising considerable rights of ownership over the streets within the seven *prakarams*. The Munsif also observes that even now, the temple exercises the right of shutting the outer gate of the 7th *prakaram*. The temple is also receiving *pala pattarai* fees. Whether the fees are received for the use of any of the streets within the seven *prakarams* or only of particular streets or portions thereof, does not clearly appear. These, no doubt, are questions which might have a bearing on the decision of the second appeal. It is also urged that when the Municipality took charge of the streets, the inconvenience of Municipal control over the streets was recognised and it was expressly stated that regard should be had for the feelings of the people connected with the temple in exercising control. What exactly the effect of the reservation in the Government order allowing the Municipality to take control of the streets would be, it is unecessary to decide at present. There does not then appear to have been any question as between the respective rights of the Thengalais and the Vadagalais or of the trustees and the Vadagalai community of the place. Nor is it necessary to express an opinion on the question whether the reservation in the Government order would make the dedication of the streets for the public use a partial dedication. The lower Courts observe that after the Municipality assumed control of the streets, they have been treated as public streets in all respects. It is, of course, open to the appellants to argue that any act done by the Municipality contrary to the ownership of the temple would not affect their rights as

against the *Vadagalais*. The finding of the Courts, however, is that there is nothing restricting the right of way that Vadagalais have over the streets as compared with the right that any one else has. Mr. Ramachandra Aiyar has argued that if the temple itself is the owner of the street, it would be open to his clients to prove that any grant of lands to the occupiers of houses and any rights of way must be taken to be subject to any reservations which must be implied by the nature of the grant. A difference would, however, have to be made between the temple having ownership of the street and the streets being part of the temple itself. This, again, is a question that it would not be proper to go into at this stage. On the whole, I am not prepared to say that the appellants have not got a fair case to argue in the second appeal. But has it been shown that any substantial loss would be caused? Admittedly, no pecuniary loss would be caused. It is not alleged that the Srirangam temple itself would be desecrated by a Vadagalai idol being carried in procession. Practically, it is admitted that the only injury that could be complained of is that the religious feelings of the Thengalai community would be outraged. It seems to me that where no pecuniary or tangible loss is shown, it would not be right to grant stay of execution merely on the ground of annoyance to the feelings of the appellants. An appellant very often is extremely annoyed that any decree against him should be executed before he has taken the opinion of the final Court of Appeal. He is particularly annoyed if his opponent is an enemy of his. If he belongs to a religious faction, I take it that his annoyance would be still greater. I think it would be a sound rule to act upon that mere annoyance to feelings cannot be a ground to grant stay of execution. There is really nothing before me to show that the idol of Desikar is an object of hatred according to the Thengalai cult, or that Vedantha Desikar is regarded as an enemy of God according to the Thengalai persuasion. It is stated that in the Srirangam temple itself there is a shrine of Vedantha Desikar. I very much doubt whether the outrage would be to the religious feelings of the Thengalais and whether it would not be to their feelings against people whom they hate because they are Vadagalais. At any rate, I am unable to hold that there is any injury that a Court of law can take notice of which would be a sufficient ground for staying execution. It is, no doubt, true that the act of the *Vadagalais* would be an innovation as they have not had a Desikar idol to carry in procession until now. But I do not think that this would be a sufficient ground for staying the injunction. Moreover, although I may stay the injunction, the declaration of the plaintiff's right would stand uninterfered with by my order. On account of that declaration, the Vadagalais would be entitled to exercise the rights which have been declared. The result then of my staying the injunction would be that the Vadagalais might still attempt to exercise their right to carry the Desikar idol in procession and the injunction being stayed the Thengalais would be at liberty to interfere with them. This is a condition of things which I think this Court ought not to be responsible for by any order that it passes.

In the circumstances, the only course open to me is to dismiss both the petitions.

Petitions dismissed.

CALCUTTA HIGH COURT.

APPLICATION FOR REVIEW OF ORDER REFUSING LEAVE TO APPEAL TO THE PRIVY COUNCIL.

No. 22 OF 1911.

April 16, 1912.

Present:—Sir Lawrence Jenkins, KT., Chief Justice and Mr. Justice N. Chatterjea.

NAND KISHORE SINGH AND OTHERS—PLAINTIFFS—APPELLANTS—PETITIONERS

versus

RAM GULAM SAHU AND OTHERS—DEFENDANTS—RESPONDENTS—OPPOSITE PARTY.

Review—Privy Council, appeal to—Order refusing leave to appeal to Privy Council, if open to review—Civil Procedure Code (Act V of 1908), O. XLV—Value below Rs. 10,000 even if interest up to date fixed for redemption is added—Value above the sum if interest subsequent to that date is added—Redemption suit, when leave should be granted.

An order of the High Court under Order XLV of the Civil Procedure Code, rejecting an application for leave to appeal to the Privy Council, may be reviewed by the Court which made the order.

In a redemption suit, even if the interest was calculated up to the six months allowed for redemption, the sum of Rs. 10,000 was not reached. The sum would be reached by the addition of inter-

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est subsequent to the date of redemption. The High Court, therefore, refused to grant leave to appeal to the Privy Council. On an application for a review of the order of the High Court:

Held, that there was no error apparent on the face of the record or any sufficient reason for granting a review.

Gooroo Persad v. *Juggut Chunder*, 8 M. I. A. 166 at p. 169; 3 W. R. 14, referred to.

Application to review an order made by the High Court, under Order XLV of the Civil Procedure Code, refusing leave to appeal to the Privy Council from a decree of the High Court (Woodroffe and Carnduff, JJ.), dated December 10th, 1911, by which Regular Appeal No. 531 of 1908, preferred from a decree of the Sub-Judge of Bhagalpur, dated August 31st, 1908, was allowed.

Mr. *Caspersz* and Babu *Upendra Nath Chatterjee*, for the Petitioners.

Dr. *Rash Behary Ghosh* and Babu *Khetra Mohun Sen*, for the Opposite Party.

JUDGMENT.—This is an application to review an order made by us under Order XLV of the Code of Civil Procedure. By that order, we rejected an application for leave to appeal to His Majesty in Council and we did so upon this ground. The learned Vakil for the the applicant, one of the most experienced and eminent Vakils of this Court, immediately told us that though the value of the subject-matter on appeal to His Majesty in Council was upwards of Rs. 10,000, still the value of the subject-matter of the suit was not Rs. 10,000 and, consequently, he could not support the application. The result was, it was rejected.

It is now sought to obtain a review of this order under section 114 of the Code and Order XLVII. It is objected on the part of the respondent that no such application can be made and for the purposes of supporting that contention, our attention has been drawn to a number of decisions in which it has been held that no appeal lies under the Letters Patent from the orders of a single Judge, rejecting an application for leave to appeal to the Privy Council. Mr. Justice Wilson, in the case of *Lutf Ali Khan* v. *Asgar Reza* (1), bases this conclusion on the view that the order was not a judgment within the meaning of the Letters Patent. If that be the reason why an appeal does not lie from an order of a single Judge, it affords no answer to an application for review.

Section 114 of the Code provides that a party, who is aggrieved by an order from which no appeal has been preferred or from which no appeal is allowed by the Code, may apply for a review of the judgment to the Court which made the order, and the Court may make such order thereon as it thinks fit. The order of rejection comes within this description and the application for review is, therefore, within the terms of section 114. I fail to see how it can be said the order of rejection was not an order of a Civil Court; it was under Order XLV of the Code, which is an Act to consolidate and amend the law relating to the procedure of the Courts of Civil Judicature.

Moreover, I would point out, in support of this view, that when an application for review is rejected by a Court, other than a High Court, then, under Order XLIII, rule 1, an appeal lies from such order. I, therefore, can see in the Code itself nothing to support the view that the order of the High Court under Order XLV is not subject to review.

The next question is whether the applicant has made out a case for review.

It is now contended that the value of the subject-matter of the suit in fact was R. 10,000, or upwards, and that there is an error apparent on the face of the record. But when the facts come to be investigated, it is conceded that even if interest be calculated not only up to the decree, but even up to the end of the six months allowed for redemption, the sum of Rs. 10,000 is not reached. In this connection, I would refer to the case in *Gooroo Persad* v. *Juggut Chunder* (2), where it was stated that "their Lordships must not, of course, be understood to intimate that the Sudder Courts are to give leave to appeal in cases in which the specified amount of Rs. 10,000 can only be reached by the addition of interest subsequent to the decree. Such cases must, in their Lordships' opinion, rest in their discretion:" that is, in the discretion of the Judicial Committee. There were, therefore, grounds for the conclusion at which the learned Vakil arrived as to the in-

(1) 17 C. 455.

(2) 8 M. I. A. 166 at p. 169; 3 W. R. (P. C.) 14.

sufficiency of the value of the subject-matter of the suit and it is not made out that there is an error apparent on the face of the record or any sufficient reason for granting the review. If leave to appeal is to be obtained, it must, in the circumstances, be obtained from their Lordships of the Privy Council and not from us.

The application must, therefore, be dismissed with costs, three gold *mohurs*.

Application dismissed.

PUNJAB CHIEF COURT.

CIVIL APPLICATION No. 1287 OF 1911.

May 17, 1912.

Present:—Mr. Justice Kensington.

JAWAHRI MAL—PLAINTIFF—PETITIONER

versus

DHANPAT AND ANOTHER—DEFENDANTS—RESPONDENTS.

Revision—Denial of justice—Punjab Courts Act (XVIII of 1884 as amended by Act XXV of 1899), s. 70 (b)—Material irregularity—Minor incurring debt—Subsequent conduct in raising another loan from the same creditor—Ratification—Apparent necessity at the time of incurring debt.

Where a person contracts a loan while a minor, and, after attaining majority, takes further advances from the same creditor, this subsequent conduct of his constitutes a ratification on his part of the original debt incurred during minority.

If a creditor knows that his debtor has sufficient justification for requiring money, both being residents of the same village, he acts rightly in advancing it, and is entitled to recover the sum thus advanced with interest.

If a Court bases its decision on a perverse view of the facts and on an arbitrary assumption, it commits a material irregularity, and its order can, therefore, be interfered with by the Chief Court on revision.

Application, under section 70 (*a*) of Act XVIII of 1884 as amended by Act XXV of 1899, for revision of the order of the Divisional Judge, Ludhiana Division, dated 30th March 1911, reversing that of the District Judge, Ludhiana, dated 29th August 1910, decreeing plaintiff's claim in part, Rs. 316-10 against defendants Nos. 1. and 2. and Rs. 193-4 against defendant No. 1. only with proportionate costs.

Mr. *Nand Lal*, for the Petitioner.

Pandit *Rambhaj Datta*, for the Respondents.

JUDGMENT.—This case is before me as a revision on the ground that the lower Appellate Court has committed what amounts to a material irregularity by basing its decision on a perverse view of the facts and upon an arbitrary assumption. This allegation appears to me to be sufficiently established and I feel bound to interfere on revision as the lower Appellate Court's way of looking at the case amounts to a denial of justice to the plaintiff.

The facts are as follows:—

In March 1905, Dhanpat, defendant No. 1, was adopted by one Basawa. A suit was immediately brought against Basawa and Dhanpat and, though the record of this suit is not before me, it is admitted that the case was decided in favour of Dhanpat both in the first Court and on appeal. In September 1905, Dhanpat and his mother, *Mussammat* Soman, struck a balance for Rs. 316 in the account-book of the plaintiff, who is a money-lender belonging to their village. The account book has been produced and it appears that Rs. 316 includes items of Rs. 31 on account of expenses of the adoption-deed, Rs. 117 for expenses of the case and Rs. 148 as interest on a previous debt on Rs. 1,100, besides some further petty items. There appears to be a certain amount of doubt whether Dhanpat was a major in September 1905, though both the Courts have found as a fact that he had then attained the age of majority. It is possible that his mother's signature was obtained to the balance owing to a doubt about Dhanpat's age.

Subsequently, Dhanpat took further advances from the plaintiff amounting in all to Rs. 193, practically all in cash, and some portion, at any rate, of these sums appears to have been advanced by the plaintiff to enable Dhanpat to meet the further expenses of litigation. There have been no re-payments and the plaintiff has accordingly sued for Rs. 860, made up of Rs. 509, principal, and Rs. 351, interest at 15 *per cent.* The first Court gave plaintiff a decree for Rs. 316 against Dhanpat and his mother and for Rs. 193 as against Dhanpat alone, disallowing all claim for interest, but the lower Appellate Court has dismissed plaintiff's claim absolutely, holding that, though it cannot be said that the claim is false, it has not been adequately proved.

It is difficult to understand how this conclusion has been reached. The claim is apparently quite straightforward and the lower Appellate Court has itself found that

some interest ought probably to have been allowed to the plaintiff if the principal debt is admitted. I can see no reason why the first Court's finding as to the principal should not have been upheld. Even if it be assumed, contrary to the findings of both the Courts, that Dhanpat was a minor in September 1905, his subsequent conduct in taking further advances from the plaintiff constitutes ratification on his part of the original debt incurred on his behalf during his minority. It is quite certain that Dhanpat required money at the time to meet the expenses of litigation and though the whole of the money advanced may not have been required for this purpose, the plaintiff should not be treated too rigorously for having come to the assistance of a young man in a time of need. Dhanpat had a sufficient pretext for requiring money owing to his altered circumstances in consequence of the adoption, which must have been well known to the plaintiff as he belonged to the same village, and I do not consider that the plaintiff acted wrongly in advancing money somewhat freely or even in adding in Rs. 148 as interest on a earlier debt. The first Court seems to me to have come to a correct conclusion as regards the principal sum now claimed.

In regard to interest, I agree with the lower Appellate Court that reasonable interest should be allowed at say 10 per cent. In round figures, the plaintiff's total claim for principal and interest may be taken at Rs. 700. The plaintiff has dealt liberally with Dhanpat and there is no reason why he should lose this considerable sum. In this Court, the plaintiff has given up his claim against Dhanpat's mother and her minor sons, who were also defendants to the suit. The remedy is pressed as against Dhanpat alone, and quite rightly so, seeing that the money appears to have been raised entirely for his personal benefit.

He has admittedly benefited largely by adoption which was the original cause of his requiring ready money to go on with. The revision is accordingly allowed and the decrees of the lower Courts are set aside. In place thereof, plaintiff is given a decree against the defendant, Dhanpat, only for Rs. 700 with costs calculated on that amount in all Courts.

Revision allowed.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL No. 376 OF 1902.

March 31, 1905.

Present:—Sir Francis Maclean, KT., Chief Justice and Mr. Justice Mitra.

HIATUNNESSA BIBI AND OTHERS—DEFENDANTS—APPELLANTS

versus

KAILASH CHANDRA SAHA—PLAINTIFF—RESPONDENT.

Second Appeal—Title suit—Finding of lower Appellate Court that plaintiff's suit is not barred—Sufficiency of finding—Remand by single Judge—Appeal coming on for hearing before Division Bench—Disposal of appeal by Division Bench.

In a suit for possession of land, the lower Appellate Court said on the question of limitation: "It does not appear that the plaintiff's claim for possession is barred." On appeal to the High Court, a single Judge held that a mere statement of this sort was not sufficient, but that the lower Appellate Court was bound to give some reasons for the finding. He, therefore, remanded the issue so that a proper finding might be arrived at on the question of limitation, and the appeal was kept on the file of the High Court. On remand, the lower Appellate Court found that the plaintiff was not in possession within 12 years before the suit. The appeal then came on for hearing before the same learned Judge who referred it to the Division Bench for disposal:

Held, that the first finding of the lower Appellate Court on the question of limitation was sufficient, and that the remand order should not have been made.

Appeal from the decree of the District Judge of Murshidabad, dated the 26th August 1901, reversing that of the first Munsif of Berhampur, dated the 29th March 1901.

The appeal at first came on for hearing before Mr. Justice Geidt sitting singly. He remanded the issue on the question of limitation by the following

JUDGMENT.—"This is a suit to recover possession of a parcel of land of which the plaintiff alleges that he was dispossessed by the defendants in the year 1299. The plaintiff's case was that the land formed part of a holding No. 267, which had been settled with him. Some four months after the institution of the suit, the plaintiff put in a petition before the Munsif in which he said that the disputed land was covered by plots Nos. 498, 499 and 500 of the Collectorate *Chittas* prepared in the year 1268.

"The defence set up was that the disputed land belonged not to the plaintiff's holding but to a holding which the defendants had acquired by purchase from Korban Ali in the year 1291.

S. N. DAR, B. A. LL. B.,
Vakil High Court,
SRINAGAR (Kashmir)

HIATUNNESSA BIBI v. KAILASH CHANDRA SAHA.

"Several issues were drawn up but it is only necessary, for the purposes of this appeal to notice two of them—the third and the fourth. The third is—"Is the claim barred by limitation?" The fourth is—"Whether the plaint land appertains to plaintiff's *jama* and the defendants have wrongfully dispossessed him?" These issues were tried together and the Munsif found that the disputed land did not belong to the plaintiff's holding and further that the plaintiff had never been in possession of this land within 12 years from the date of institution of the suit. He accordingly dismissed the plaintiff's claim.

"On appeal, the District Judge has reversed both these findings of the Munsif and decreed the plaintiff's suit. The first point taken on appeal is that the District Judge has proceeded on the assumption that holding No. 267 comprises the *Chitta dags* Nos. 498, 499 and 500. Not only, is it said, is this a pure assumption unwarranted by evidence but it was opposed to the distinct finding of the Munsif that the holding did not consist of those three *dags*.

"I am, however, unable to discover in the Munsif's judgment any such finding. What the Munsif has said is that the plaintiff had totally failed to prove that Nos. 498, 499 and 500 *Chitta dags* covered the land in suit. This statement of the Munsif clearly proceeds also on the assumption that the holding No. 267 was covered by the 3 *dags* specified, for unless that assumption were made, the statement would be wholly irrelevant in reference to the trial of the issue before him.

"Reading the judgments both of the Munsif and of the District Judge, it appears to me that the statement of the plaintiff that the holding No. 267 comprised these three *dags* was, in no way, disputed by the defendants. Furthermore, the objection that the District Judge had made an assumption unwarranted by evidence is nowhere taken in the grounds of appeal preferred to this Court, and from this fact, it appears to me clear that the defendants not only did not dispute the plaintiff's allegation in this matter but that they were not even in a position to dispute it, and, therefore, acquiesced in it. I am, therefore, of opinion that the objection now under consideration is not one that should prevail. It would be impossible to decide it properly without going into the evidence which is not before me. It was not taken in the grounds of appeal and the appellant has not even put it within my power to decide it as he has not called for the *Chittas* which have been taken back by the plaintiffs. The second ground of appeal is that the District Judge has come to no proper finding on the issue as to limitation. The Munsif discussed this question very thoroughly on the evidence before him and on that evidence and the circumstances and the probabilities of the case, he found himself unable to believe that the plaintiff was ever in possession of the disputed land or wrongfully dispossessed therefrom. Now, it was for the plaintiff to prove that the dispossession occurred within 12 years before the institution of this suit. But all that the District Judge said on this point is that "it does not appear that the plaintiff's claim for possession is barred." Considering that the District Judge's judgment was one of reversal, it appears to me that a mere statement of this sort was not sufficient. When the Munsif, after a detailed discussion of the evidence, had come to the conclusion that the plaintiff was never in possession of the disputed land or wrongfully dispossessed therefrom, it appears to me that the District Judge was bound to give some reasons for the finding to the contrary at which he arrived.

"The case will, therefore, be remanded to the District Judge that he may come to a proper finding on the question of limitation that was raised in this case. The District Judge will record his finding and return the record with his finding within six weeks.

"The record will be sent down to him at once."

The lower Appellate Court submitted its finding to the High Court, and the appeal came on again before Mr. Justice Geidt, who referred it to a Division Bench.

Babus *Sarat Chandra Roy Ghaudhuri* and *Bepin Chandra Mullick*, for the Appellant.

Dr. *Rash Behary Ghosh* and Babu *Hemendra Nath Sen*, for the Respondent.

JUDGMENT.

MACLEAN, C. J.—This is an appeal from the decision of the officiating Judge of Murshidabad. It came on appeal before Mr. Justice Geidt sitting alone and he remanded it, because he thought that the District Judge had not sufficiently found whether the plaintiff had been in possession of the pro-

perty in dispute within twelve years before the institution of the suit. He, therefore, remanded the case for inquiry on that point, keeping the case on the file of this Court. That inquiry has now been made and has resulted in a finding that the plaintiff was not in possession within twelve years before the filing of the suit. Mr. Justice Geidt, acting under the powers given him by the rules of this Court, has sent the case to be disposed of by the Judges taking the Presidency Group, and it, therefore, now comes before us. The whole case, that is to say, the appeal from the District Judge is now before us as it was originally before Mr. Justice Geidt. It is contended, on behalf of the appellant, that we are bound to adopt the second finding on the question of possession and so to dismiss the suit. On the other hand, it is contended that, the whole case being now before us, it is open to us to decide whether the remand order of Mr. Justice Geidt was justified, the contention being that the District Judge had found, as a fact, that upon the question of possession the plaintiff was not barred, and, consequently, that the remand order ought not to have been made. We must either decide the whole matter now, or send the case back to Mr. Justice Geidt. If we were to decide the appeal on the last finding as to possession by the Judge on the remand and so dispose of the whole case, we should deprive the plaintiff of his right to appeal against the propriety of the remand order. If we send the case back to Mr. Justice Geidt, it would, I think, be open to him to re-consider his order for the remand, but, if he did not do that, but dismissed the suit on the last finding as to possession, the plaintiff could appeal and challenge the propriety of the remand order. To adopt this circuitous procedure would only entail further and unnecessary cost on the parties: and, instead of driving the parties to this course, I think we may deal with the whole matter, as Mr. Justice Geidt has asked us so to do and treat the matter as if the propriety of the remand order were now before us, as it would be on an appeal from Mr. Justice Geidt. The appellant asks us to adopt a course which would have the effect of depriving the plaintiff of his right of appeal against the remand order: we ought not to do this. I think, we must regard the substance, and not the technicalities of the case. I do not think the remand order should have been made, looking at the judgment of the District Judge as a whole. He found the title in favour of the plaintiff and his language is, I think, sufficient to warrant us in saying that he found that the plaintiff had been in possession within 12 years before the institution of the suit. If we regard his language at page 13 of the printed paper book, we find that he had clearly directed his mind to this question of possession for this was the only point about possession which resulted in his finding that "it does not appear to me that the plaintiff's claim for possession is barred." To what can these words apply except to the question of whether or not the plaintiff had been out of possession for 12 years before suit? It is difficult for us to say that there is not a sufficient finding that the plaintiff had been in possession within 12 years before suit. I think, our proper course is to dispose of the whole matter and not to drive the parties to further waste of money and time by sending the case back to Mr. Justice Geidt, with the result that if he ultimately decided in the present appellant's favour, a further appeal by the plaintiff would be inevitable.

The appeal fails and must be dismissed with costs.

MITRA, J.—I agree.

Appeal dismissed.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No 1478 OF 1910.

August 7, 1912.

Present:—Sir Ralph Benson, KT., Offg. Chief Justice, and Mr. Justice Abdur Rahim.

TUMMALA NAGABHUSHANAM—PLAINTIFF—APPELLANT

versus

SRI RAJAH VENKATADRI APPA ROW BAHADUR ZEMINDAR GARU, BEING MINOR, REPRESENTED BY THE COLLECTOR OF KISTNA—DEFENDANT—RESPONDENT.

Abatement of suit—Death of wrong-doer—Tort—Suit for damages for wrongful distraint—Action commenced against wrong-doer—Actio personalis moritur cum persona—*Scope of doctrine—How far applicable to India—Act XII of* 1855, *s.* 2.

The only cases in which, apart from questions of breach of contract, express or implied, a remedy for

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a wrongful act can be pursued against the estate of a deceased who has done the act, are those in which the property or proceeds or the value of property belonging to another have been appropriated by the deceased person and added to his own estate or moneys.

An action for damages for distraint illegally levied by a person on certain moveables belonging to the plaintiff, some of which either perished or deteriorated owing to the negligence of the defendant's servants while the rest were misappropriated by the servants, is not in the nature of a suit for the recovery of specific moveables appropriated by the defendant or their value.

To such an action the maxim '*actio personalis moritur cum persona*' applies, in the absence of any statutory provision to the contrary.

Phillips v. *Homfray*, (1883) 24 Ch. D. 439; 52 L. J. Ch. 833; 49 L. T. 5; 32 W. R. 6, relied upon.

Section 2 of Act XII of 1855 has no application to a suit instituted against the wrong-doer himself in his life-time. Such a suit abates on the death of the wrong-doer.

Haridas Ramdas v. *Ramdas Mathuradas*, 13 B. 677, and *Ranchodo Doss* v. *Rukmany Bhoy*, 28 M. 487, relied upon.

Second appeal from the decree of the District Court of Kistna at Masulipatam, in A. S. No. 240 of 1908, presented against that of the Court of the District Munsif at Gudivada, in O. S. No. 380 of 1905.

Mr. *T. Prakasam*, for the Appellant.

Mr. *M. Kunjunni Nair*, for the Respondent.

JUDGMENT.—When the allegations in the plaint are carefully considered, the suit must in substance be regarded, as held by the District Judge, to be one for recovery of damages for distraint illegally levied by the deceased *Zemindar*, the original 1st defendant, on certain moveables belonging to the plaintiff, some of which either perished or deteriorated owing to the negligence of the *Zemindar's* servants, while the rest was misappropriated by those servants. It cannot be regarded as a suit for recovery of specific moveables appropriated by the original 1st defendant or their value. The nature of the action being such as we have stated, the maxim *actio personalis moritur cum persona* would apply in the absence of any statutory provision to the contrary. The scope of this doctrine is thus stated by Bowen, L. J., in *Phillips* v. *Homfray* (1) :—"The only cases in which, apart from questions of breach of contract, express or implied, a remedy for a wrongful act can be pursued against the estate of a deceased who has done the act, appear to us to be those in which the property or the proceeds or the value of property belonging to another have been appropriated by the deceased person and added to his own estate or moneys." In India, no doubt, this rule of Common Law has been to some extent modified by Act XII of 1855, which enacts that an action may be maintained against the representatives of a deceased person for any wrong committed by him in his life-time for which he would have been subject to an action but, as pointed out in *Haridas Ramdas* v. *Ramdas Mathuradas* (2), which has been followed in *Ranchodo Doss* v. *Rukmany Bhoy* (3), section 2 of that Act, which provides that no action commenced under the provision of this Act shall abate by reason of the death of either party, has no application to a suit which was instituted against the wrong-doer himself in his life-time as such an action could not be said to have been commenced under the provisions of the Act. Such suits are still governed by the rule enunciated in *Phillips* v. *Homfray* (1). The appeal is, therefore, dismissed with costs.

Appeal dismissed.

(1) (1883) 24 Ch. D. 439; 52 L. J. Ch. 833; 49 L. T. 5; 32 W. R. 6.

(2) 13 B. 677.

(3) 28 M. 487.

CALCUTTA HIGH COURT.

REGULAR CIVIL APPEAL No. 407 OF 1906.

May 20, 1909.

Present:—Mr. Justice Coxe and Mr. Justice Richardson.

SARAT CHANDRA ROY CHOWDHURY AND ANOTHER—DEFENDANTS—APPELLANTS

versus

RATUBUDDIN MANDAL AND OTHERS—PLAINTIFFS—RESPONDENTS.

Landlord and tenant, relationship of—Kabuliat *executed by one of two brothers—Whether other brother becomes tenant—Intention of parties—Conduct of parties to be considered—Subsequent knowledge of landlord that brothers agreed to share tenancy, effect of—Novation of contract—Bengal Tenancy Act (VIII of* 1885), *s.* 5—*Presumption—Tenure-holder—Holding more than* 100 bighas—*Occupancy-rights before commencement of Act—Whether presumption to be made.*

Where one of two brothers executed a *kabuliat*, the question whether the other brother became a tenant of the landlord depends on what was the intention of the parties. If the landlord knew that he was letting the land to both, but took the *kabuliat* in

SARAT CHANDRA ROY *v.* RATUBUDDIN.

the name of one alone merely for the sake of convenience, then the relation of landlord and tenant was constituted between him and the other brother. But if the landlord knew nothing of the arrangements made between the two brothers that they would equally share the tenancy, and believed himself to be contracting with the brother executing the *kabuliat* only, then those arrangements could not bind him in any way and would not create any relation between him and the other brother.

To decide what was the intention and knowledge of the parties, their conduct must be taken into consideration.

If the landlord came to know afterwards that the brother executing the *kabuliat* had allowed the other brother an interest in the tenancy, that would not amount to a novation of their contract.

Although the presumption referred to in section 5 of the Bengal Tenancy Act that if a man holds more than 100 *bighas*, he must be supposed *prima facie* to be a tenure-holder, is not applicable to the rights of occupancy acquired by a *raiyat* before the Act came into operation, yet when the question is whether a tenant was or was not a *raiyat*, the area of the land held should be taken into consideration, though it is not necessary to adhere to the exact standard of 100 *bighas*.

Baboo Dhunput Singh v. *Baboo Gooman Singh*, W. R. Gap. No. 1864, Act X Rulings, 61 and *Gopee Mohun Roy* v. *Sib Chunder Sen*, 1 W. R. 68, referred to.

Appeal against the decree of the Subordinate Judge of Rungpur, dated the 16th July 1906.

Babus *Kishori Lal Sarcar*, *Promotho Nath Sen*, *Debendra Nath Bagchi* and *Haris Chandra Roy*, for the Appellants.

Babus *Ram Chandra Majumdar*, *Kumar Sankar Roy*, *Debaki Lal Sen Gupta* and *Debendra Narain Bhattacharjee*, for the Respondents.

JUDGMENT.—The plaintiffs in the suit out of which this appeal arises are the grandsons of one Imamdi. It is common ground, proved by the *patta* produced on behalf of the plaintiffs (Exhibit 7) and the *kabuliat* filed for the defence (Exhibit A), that Imamdi had a tenancy with a rent of Rs. 58 under the landlords whose successors are the principal defendants in the case. Imamdi had two sons, named Yar Mahomed and Gulal, the plaintiffs being the sons of the latter and the *pro forma* defendants the sons of the former. The landlords, on the strength of the *kabuliat* above referred to, which was executed by Yar Mahomad alone in 1867, sued to eject the heirs of Yar Mohamad on the ground that their tenancy had come to an end. The decree does not show whether this was because its term had expired or because Yar Mohamad being dead, the tenancy was not heritable. We may, however, take this opportunity of observing that the *kabuliat* of 1867 was for a term of nine years and that Yar Mohamad and his heirs appear to have occupied the position of tenants holding over on the terms of that document with the exception that the rent payable was subsequently increased by an arrangement to which we shall refer. It has never been contended that the *kabuliat* operated of itself to create any permanent right in Yar Mohamad or any body else. The plaintiffs asked to be made parties to the ejectment suit on the ground that half the tenancy was theirs. But their prayer was refused; and as Yar Mohamad's heirs did not contest the suit, it was decreed *ex parte*. The plaintiffs have now brought this suit for a declaration of their right to half the tenancy and for an injunction to restrain the defendants from executing the ejectment decree. The suit has been decreed by the Subordinate Judge of Rangpur and the landlords appeal.

We may remark at the outset that the learned Pleader for the respondents tells us that his clients do not ask that the landlords should be restrained from executing the whole decree but only so far as it affects their share.

The learned Subordinate Judge finds that Imamdi was a *raiyat* with a right of occupancy and that, therefore, the plaintiffs, who are the heirs of one of his heirs, are entitled to a share in his holding and cannot be ejected. He holds, further, though the grounds given for the finding seem quite inconsistent with it, that the *kabuliat* of Yar Mohamad was a collusive transaction. Both these findings are attacked in appeal.

It will be convenient to take the second point first as it can be disposed of without difficulty. The Subordinate Judge admits that the evidence of the witnesses, who testify to the so-called fraudulent conduct of Yar Mohamad, is "extremely unsatisfactory and contradictory." He finds that the "fact of the execution of the *kabuliat* was known to the plaintiffs as appears from their conduct." It is quite clear that Gulal was aware of the *kabuliat* and that that document has been recognized ever since its execution as the document from which such rights as Gulal or the plaintiffs possessed or have

exercised, were derived. As between the two branches of the family, Gulal's branch have held their share of the tenancy at the rate specified in the *kabualiat*, and have all along allowed Yar Mohamad in whose name the *kabuliat* was executed and his heirs to take all the rent receipts. It is a curious circumstance in this case that in 1881-82, a new Settlement was made and the rent raised to Rs. 337-8. Both sides have entirely ignored this matter. The landlords in their ejectment suit referred only to the Settlement of 1867, while the plaintiffs have not attempted to show that that Settlement has been superseded. The existence of this Settlement is shown merely by casual references in receipts. It may be that it was not so much a fresh Settlement as a mere subsidiary covenant to pay a little increased rent for some new land gained from the river, and was not regarded as superseding the regular Settlement of 1867. Be that as it may, it is clear that before 1897, the rent had been raised to Rs 337-8, and in that year, the plaintiffs mortgaged their share of the tenancy to a company. The rent is given as Rs. 337-8 and the area as *Gaons* 8-7-10, precisely as in the *kabuliat* of 1867. There is not a trace of evidence to show that when the rent was raised by this *kabuliat* from Rs. 53 to Rs. 300, the father of the plaintiffs made any objection. He must have known that some agreement had been arrived at to justify such an increase. We feel no doubt that the plaintiffs and their predecessor have all along known and assented to this *kabuliat*, and cannot agree with the Subordinate Judge that it was collusive.

On the question whether plaintiffs are *raiyats*, we are equally unable to agree with the Subordinate Judge. The test in this matter is the purpose for which the tenancy was created If Imamdi took the land to cultivate himself, he was a *raiyat*. If he took it to cultivate it by tenants, he was a tenure-holder. The Subordinate Judge rejects the oral evidence. It has been read to us and we cannot say that it is of any real value on either side, and certainly cannot hold that the plaintiffs' oral evidence preponderates over that of the defence. The Subordinate Judge relies on a *patta* produced by the plaintiffs, from which it appears to him that the land was settled with Imamdi for cultivation. He relies also on the suit against Yar Mohamad which preceded the *kabuliat* of 1867, which suit, in his opinion, could, under Act X of 1859, which was then in force, have been brought only against a *raiyat*. He relies also on certain statements in the quinquennial papers and in the *Thak* map.

It will be convenient to take these points in order. As to the *patta*; it may be said, in the first place, that it is no evidence against the defence. It purports to be signed by one Kali Nath Das and as it is over 30 years old, it may be assumed that it was so signed. But there is no evidence worth the name to connect Kali Nath Das with the defendants. In the second place, the *patta* does not show that the land was settled with Imamdi for cultivation and we are at a loss to understand why the learned Subordinate Judge thought that it did. Towards the end of the document, it refers to the tenancy which it attested as an *ijara* which certainly is a very unusual term to apply to a cultivating lease.

As to the suit, all that we know about it is derived from the following passage in the *kabuliat* of 1867: "As the term of the *patta* of the said deceased Mandal has expired and as I have no right of possession thereto, you called me to take fresh settlement. But as I did not come forward to take fresh settlement, you brought a suit against me in No. 187 of 1866-67 in the Collectorate under Act X of 1859, claiming to get a *kabuliat* from me for a term of two years." There is certainly nothing in Act X of 1859 to bar the institution of a suit of this description against a tenure-holder, and the description itself obviously suggests that the suit was not a suit for enhancement against an occupancy *raiyat*, such as is referred to in section 17. In this connection, reference may be made to clause (1) of section 23 of Act X of 1859 and to such cases as those of *Maharajah Ramnath Singh* v. *Huro Lal Pandey* (1) and *Kalam Sheikh* v. *Panchu Mandal* (2).

The quinquennial papers throw no light on the matter. They show that in 1816, there were 11 *bishes* odd of cultivated land in the village, the rent of which amounted

(1) 8 W. R. 188.
(2) 2 B. L. R. A. C. 252.

to Rs. 50 less a deduction of 12 per cent. as collection charges. This clearly does not throw much light on the question, whether the tenancy of 6 *gaons* odd, which Imamdi is said to have held at a rent of Rs. 58 sometime before 1839, was granted for personal cultivation or for cultivation by tenants. Clearly, the state of affairs in 1816 was very different from that in 1839 and there is nothing to show what was the character of the tenancies existing on the land in either year. The *thak* papers carry us no further. They show that in December 1856, there were 15 cultivators and no "non-cultivators" on the land while the survey map the next year shows 17 agricultural inhabitants and 8 non-agricultural. It is usual for petty tenure-holders to retain a certain amount of land in their own cultivation, and the fact that Imamdi, who was, no doubt, a man of the cultivating class, may have been described as a cultivator does not in the least justify the inference that he took the land to cultivate the bulk of it personally and not to settle tenants on it.

The evidence, therefore, that Imamdi was a *raiyat* seems to us quite inconclusive. On the other hand, there is the presumption referred to in section 5 of the Bengal Tenancy Act that if a man holds more than 100 *bighas*, he must be supposed, *prima facie*, to be a tenure-holder.

This provision of the Act is not applicable to the rights of occupancy acquired by a *raiyat* before the Act came into operation (section 19). But when the question was whether a tenant was or was not a *raiyat*, reported cases decided under the old law show that the area of the land held was taken into consideration along with other circumstances: *Baboo Dhunput Singh* v. *Baboo Gooman Singh* (3) and *Gopee Mohun Roy* v. *Sib Chunder Sen* (4). The provision, therefore, merely incorporates in the law a general principle so reasonable and probable that it would naturally be drawn by a sensible man; and it is, therefore, safe to apply the principle even in cases where the actual section itself may not be strictly applicable, though of course in such cases it might not be necessary to adhere to the exact standard of 100 *bighas*. The land settled with Imamdi according to the plaintiff was about 2,000 *bighas*. What man in Eastern Bengal would take an area of that size for the purpose of cultivating it by his own servants? The suggestion is opposed to all experience. There is no doubt that for all the time of which we have any trustworthy record, the bulk of the land has been held by tenants under Imamdi's successors and we have no doubt that it was in order to settle these or other tenants that the land was taken. We differ, therefore, from the learned Subordinate Judge and hold that Imamdi and his successors were and are tenure-holders. Taking this view, much of the learned Subordinate Judge's reasoning falls to the ground. If Imamdi were an occupancy-*raiyat*, his holding would be heritable and the plaintiff's rights could not be denied. Moreover, the conduct of Yar Mohamad and his heirs in not resisting the ejectment suits would be open to the suspicion of collusion. But if Imamdi and his successors were, as they appear to have been, merely tenure-holders for a period, then these considerations lose all their force.

It remains, therefore, to be ascertained whether the plaintiffs themselves were tenure-holders under the appellants. Now, as between the plaintiffs and Yar Mohammad, there can be little doubt of the plaintiffs' interest; so strong is the tendency to regard all property, however transient, as heritable that it is not likely that Gulal on Imamdi's death would willingly have acquiesced in his total exclusion from the tenancy that had been Imamdi's. It is proved beyond doubt that for many years not only the plaintiffs but also their cousins have been dealing with the property as if half belonged to the one and half to the other side of the family. We have little or no doubt that as between Yar Mohamad and Gulal, the lease of 1867 was taken with the intention that half should belong to the one and half to the other. The question, therefore, whether the latter became a tenant of the landlord depends on what was the intention of the parties to the *kabuliat* of 1867. If the landlord knew that he was letting the land to both, but took the *kabuliat* in the name of one alone merely for the sake of convenience, then clearly the relation of landlord and tenant was constituted between him and Gulal. But if the landlord knew nothing of the arrangements

(3) W. R. Gap. No., 1864 Act X Rulings, 61.
(4) 1 W. R. 68.

that Yar Mohamad and Gulal had made between themselves, and believed himself to be contracting with Yar Mohamad only, then these arrangements could not bind him in any way and would not create any relation between him and Gulal. To decide what was the intention and knowlege of the parties, we must look to their conduct. It is in favour of the plaintiffs that the landlords must have been conscious of that tendency, to which we have alluded, of regarding all property as heritable, which would lead them and all those who were acquainted with Imamdi to expect that all his children should share in what had been his lease. On the other hand, the lease itself tells slightly against the plaintiffs, and it must be borne in mind that from the point of view of the landlords, Imamdi's interest had come entirely to an end. But what tells most strongly against the plaintiffs, in our opinion, is that they produce no rent receipts. Every one knows the value that tenants attach to rent receipts. They do not regard them merely as acknowledgments of money but as documents of title to the property they care most about, showing on what terms they hold it. The *kabuliat* under which this land is held was given 40 years ago and it seems an extraordinary thing to us that if really the landlords originally or subsequently intended to lease the land to the plaintiffs, they should not be able to produce a single receipt for all that time. Of course, it may be admitted that the receipt would be in the name of Yar Mohamad, but we should expect that if Yar Mohamad's name had been taken merely for convenience, numerous receipts would in the course of these years show the names of Gulal and his sons as *marfatdars* and would at any rate come from their custody. The fact that not a single receipt has been produced by them seems to us to be very significant and to indicate that the landlords have never entered into any contractual relation with Gulal or his heirs. In this connection, we may refer briefly to *Woopendro Mohun Tagore* v. *Thanla Dossia* (5), to the remarks of Garth, C. J., in *Jeo Lal Singh* v. *Gunga Pershad* (6) on page 1002 and to the more recent cases of *Modhusudun Nath* v. *Hiru Ram* (7) and *Nitayi Behari* v. *Hari Govinda* (8).

Great stress has been laid on Exhibit B, a letter sent by the landlords' agent to the first plaintiff in 1896. It is very confused and ungrammatical and it is impossible to translate it exactly into good English. It runs somewhat as follows: "By way of giving Rs. 100 of the rent of Yar Mohamad you have sent the said rent.* * * It is wrong not to have sent the rest.* * * By sending the remainder, you will receive a *dakhila* on returning this letter." The document, however, does not seem to us to be as important as the Subordinate Judge holds. It is likely enough that the landlords at some time, or other came to know that Yar Mohamad had allowed Gulal an interest in the tenancy. But that knowledge would not amount to a novation of their contract. The document states as distinctly as it states anything that the rent was Yar Muhamad's rent. If such rent was sent by the first plaintiff, it is likely enough that the landlord's agent should acknowledge receiving the money and complain that no more had been sent. The words "You shall take a *dakhila*" are doubtless in favour of the plaintiff to some extent but this casual expression in a letter is not a sufficient foundation for holding that the landlord recognized the plaintiff's tenancy. And the plaintiff admits in cross-examination that when he showed this to the landlord himself, the latter at once said it was a mistake.

We need not refer to the other documents, which are said to indicate a recognition of the plaintiff's tenancy, as it is quite clear that they relate to an entirely different tenancy.

It is quite clear in spite of this letter that the landlords never assented to any division of the tenure between Yar Mohamad and Gulal, that in all proceedings in the Courts, the landlords treated Yar Mohamad as their tenant, and that before the suit for ejectment, the plaintiffs' branch of the family never claimed the right to be made a party. In our opinion, there is nothing in Exhibit B which detracts from the effect of the authorities to which we have referred, or justifies us in drawing a distinction between them and the present case.

We, therefore, think that the plaintiffs

(5) 12 W. R. 263.
(6) 10 C. 996.
(7) 25 C. 396; 2 C. W. N. 94.
(8) 26 C. 677.

have failed to prove that the landlords ever entered into the relation of landlord and tenant with them and must accordingly decree the appeal and direct that the suit be dismissed with the costs of both Courts.

Appeal decreed.

PUNJAB CHIEF COURT.

FIRST CIVIL APPEAL NO. 182 OF 1911.

April 9, 1912.

Present:—Mr. Justice Shah Din and Mr. Justice Scott-Smith.

NATHU MAL AND OTHERS—DEFENDANTS—APPELLANTS

versus

MUL CHAND, (MINOR)—PLAINTIFF—RESPONDENT.

Hindu Law—Joint family—Property acquired in the name of one of the members of a joint Hindu family—Pleadings—Appeal—Plea not raised before the first Court—Plea raised but not put in issue by first Court—Point not taken in grounds of appeal.

In the absence of some definite proof of self-acquisition, a purchase of property in the name of one of the members of a joint Hindu family must be presumed to have been made on behalf and for the benefit of that family.

Where the first Court has neither put in issue a plea of a defendant nor has given any finding thereon and the defendant has failed to raise the point in the grounds of his appeal, such plea cannot be allowed to be advanced in argument to attack the judgment under appeal.

A point not raised in the original Court cannot be allowed to be advanced for the first time in appeal.

First appeal from the order of the Subordinate Judge, 1st class, Amritsar, dated the 4th January 1911, decreeing a portion of the plaintiff's claim

Lala *Balwant Rai*, for the Appellants.

Mr. *Nand Lal*, for the Respondent.

JUDGMENT.—The following pedigree shows the relationship of the parties:—

NATHU MAL—(Defendant No. 1),

Balmokand, married *Musammat* Basant Kaur,	Hardial (Defendant No. 2).	Radha Kishen (Defendant No. 3).
Mool Chand (Plaintiff).		

Mool Chand brought a suit against his grandfather, Nathu Mal, and his uncles, Hardial and Radha Kishen, for possession by partition of a certain share in some house and shop property situate in the city of Amritsar. The allegations upon which the suit was based are contained in the plaint and it is unnecessary to set them out here. The defence in substance was that except one residential shop No. 1336, all the other shops and houses in suit were the self-acquired property of Nathu Mal; that plaintiff's father Balmokand had separated off from Nathu Mal before the said property was acquired by the latter; that a partition of the joint family property had already taken place, and that in the life-time of Nathu Mal the plaintiff was not entitled to enforce partition of the property in dispute. Upon the pleadings of the parties, several issues were framed by the District Judge, which are fully set forth in the judgment. The District Judge held that the plaintiff's father had not been separated off from Nathu Mal; that the property in suit had been acquired with the funds of the joint family, that there had been no partition of the joint family property, and that the plaintiff was entitled to a one-fourth share in the house and shop property in dispute. A decree was accordingly passed in favour of the plaintiff against the defendants for possession by partition of one-fourth share in the shops and houses specified in the plaint.

From the decree of the District Judge, the defendants have appealed to this Court, and on their behalf, Lala Balwant Rai has contended (1) that plaintiff's father had separated off from the family about 6 to 10 years prior to his death receiving Rs 500 in lieu of his share of the joint family property, namely, the residential shop No. 1336; (2) that the other shops and houses in dispute were acquired by Nathu Mal after Balmokand's separation; (3) that the plaintiff is not entitled to enforce partition of the alleged joint property of the family in the life-time of Nathu Mal, and (4) that, in any case, the plaintiff being a minor cannot ask for partition of the family property. The third and fourth contentions can be disposed of in a few words. Although in their written statements, Nathu Mal and Hardial pleaded, *inter alia*, that the plaintiff could not enforce partition during the life-time of Nathu Mal, no issue was

framed by the District Judge on this point, nor did he record a finding upon it in his final judgment. In the memorandum of appeal, this point has not been raised, and it is now too late for the appellant's Pleader to urge it in argument. The other contention, namely, that the plaintiff being a minor could not enforce partition of the family property, was never raised in the Court below, and it cannot be allowed to be advanced for the first time an this Court. We accordingly overrule the third and fourth contentions.

As regards the first contention, the evidence on the record does not establish the alleged separation of Balmokand from the family several years before his death. The plaintiff's witnesses, namely, Balmokand, Harkishen Das, Moola Mal, Gopal and Faqirya, all say that although the plaintiff's father had been keeping a separate shop for some years before his death, he was joint with Nathu Mal in board and residence and that no partition of the family property ever took place. They add that the separate shop was kept by Balmokand for the benefit of the family, and that all the shops and houses in dispute, other than the ancestral house, were acquired jointly by the father and the son. The evidence produced by the defendants on this point is far from staisfactory. Their witnesses, no doubt, say that plaintiff's father had been separated off from Nathu Mal for some time before his death; but they are not agreed as to the time when the alleged separation took place. Jowahir Shah says, that he had been separate for about 10 years before his death; Lachman Das, Natha Singh and Devi Dial do not say when the separation occured; Nika Mal and Ishar say, that he separated from Nathu Mal 9 or 10 years ago; while Pohlu Mal says that he had been carrying on separate business only for two or three years prior to his death. Such oral evidence on a point of such importance is of little value, and we are not prepared to place any reliance on it. The sale-deed, Exhibits D-I, and D-II, which relate to some of the property in dispute, no doubt, show that that property was purchased in 1896 and 1899 in the name of Nathu Mal alone, but as, in our opinion, plaintiff's father was joint with Nathu Mal at the time of those purchases, in the absence of definite evidence to prove that Nathu Mal acquired the property with his own separate funds, these acquisitions must be held to have been made on behalf and for the benefit of the joint family and the plaintiff's father had, therefore, a share in the same. The whole property in dispute must, therefore, be treated as a joint family property of the parties, and there can be no question that the share of the plaintiff, if he is entitled to enforce partition of the same, is one-fourth. The decree passed by the District Judge is, in our opinion, correct, and we dismiss the appeal with costs.

Appeal dismissed.

MADRAS HIGH COURT

SECOND CIVIL APPEAL No. 1363 OF 1909.

March 29, 1911.

Present:—Sir Ralph Benson, Kt., Judge, and Mr. Justice Sundara Aiyar.

MAHAMED KASIM SAHIB—PLAINTIFF—APPELLANT

versus

PANCHAPAKESA CHETTI—DEFENDANT—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XL, r. 1—Receiver, functions of—Suit by Receiver to recover value of property sold prior to his appointment.

The functions of a Receiver appointed under Order XL, rule 1 of the Civil Procedure Code, 1908 (section 503 of the Code of 1882) are to take possession from the parties to the suit of any moveable and immoveable property in respect of which he has been appointed Receiver, to manage it, to realise its income, and to continue in custody of it until removed by the Court.

He cannot recover from a stranger to the suit property which the latter had acquired anterior to his appointment as Receiver; nor does his appointment affect any rights previously acquired by third persons, nor has he the right to recover property sold away by the judgment-debtor on the ground that the sale is voidable under section 53 of the Transfer of Property Act, or that the sale was not binding on the creditors of the judgment-debtor.

Second appeal against the decree of the District Judge of Tanjore, in Appeal Suit No. 21 of 1909, presented against that of the Subordinate Judge of Negapatam, in Original Suit No. 31 of 1907.

The *Advocate-General*, for the Appellant.

Mr. *S. Guruswami Chetti*, for the Rerspondent.

MAHAMED KASIM v. RANCHAPAKESA CHETTI.

JUDGMENT.—The suit in this case was instituted by a Receiver appointed by the Subordinate Court of Negapatam in execution of the decree in Small Cause Suit No. 1210 of 1904 of that Court. The object of the suit was to recover certain goods, which were attached in execution of this small cause decree and of which the plaintiff was appointed Receiver, or the value of the goods. The application for the appointment of a Receiver was made on the 19th August 1907, (Exhibil D) and the order of appointment (Exhibit H) was passed on the 18th September 1907. The defendant was the purchaser of the goods from the judgment-debtor under a sale-deed, dated the 12th September 1904. He contended, *inter alia*, that the plaintiff had no authority to institute the suit as the order sanctioning the appointment of the Receiver was passed only on the 13th of September 1907, after the institution of the suit by the District Court of Tanjore, that the suit was barred by section 244 of the Civil Procedure Code, and that the plaintiff had no right to recover the goods from the defendant to whom they had been sold long before they were attached in execution of the small cause decree. The plaintiff's case was that the alleged sale of the goods was not a *bona fide* transaction, but that they were removed by Gopichettiar, the judgment-debtor, to the defendant's house on the 30th September 1904 fraudulently with the intention of defeating his creditors. The Subordinate Judge overruled all the pleas referred to above, and held that the transfer to the defendant was made by the judgment-debtor with the fraudulent intention of defeating his creditors, but that there was a debt truly due to the defendant to the extent of Rs. 200. He found that the goods were worth Rs. 500 and passed a decree in the plaintiff's favour for that amount as the goods themselves were not in existence. The plaintiff appealed to the District Court contending that the goods were worth more than Rs. 2,500 and the defendant preferred a memorandum of objections objecting to the Subordinate Judge's decree *in toto*. The District Judge allowed the memorandum of objections and dismissed the suit.

The only question we have to decide is, whether the plaintiff, as the Receiver, was entitled to sue the defendant for the goods or heir value. We have come to the conclusion that he was not entitled to do so, and the judgment appealed from is right. The order appointing the plaintiff (who we may say, by the way, was himself the decree-holder) as Receiver was passed under section 503 of the Civil Procedure Code and it is to the following effect: "Whereas the property sepecified in the annexed schedule has been attached in execution of a decree passed in the above suit on the 12th November 1904, in favour of the plaintiff, you are hereby appointed Receiver of the said property under section 503 of the Code of Civil Procedure with full powers under the provisions of that section. You are required to render a due and proper account of your receipts and disbursements in respect of the said property", etc. Then follows the schedule of the property consisting of 22 items of moveables estimated to be worth Rs. 4,000 and odd. It will be remembered that long before the date of the order, the judgment-debtor had ceased to be in possession of the goods having sold them to the defendant in 1905. The application for the appointment of Receiver brought that fact to the notice of the Court, and the prayer was that a Receiver should be appointed for collecting either the property or the price thereof. The order, however, did not appoint the plaintiff as Receiver for recovering the value of the goods from the defendant but only as Receiver of the moveable property itself. Under section 503 of the old Civil Procedure Code, when a person is appointed receiver of any moveable or immoveable property, he is entitled to take possession of it from the parties to the suit, to manage it, to realise its incomes and to continue in custody of it until discharged by the Court. The title to the property does not rest in him; see *Ram Lochun Sircar* v. *Hogg*(1). His rights arise only on the date of his appointment and not before; see *Defries* v. *Creed* (2) and *Edwards* v. *Edwards* (3). He is not entitled to recover possession from a third party, stranger to the suit, whose rights date prior to his appointment. Nor does his appointment affect any rights previously acquired by third persons—see Alderson on Receivers—section 169. In High on Receivers, the author states (section 359):

(1) 10 W. R. 430.

(2) (1865) 34 L. J. Ch. 607; 11 Jur. (N. S.) 360; 12 L. T. 262; 13 W. R. 632.

(3) (1876) 2 Ch. D. 291; 45 L. J. Ch. 391; 34 L. T. 472; 24 W. R. 713.

"As regards the title acquired by a Receiver of a National Bank thus appointed, the rule is that he holds such estate and title as the bank itself had in its assets, his title being similar in this respect to that of an assignee in bankruptcy. He is not a third person in the sense of commercial transactions, and cannot avoid a pledge of estates of the bank which could not be avoided by the corporation itself. When, therefore, the bank has deposited notes constituting a part of its assets with a creditor as security for advances, the bank itself being concluded by the deposit or pledge, the Receiver is not entitled to such notes, and cannot maintain an action therefor until the creditor or pledgee is made whole for his advances." No authority has been cited to us, nor are we aware of any, in support of the position that a Receiver appointed in the circumstances of this case has any right to recover property which has been already sold away by the judgment debtor on the ground that the sale is voidable as against the creditors on the principle embodied in section 53 of the Transfer of Property Act. Mr. Varadachari relied on a passage in paragraph 454 of High on Receivers, where it is laid down that a Receiver, in proceedings supplementary to execution in some of the States of America, may institute actions in his own name to set aside fraudulent assignments or transfers made by a debtor with the view of defeating his creditors, and may recover the property so transferred for the purpose of applying it in satisfaction of the judgments, but the passage has reference to Receivers not of particular property attached by the Court but over all the property and effects of a judgment-debtor and, as laid down in Alderson on Receivers, section 508, the object of the appointment in such cases is to discover all property which belongs to the judgment-debtor for the benefit of his creditors, and the Receiver's right extends not only to all property and rights of property of the debtor, but to property which he has disposed of in fraud of his creditors. In England also, Receivers of the debtor's estate could, formerly at least, be appointed for the benefit of his creditors. "Lord Eldon declared that it was in his day the ancient rule where a judgment-creditor found upon the issue of his execution that the debtor's estate was protected in such a way by circumstances respecting a prior title that the judgment could not be enforced, he might apply for a Receiver and that the fact that the creditor could not at law obtain satisfaction of his judgment was sufficient to entitle him to a Receiver of his debtor's estate" But there is apparently no provision in the Indian Law for the appointment of such a Receiver. We are of opinion, therefore, that the Receiver in this case had no power to maintain the suit against the defendant for the value of the goods sold to him on the ground that his sale was not binding on the creditors of the judgment-debtor.

We may also note that the plaint does not state, nor does it otherwise appear, that the Receiver obtained the permission of the Court to institute this suit. The ordinary rule is that the permission of the Court is necessary to entitle the Receiver to institute suits—see Woodroffe on Receivers, pages 241, 242, Kerr on Receivers, page 202 and High on Receivers, section 208. As, however, no objection was raised by the defendant to the maintainability of the suit on this ground, we do not think it necessary to consider the question further or to rest our decision on it.

We dismiss the second appeal with costs.

Appeal dismissed.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 855 OF 1910.

March 29, 1912.

Present:—Mr. Justice Robertson and Mr. Justice Chevis.

YAKUB KHAN AND ANOTHER—PLAINTIFFS APPELLANTS

versus

RAGHPAT RAI AND ANOTHER—DEFENDANTS—RESPONDENTS.

Custom—Alienation—Necessity—Interest in advance—Compound interest—Money required for pre-emption decree—Small sum of money paid as make-weight—Decree passed on book account—Acquiescence—Estoppel—Market-value of land.

Where the principal mortgage-money is shown to have been borrowed for legal necessity, the interest added in advance as well as the compound interest charged under the terms of the mortgage-deed cannot be disallowed. These constitute a valid charge on the mortgaged property.

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Such an alienation cannot always be regarded as unnecessary merely because the mortgagor has agreed to pay heavy interest thereon.

Interest at 12 per cent. per annum is not excessive.

If interest is not paid when due, there is nothing illegal in charging compound interest.

All that an alienee has to do is to satisfy himself that the alienor wants the money for a necessary purpose but he is not bound to go any further.

It is a valid necessity to raise money for paying in amount fixed for a decree for pre-emption of land.

Where a transaction is in the main for necessity, it cannot be upset merely because the alienor receives as make-weight a comparatively small sum of money even though no particular necessity for that sum may be shown.

Where a decree has been passed on a book-account, apparently for ordinary expenses and interest, strict proof of necessity is not required, particularly where the record of the case has been destroyed.

One hundred times the *jama* of a land is its fair price.

Where, leaving out of consideration the items overcharged by a vendee, the land has still fetched the price at this rate, the sale is not liable to be disturbed for want of full necessity.

The mere fact of the sons cultivating a part of the alienated land as tenants under the alienee during their father's life-time does not amount to an estoppel, but long delay in suing coupled with several previous unsuccessful attempts of their father to get the sale set aside raises the presumption that the sale was for consideration and necessity.

Second appeal from the order of the Divisional Judge, Jullundur Division, dated the 29th April 1910, confirming that of the Subordinate Judge, 2nd class, Jullundur, dated the 23rd December 1909, dismissing plaintiff's claim.

Mr. *Roshan Lal*, for the Appellants.

Rai Sahib Pandit *Sheo Narain*, Rai Bahadur Bakhshi *Sohan Lal* and Bakhshi *Tek Chand*, for the Respondents.

JUDGMENT.—The plaintiffs, sons of Nawab Khan, sue for a declaration that the sale of 273 *kanals*, 18 *marlas* of land sold by their father Nawab Khan to Raghpat Rai on 22nd August 1897 shall not affect their reversionary rights. It may be noted that Nawab Khan has died while the appeal has been pending in this Court. The lower Courts have held the sale binding on the plaintiffs, who have preferred a further appeal to this Court.

Nawab Khan supported his sons in their attempt to prove that he was a drunkard and a profligate, but the evidence on this part of the case has rightly been rejected by he lower Courts, and plaintiff's Counsel has ot addressed us on this part of the case.

The sale price, according to the sale-deed, was Rs. 3,630, made up as follows:—

	Rs.	a.	p.
(1) On account of profits and interest on mortgage-deed, dated 16th February 1891	465	0	0
(2) On account of profits and interest on deed of mortgage, dated 30th August 1895 ...	100	0	0
(3) On account of decree passed by Lala Atma Ram, Munsif	935	0	0
(4) On account of two bonds, *bahi* account, revenue and *malikana* of some occupancy land ...	1,635	0	0
(5) To be paid to Chuni Lal, prior mortgagee ...	495	0	0
TOTAL ...	3,630	0	0

But these items do not include the principal sums of Rs. 1,500 and Rs. 175 due by Nawab Khan on the mortgage-deeds of 16th February 1891, and 30th August 1895; these sums were included at time of attestation of mutation, and the full sale price was then acknowledged to be Rs. 5,305.

All the items except that of Rs. 495 are disputed by the appellants. To understand how matters stand, it is necessary to go into the previous transactions between the parties.

On 16th February 1891, Nawab Khan mortgaged 82 *kanals* to Ralla Ram for Rs. 1,500. This was a mortgage without possession. The sum of Rs. 74-7-0 was paid in cash before the Sub-Registrar, Rs. 165-8-0 were included as interest in advance up to *Jeth* 1948, (May-June 1891) and the rest was kept to be paid into Court in compliance with a pre-emption decree which Nawab Khan had obtained. As a matter of fact, it was found that Rs. 1,175-12-0 would be sufficient payment to fulfil the requirements of the pre-emption decree, so Rs. 1,175-12 0 were paid into Court by Ralla Ram on Nawab Khan's account on 20th February 1891, and the same day Nawab Khan was paid (as his receipt shows) the balance of Rs. 84-5-0. Thus, the full sum of Rs. 1,500 was made up. The deed provided that after the expiry of the term for which interest in advance had

been deducted, the mortgage-debt was to bear interest at the rate of Rs. 90 *per* harvest and in case of default compound interest was to be charged at the rate of Re. 1-9-0 per cent. Ralla Ram and Raghpat Rai were brothers, and joint, so this mortgage is really equivalent to one in favour of the present alienee. Now, at this very time, Nawab Khan was in debt to one Gande Rai, who had obtained a decree against him, and it would doubtless have been wiser for him to clear off his existing liabilities before he proceeded to encumber his land by raising money to pre-empt the land of others, but all that Ralla Ram had to do was to satisfy himself that Nawab Khan wanted the money for a necessary purpose, and it was sufficient for him to know that Nawab Khan had got a pre-emption decree and he was not bound to go further and to catechize Nawab Khan as to the existence of other liabilities and how he proposed to meet them. As a matter of fact, Nawab Khan failed to get any benefit from his present pre-emption decree, for his creditor, Gande Rai, attached the Rs. 1,175-12-0. Ralla Ram acted as *mukhtar* in cases for Gande Rai, but deposes that in this particular case he did not so act, but that Gande Rai himself got the money attached. No doubt, the matter looks peculiar, but there is no proof that Ralla Ram, when he paid the money into Court, knew that Gande Rai would attach it. So we think the sum of Rs. 1,175-12-0 must be passed as for necessity. As to the sums of Rs. 84-5-0 and Rs. 74-7-0 paid in cash; these are comparatively small sums, and if a transaction is in the main for necessity, we are not prepared to upset it simply because the alienor receives as make-weight a small sum of money, even though no particular necessity for that sum may be shown. As to the item of Rs. 165-8-0 deducted as interest in advance; this was, no doubt, a very severe charge for interest for only about three months, but Nawab Khan agreed to it, and we do not think an alienation can always be regarded as unnecessary simply because the mortgagor agrees to pay heavy interest. As to the future interest; Rs. 180 per annum is not excessive interest to charge on a sum of Rs. 1,500, being at the rate of 12 per cent., and, of course, if interest is not paid when due, there is nothing illegal in charging compound interest.

Then, on 29th August 1895, Nawab Khan executed two bonds one (registered) for Rs. 1,000, and one (unregistered) for Rs. 123, total, Rs. 1,123. This sum is made up as follows:—

	Rs.	a.	p.
Interest on mortgage-deed of 16th February 1891, for 9 harvests at Rs. 90 per harvest	810	0	0
Interest on arrears of interest on same deed ...	303	12	0
Costs of registration, etc., ...	9	4	0
TOTAL ...	1,123	0	0

Counting from *Jeth* 1948 (=May-June 1891) up to which period interest had been deducted in advance, interest for only 8 harvests was really due at the time, but apparently interest has been charged for 5 *rabi* and 4 *kharif* crops, though it certainly seems rather sharp practice to charge for 5 *rabi* crops for a period from May 1891-August 1895. If no interest had been deducted in advance and interest had been calculated simply from date of execution of the mortgaged-deed (*i. e.*, 16th February 1891) up to date of execution of these bonds, then, no doubt, it would be fair to reckon interest as due for 9 harvests.

Then, on 30th August 1895, comes a mortgage of 37 *kanals*, 16 *marlas* to Raghput Rai for Rs. 175, made up as follows:—

	Rs.	a.	p.
Cash before Sub-Registrar for land revenue ...	150	0	0
Interest deducted in advance up to 1952 (=January 1896)	25	0	0
TOTAL ...	175	0	0

This mortgage was without possession, future interest was to be charged at the rate of Rs. 40 per annum, with compound interest on arrears at the rate of 12 per cent. per annum.

On 11th August 1897, Raghpat Rai obtained a decree against Nawab Khan on book-account for Rs. 869 and Rs. 68 costs, total Rs. 937-0-0.

It is now possible to see how the different items of the consideration for the sale-deed now in dispute are made up.

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Interest on the mortgage-deed of 16th February 1891, had been charged up to date in the bonds of 29th August 1895, and only four more harvests had passed when the sale-deed in question was written, so only Rs. 360-0-0 was due as interest when the sale-deed in question was written. But there is the compound interest to be added, and so the interest is swelled to Rs 465-0-0

Then comes the interest on the deed of Rs. 175-0-0 at Rs. 40-0-0 per annum, *i.e.*, Rs. 80-0-0, and the compound interest swells the amount to Rs. 100 0-0.

Then comes the item of Rs. 935-0-0 due on the decree, and here, for the first time, we find no further interest charged, but a trivial deduction of Rs. 2-0 0. As to this decree, it would be extremely hard on Raghpat Rai to call on him after all these years again to prove his book-debt. The *bahis* still exist, and as he once got a decree on this debt, we see no sufficient reason to doubt the genuineness of it. All that can be said on an examination of the account is, that it seems to include a very large amount of interest and compound interest but this is inevitable when a *baki* account goes on for long and fresh balances are struck from time to time.

Then comes the item of Rs. 1,635-0-0, principal and interest, on the bonds for Rs. 1,123-0 0. And, lastly, there is the undisputed item of Rs. 405-0-0. which went to pay off the prior mortgagee. No doubt, the charges on account of interest have throughout the account been very severe, but the circumstances of the whole case must be carefully considered before we can upset the sale. When mutation was effected in January,. 1898, Nawab Khan raised certain objections in vain, and then in April 1898, he set up his wife to claim this land and some other land as having been gifted to her in payment of her dower. This suit failed. Then no steps were taken till the present suit was lodged in August 1909. The long delay cannot be attributed solely to the youth of the plaintiffs, for they have passed their majority by some years. One result of the long delay is that it is much harder now for the defendant to prove exactly what was really due to him at the time of the sale. For instance, the records of the case in which a decree was passed by the Munsif are now destroyed. The mere fact that the plaintiffs cultivated part of the land in dispute as tenants under the defendant during their father's life-time does not, in our opinion, operate as an estoppel. But, having regard to the long delay, we think that the defendant has proved, so far as can now be reasonably expected of him, that the sale was for consideration and necessity Even if we leave out of consideration certain items which seem to have been over-charged in the accounts, we still think the land has been sold for a reasonable price, the area being only 273 *kanals* and the revenue only Rs. 37-5-9. Taking the price at 100 times the reveune, the sale price would be only Rs. 3,740-0-0 (approximately) and this much at least seems to have been fairly due from Nawab Khan, after making all possible deductions for over-charges. In taking 100 times the *jama* as a fair sale price, we bear in mind the fact that the land was sold as long ago as 1897, and we do not think 100 times the revenue to be too low an estimate of the sale price existing in 1897.

The appeal fails and is dimissed, but, in consideration of the over-charges which seem to have been made by the vendee in certain cases, we leave the parties bo bear their own costs in this Court.

Appeal dismissed.

CALCUTTA HIGH COURT.

REGULAR CIVIL APPEAL NO. 134 OF 1909.

July 31, 1912.

Present:—Sir Ashutosh Mookerjee, KT., Judge and Mr. Justice Holmwood.

Kumar KALANAND SINGH AND OTHERS DEFENDANTS—APPELLANTS

versus

Bibi JARAO KUMARI AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Patni Regulation (VIII of 1819*), ss.* 9, 13 *cl.* (3) (4)—*Payment of* patni *rent by* darpatnidar—*No* dar-patni *rent due at the time—Payment from private fund —Possession taken by* darpatnidar *Suit for arrears of* dar-patni *rent—Set off, whether can be claimed by* dar-patnidar *without rendering account—Eviction by landlord—Suspension of rent—What is necessary to constitute eviction—Actual physical expulsion, if necessary—Mesne profits, decree for, obtained by evicted tenant, whether revives claims for rent—Defaulting* patnidar *purchasing tenure—Evicting* dar-patnidar—*Annulment of* dar-patni.

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The plaintiffs were the *patnidars* and the defendants *dar-patnidars* under them. The defendants, to preserve their own interest, made certain payments to save the *patni* from sale for arrears of rent under Regulation VIII of 1819, section 13. While making the payments, the defendants stated that the rent due from them had been paid in full and that what was paid was an advance from private funds. They then obtained possession of the *patni taluk*. The plaintiffs brought a suit for rent in respect of the *dar-patni*. The defendants did not offer to render an account of the sums collected by them during their possession of the tenure but asked that the amount sought to be recovered by the plaintiffs may be set off against the amount deposited by them:

Held, that the defendants' plea must be overruled, that they could not drive the plaintiffs to a separate suit to determine whether they had or had not by means of their possession already realised the amount advanced by them, and that the defendants were not entitled to claim a set-off.

The principle of law is that a landlord who has evicted his tenant is not entitled to claim rent from him in respect of the period of eviction.

Chandra Kant Das v. *Ramanath Barman*, 6 Ind. Cas. 478; 11 C. L. J. 591 and *Rasseswari Chodhurani* v. *Raja Sri Sourendra Mohun Tagore*, 5 Ind. Cas. 105; 11 C. L. J. 601, relied upon.

To constitute an eviction within the meaning of the above rule, it is not necessary that there should be an actual physical expulsion from any part of the premises; any act of a permanent character done by the landlord with the intention of depriving the tenant of the benefit of the enjoyment of the demised premises or any part thereof will operate as an eviction.

Upton v. *Townend*, 17 C. B. 30; 25 L. J. C. P. 44; 1 Jur. (N. S.) 1089; 4 W. R. 56 and *Hoymobutty Dossee* v. *Sreekissen Nundy*, 14 W. R. 58, followed.

The fact that the evicted tenant has obtained a decree for mesne profits, does not revive the claim for rent which was extinguished by reason of the misconduct of the landlord, the decree for mesne profits in his favour does not necessarily restore him to all the advantages he would have enjoyed, had his possession not been illegally disturbed.

Kadumbinee Dossia v. *Kasheenauth Biswas*, 13 W. R. 338 and *Chandra Kanta Das* v. *Rama Nath Barman*, 6 Ind. Cas. 478; 11 C. L. J. 591, relied upon.

Gobind Chund v. *Mun Mohan*, 14 W. R. 43, referred to.

A defaulting *patnidar* purchased in the name of another person, the *patni* in arrears, in contravention of the express provisions of section 9 of the Patni Regulation, and took possession of the *dar-patni* tenure in the name of the ostensible purchaser:

Held, that the *patnidar* was not entitled to annul the *dar-patni* tenure created by himself and as he, under colour of law, evicted the *dar-patnidar*, he was not entitled to get any rent from the latter for the period of dispossession.

Appeal from the decree of the Sub-Judge of Purneah, dated December 19th, 1908.

Babus *Jogendra Nath Mukerjee* and Moulvi *Syed Muhammad Tahir*, for the Appellants.

Babus *Hemendra Nath Sen* and *Khetra Mohan Sen*, for the Respondents.

JUDGMENT.—This is an appeal on behalf of the defendants in a suit for recovery of arrears of rent of a *dar-patni* tenure. The rent is claimed in respect of three years from the 13th April 1904 to the 13th April 1907, at the rate of Rs. 3,416 a year, with cesses at the annual rate of Rs. 316-9-0. The Subordinate Judge has decreed this claim in full. Upon the present appeal, that decree has been assailed on three grounds, namely, *first* that as the defendants made payments of *patni* rent to save the superior tenure from sale under section 13, clause (4), of Regulation VIII of 1819, the sum claimed by the plaintiff ought to be set-off against the sum so paid, with the result that the suit should be dismissed in its entirety; *secondly*, that the claim in respect of the period from the 14th May 1904 to the 16th September 1905 ought to be disallowed, because the defendants were kept out of possession of the property by reason of the unlawful conduct of the plaintiffs themselves; and *thirdly*, that credit ought to have been allowed for two payments of Rs. 600 and Rs. 2,000 respectively.

In support of the first contention, our attention has been invited to the fact that on the 17th November 1905 and 15th May 1907, the defendants paid Rs. 7,927 and Rs. 17,707, respectively, in respect of the rent payable by the plaintiffs' *patnidars* to their superior landlord. With reference to these payments, it has been argued that as the defendants have paid, on account of the plaintiffs, a sum far in excess of the amount now sought to be recovered as arrears of rent, the claim ought to be disallowed in its entirety. In our opinion, there is no foundation for this contention. Under section 13 of Regulation VIII of 1819, an under-tenant is entitled to make a payment to save the *patni* tenure from sale with a view to the preservation of his own interest, and when he does so, his position is regulated by the provisions of clauses 3 and 4 of the section. If the amount lodged is rent due to the *patnidar* from the under-tenant, the fact has to be stated at the time of the deposit, and the amount is directed to be carried to the account of the tenant lodging it, to be deducted from any claim of rent that may at the time be pending or be thereafter brought forward against him by the proprietor of the advertised tenure on account of the year or

months for which the notice of sale may have been published. If, on the other hand, the amount has been lodged by an under-tenant, who has already paid the whole of the rent due from himself, the amount lodged is an advance from private funds and not a disbursement on account of the rent. In such a contingency, it is expressly directed that the deposit shall not be carried to credit in or set against future demands for rent, but shall be considered as a loan made to the proprietor of the tenure preserved from sale by such means, and the *taluk* so preserved becomes security to the person making the advance, who is considered to have a lien thereon in the same manner as if the loan had been made upon mortgage; and he further becomes entitled, on applying for the same, to obtain immediate possession of the tenure of the defaulter in order to recover the amount so advanced from any profits belonging thereto. The possession thus obtained is to continue till the debt has been re-paid, and the defaulter is free, by payment of whatever is due, to recover his tenure from the hands of the person who has made the advance and entered into possession in consequence. In the case before us, the appellants pursued the latter course. They stated specifically, when they made the deposits, that the rent due from them had been paid in full and that what was lodged was an advance from private funds. Upon this representation deliberately made, they obtained possession of the *patni taluk* and have continued in possession up to the present moment. As the appellants are *dar-patnidars* of a portion only of the lands comprised in the *patni* tenure, the result has been that, although the landlords are entitled to realise rent from them only in respect of the *dar-patni* lands, they are now in possession of the entire land of the *patni taluk*. The appellants have argued before us that upon the facts now disclosed, it is obvious that the statement made on their behalf at the time of the deposits was untrue in part at least, that a portion of the rent payable by them was in arrears, and that consequently they should have proceeded under clause (3) of section 13 of the Regulation. It has been contended that inasmuch as if they had done so, they would have been entitled to deduct the amount deposited from the claim of the rent then pending or thereafter brought forward against them by the *patnidar*, they should be placed in the same position now. In our opinion, it is not open to them to resile from the position they designedly took up at the time they made the deposits. In fact, the contention of the appellants is manifestly unreasonable. They have, under the colour of clause (4) of section 13 of Regulation VIII of 1819, taken possession of the tenure and enjoyed its profits. They do not offer to render an account in the present litigation of the sums collected by them during their possession of the tenure; they merely ask that the amount sought to be recovered by the plaintiffs, may be set off against the amount deposited by them, with the result that the claim may be dismissed in its entirety, while the plaintiffs are to be driven to a separate suit to determine whether the defendants have or have not, by means of their possession of the *putni* tenure, already realised the amount advanced by them. This argument has only to be stated to be repudiated as wholly unsound. It is plain that the defendants are not entitled to plead at the stage that clause (4) of section 13 of the Patni Regulation has no application to their case, and under that clause, they cannot obviously claim a set off, The first contention of the appellants, therefore, fails.

In support of the second contention it has been argued that the appellants were deprived of possession of the *dar patni* tenure by reason of the fraudulent conduct of the plaintiffs, and that, consequently, the latter have lost their claim to rent during the period of dispossession, as ruled in *Kadumbinee Dossia* v. *Kasheenauth Biswas* (1) and *Chandra Kanta Das* v. *Rama Nath Barman* (2). The facts, in so far as they are material for the decision of this question, are indisputable. The plaintiffs wilfully defaulted to pay *patni* rent to the superior *zemindar*. The *zemindar* thereupon proceeded to bring the tenure to sale under Regulation VIII of 1819. At the sale, the plaintiffs themselves purchased the tenure in the name of one Hukum Chand Boid on the 14th May 1904. The nominal purchaser obtained delivery of the property through the Collectorate. He professed to be a stranger to the proceedings

(1) 13 W. R. 338.
(2) 11 C. L. J. 591; 6 Ind. Cas. 478.

and claimed to have acquired the *patni* free of the interest of the *dar-patnidar*. He was, consequently, placed in possession and continued in occupation of the *dar-patni* till the 16th September 1905, when he was ousted by virtue of a decree in a suit commenced by the present appellants for reversal of the *patni* sale. In that suit, it was declared on the 24th August 1905 that Hukam Chand Boid was a nominal purchaser for the benefit of the plaintiffs; in other words, that the defaulter had purchased the tenure in contravention of the express provisions of section 9 of Regulation VIII of 1819. There can be no room for controversy that the plaintiffs as purchasers under Regulation VIII of 1819 were not entitled to annul the *dar-patni* tenure created by themselves or their predecessors; they could not take recourse to the provisions of the Patni Regulation to enable them to effectuate a fraud upon the under-tenure holders. In support of this proposition, reference may be made to the cases of *Nawab Sidhee Nuzur Ali Khan* v. *Oojoodhyaram Khan* (3), *Mahomed Nasseer* v. *Kishen Mohun* (4), *Gouree Kamul* v. *Raj Kishen* (5), *Madhub* v. *Joy Kumaree* (6), *Gouree Kamul* v. *Raj Kristo* (7), *Koylash Chunder Banerjee* v. *Kalee Prosunno Chowdhry* (8), *Srinath Ghose* v. *Haro Nath Dutt* (9), *Kishore Chunder Sen* v. *Kally Kinkur* (10), *Jatendra Mohun Tagore* v. *Debendra Monee* (11), *Ram Lall* v. *Debendra* (12), *Fakir Chander* v. *Ram Kumar* (13) and *Harendra Lal Chowdhury* v. *Salimullah* (14). The Court will in a matter of this description strip off all disguises and look at the transaction in its naked reality. What then is the true character of the events in the case before us? The plaintiffs deliberately brought the *patni* tenure to sale and, in defiance of statutory provisions, purchased the property themselves; they then took possession of the *dar-patni* tenure in the name of the ostensible purchaser. The whole transaction was a flagrant abuse of the provisions of the Regulation, and was nothing less than a device, carefully planned and successfully carried out, to dispossess the under-tenure-holders. In essence, therefore, the plaintiff, under colour of law, evicted the defendants. The principle that the landlord who has evicted his tenant is not entitled to claim rent from him in respect of the period of eviction is, consequently, applicable. It cannot be disputed, in view of the decisions analysed in the cases of *Chandra Kant Das* v. *Ramanath Barman* (2) and *Rasseswari* v. *Sourendra* (15), that the lessee is not liable for rent accruing due after he has been evicted from the premises by the landlord so long as the eviction continues. It is further clear, as laid down in the cases of *Upton* v. *Towrnend* (16) and *Hoymobutty Dossee* v. *Sree Kissen Nundy* (17), that to constitute an eviction within the meaning of this rule, it is not necessary that there should be an actual physical expulsion from any part of the premises; any act of a permanent character done by the landlord with the intention of depriving the tenant of the enjoyment of the demised premises or any part thereof, will operate as an eviction. There is no controversy in the present case that, as the result of the fraudulent conduct of the plaintiffs, the defendants were actually precluded from enjoying possession of the *dar-patni* tenure from the 14th May 1904 to the 15th September 1905; they are accordingly, *prima facie*, not liable for the rent of this period. The learned Vakil for the respondents has, however, very earnestly appealed to us to show some consideration to the plaintiffs. He has pointed out that in the suit commenced by the appellants to set aside the *patni* sale, they obtained a decree for recovery of possession with mesne profits; and he has argued that as they have obtained a decree for mesne profits, they should, in justice, be made liable for the rent payable. In our opinion, there is no foundation for this

(3) 10 M. I. A. 540; 5 W. R. (P. C.) 83.
(4) W. R. F. B. 92.
(5) 5 W. R. 106.
(6) 5 W. R. 201.
(7) 14 W. R. 369.
(8) 16 W. R. 80.
(9) 9 B. L. R. 220; 18 W. R. 240.
(10) 20 W. R. 333.
(11) 2 C. L. R. 419.
(12) 8 C. 8.
(13) 31 C. 909 (P. C.); 8 C. W. N. 721; 1 A. L. J. 420; 6 Bom. L. R. 741; 31 I. A. 195.
(14) 12 C. L. J. 336; 7 Ind. Cas. 21.
(15) 11 C. L. J. 601; 5 Ind. Cas. 105.
(16) 17 C. B. 30; 25 L. J. C. P. 44; 1 Jur. (N. S.) 1089; 4 W. R. 56.
(17) 4 W. R. 58.

contention. As was pointed out in the cases of *Kadanbini Dassee* v. *Kashi Nath Biswas* (1) and *Chandra Kanta Das* v. *Rama Nath Barman* (2), the fact that the evicted tenant has obtained a decree for mesne profits does not revive the claim for rent which was extinguished by reason of the misconduct of the landlord; the decree for mesne profits in his favour does not necessarily restore him to all the advantages he would have enjoyed, had his possession not been illegally disturbed: *Gobind Chund* v. *Mun Mohanjha* (18). We may further observe that it might possibly have been open to the present respondents, when the mesne profits were assessed, to contend that profits ought to be calculated, not at the gross collections from the tenants, but at that sum reduced by the rent payable to the superior landlord. But no objection of this kind was taken in those proceedings, and the judgment of the Subordinate Judge upon the question of mesne profits was affirmed by this Court on the 13th March 1912. It is, therefore, not open to us to re-investigate that matter; and if we were now to accede to the contention of the respondents, the result would be that they would now be allowed credit for a sum which they might possibly have claimed in the proceedings for assessment of mesne profits. This clearly is not permissible; and in so far as the claim for rent is concerned, it is plainly barred upon the principle already explained. The second ground, therefore, must prevail.

In so far as the third ground is concerned, it is wholly unsubstantial. There was no suggestion in the Court below that any payments had been made by the defendants for which the plaintiffs were bound to allow credit. We are really not concerned with the sums alleged to have been deposited in Court; the deposits were not such as the plaintiffs were bound under the law to recognise and accept. The third ground, therefore, fails.

The result is that this appeal is allowed in part and the decree of the Subordinate Judge modified. The claim for rent in respect of the period from the 14th May 1904 to the 15th September 1905 will stand dismissed. The amount will be calculated on the basis that the annual rent payable together with cesses is Rs. 3,732-9-0. Subject to this variation, the decree of the Court below will be affirmed. As the victory has been a divided one, each party will pay his own costs throughout the litigation.

Appeal allowed in part.

(18) 14 W. R. 43.

MADRAS HIGH COURT.

APPEAL AGAINST ORDER No. 46 OF 1911.

August 20, 1912.

Present:—Sir Ralph Benson, Kt., Offg. Chief Justice, and Mr. Justice Napier.

ARUNAGIRI MUDALIAR—PETITIONER—APPELLANT

versus

UTHANDO MUDALI—RESPONDENT.

Limitation Act (IX of 1908), *Sch. I, Art.* 180—*Civil Procedure Code (Act XIV of* 1882), *ss.* 311, 314—*Court sale—Application for delivery,* 3 *years after confirmation of sale, barred.*

A Court sale was confirmed on 28th July 1906 and an application for delivery of the property was not made till the 19th January 1910:

Held, that under section 314, Civil Procedure Code, 1882, the sale became absolute on 28th July 1906 and not on the day on which a petition filed by a third party under section 311 of the Civil Procedure Code, 1882, was dismissed.

The application for delivery of the property, having been made after three years from that date, was barred under Article 180, Schedule I, of the Limitation Act.

Appeal against the order of the District Court of South Arcot, dated 10th January 1911, in Appeal Suit No. 191 of 1910, presented against the order of the Court of the District Munsif of Tiruvannamali, dated the 14th April 1910, in Original Petition No. 53 of 1906, Original Suit No. 687 of 1892, on the file of the Court of the District Munsif of Tindivanam.

Mr. *C. Padmanabha Iyengar*, for the Appellant.

Mr. *K. Jagannadha Iyer*, for the Respondent.

JUDGMENT.—The application for delivery of the property was made on the 19th January 1910, *i.e.*, after the Limitation Act of 1908 had come into force. The sale had been confirmed on the 28th July 1906, and thereupon became absolute under section 314 of the

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Code of Civil Procedure, 1882. It has been contended before us that the sale did not become absolute until the final dismissal of the petition put in by a third party under section 311 of the Code of Civil Procedure, 1882, but we are unable to accept this contention. On these facts, we are of opinion that the Article of Limitation Act applicable to the present application is Article 180 of the 2nd Schedule of the Act of 1908, the period of limitation being three years from the date when the sale became absolute.

We, therefore, dismiss this appeal with costs.

Appeal dismissed.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 1017 OF 1910.

July 18, 1912.

Present:—Mr. Justice Rattigan.

RAM DITTA MAL—PLAINTIFF—APPELLANT

versus

Musammat KARAM DEVI—DEFENDANT—RESPONDENT.

Pardanashin *lady—Hard terms of mortgage—Pleadings—New plea in further appeal not allowed—Compensation for improvements—Costs of defending a suit by third person to establish his right in mortgaged property.*

An Indian lady, who does not ordinarily appear in public, but goes about the Bazar to make purchases for the household, can hardly be described as *parda nashin* in the strict sense of the term.

Such a lady cannot be relieved from a transaction on the ground that its terms are unusually hard, particularly where she had the opportunity of taking independent advice.

A party cannot be allowed to put forward a new case in appeal.

A mortgagee is entitled to get compensation for improving the mortgaged property if allowed to do so by the mortgagor, and the money due to the former is a charge on the latter's interest in the mortgage-property.

When a mortgagee, with knowledge that a third person had an interest in the mortgaged property, accepted a mortgage of the property, he cannot claim from his mortgagor costs incurred by him in the litigation for opposing the claim of that person.

Second appeal from the order of the Divisional Judge, Lahore, dated 10th June 1910, modifying that of the Subordinate Judge, 1st class, Lahore, dated 10th February 1910, decreeing claim in parts.

Mr. *C. Bevan Petman*, for the Appellant.

Rai Bahadur Lala *Sukh Dial* and Lala *Roshan Lal*, for the Respondents.

JUDGMENT.—The facts of this case are fully stated in the judgment of the Sub-Judge, who granted plaintiff a decree for the full amount of the principal money claimed by him, and also decreed, though in a modified form, plaintiff's claim for compensation in respect of buildings erected by him and costs incurred by him in the previous litigation with *Musammat* Gujri, and the full amount of interest for which he prayed.

The Divisional Judge on appeal held that the plaintiff was entitled to recover merely Rs. 300, being half of the alleged principal consideration of the mortgage-deed and varied the decree of the Sub-Judge by transferring it into a simple money-decree for that amount against defendant and he further directed that plaintiff should pay defendant's costs throughout.

I have heard elaborate arguments by Mr. Petman for the plaintiff-appellant and by Mr. Sukh Dial for defendant-respondent, and I have also carefully considered the judgment of the Divisional Judge. I am, as a result, obliged to differ from the findings of the latter. The defendant-mortgagor is, no doubt, an Indian lady who does not ordinarily appear in public, but she can hardly, I think, be described as a *parda nashin* in the strict sense of the term. She certainly goes about the bazar to make purchases for the household and appeared, though probably in a *burqa*, before the petition-writer. But, however this may be, it is clear from the evidence that in this transaction, she had the advice of her brother-in law, Radha Kishen, who attested not only the deed of mortgage but also the two receipts that were executed on the same date. Mr. Sukh Dial argues that Radha Kishen had a deep game of his own to play, and that he was endeavouring to rob *Musammat* Gujri, (the mortgagor's sister) of all rights that she had in the family property, and that it was with this object in view that he was encouraging the

mortgagor to pose as the sole owner of the property mortgaged. I confess I am not able to appreciate properly this rather subtle argument, but I fail to see any ground for supposing that Radha Kishen was in collusion with the mortgagee or that he had any object to gain by not giving proper advice to his sister-in law, the defendant. Mr. Sukh Dial also argues that the sum of Rs. 300 (half of the consideration-money), which is said to have been paid to Madho Singh, a prior creditor, for money lent to the mortgagor's deceased mother, and to the mortgagor herself, in order to defray the expenses of a pilgrimage to the Ganges and expenses connected with the mother's funeral, was wholly fictitious, and that no such sum was due to Madho Singh. This, however, is an entirely new plea, and in the original Court, the contention was, that though the debt was due to Madho Singh, the money had not been paid by the plaintiff. I cannot allow the defendant to put forward a new case at this late stage, and the question, therefore, is whether or not Madho Singh received Rs. 300 through the plaintiff. Upon this point, the evidence is, I think, conclusive. There are the two receipts filed in the case and also the evidence of the petition-writer and Madho Singh himself, the latter distinctly stating that he has been duly paid the debt due to him. In face of this statement, it is impossible for defendant to contend that Madho Singh has not been paid.

The general drift of Mr. Sukh Dial's argument was that the mortgage in question was one of an inequitable and unconscionable character and as such not binding upon the defendant, an Indian lady, who could not understand its terms. This, again, is an argument which was not put forward in precisely this form in the first Court, but, apart from that objection, I can find no force in it. Some of the terms were, no doubt, onerous and in all probability could not be enforced if plaintiff was suing to enforce the mortgage in all its strictness. I also agree that the provision as to interest was one that cannot commend itself to a Court of Justice, but, speaking generally, I see no reason to doubt that the mortgagor and Radha Kishen thoroughly understood the terms and conditions of the deed which were read over and explained to the mortgagor by the Sub-Registrar.

In the circumstances, I think the plaintiff is entitled to claim the amount allowed to him by the District Judge as compensation for the building which he put up. As regards interest, however, I think I shall be doing justice to both parties if I direct that the principal amount of Rs. 600 shall bear interest at the rate of 6 per cent. per annum up to the date of suit. I do not think that plaintiff is entitled to any compensation for costs incurred by him in the previous litigation as I find it difficult to believe that he, a neighbour of the defendant, was unaware of the existence of *Musammat* Gujri and of her rights in the property. He accepted a mortgage from the defendant with knowledge of the risks that he ran and I see no reason why he should not pay the costs incurred by him in contesting *Musammat* Gujri's claim.

The result is, that I accept this appeal and, setting aside the decree of the Divisional Judge, I grant plaintiff a decree for (*a*) Rs. 600 principal, (*b*) interest thereon at the rate above specified up to the date of suit and (*c*) Rs 233-10-0 as compensation for the building erected by him. The above sum will be a charge on defendant's interests in the mortgaged property

Proportionate costs to be paid by defendant throughout.

Appeal accepted.

MADRAS HIGH COURT.

APPEAL AGAINST APPELLATE ORDER No. 68 OF 1910.

August 13, 1912.

Present:—Sir Ralph Benson, Kt., Offg. Chief Justice, and Mr. Justice Napier.

KOMANDUR KAMALAMMAL—PETITIONER—APPELLANT

versus

KOMANDUR NARASIMHACHARLU AND OTHERS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXXIV, r. 6—Mortgage suit—Successful party—Personal decree for costs.

KHIDMAT RAI v. ANANT RAM.

Under Order XXXIV, rule 6 of the Code of Civil Procedure, the successful party in a mortgage suit which is contested is entitled to have a personal decree for costs against the persons who contested the suit, when the mortgage property has been sold and found insufficient.

Kamalammal v. *Komandur Narasimhacharlu*, 30 M. 464; 17 M. L. J. 317; 2 M. L. T. 359, referred to.

Appeal against the appellate order of the District Court of Nellore, in Appeal Suit No. 173 of 1909, dated 11th March 1910, presented against that of the Court of the District Munsif of Nellore, in M. P. No. 54 of 1909, in Original Suit No. 563 of 1901.

Mr. *K. Bhashyam*, for the Appellant.

Mr. *K. P. Lakshman Row*, for the Respondents.

JUDGMENT.—We do not think that the order of the Court below can be supported. The present appellant, who was the successful party in the mortgage suit, which was defended at every stage by the present respondents, was entitled to have a personal decree against the defendants for his costs in that suit. He sought to have the decree amended so as to give him such personal decree, but this Court decided [see report of the case in *Kamalammal* v. *Komandur Narasimhacharlu* (1)] that the application was premature and that such a decree could only be given if the sale proceeds should prove insufficient to satisfy the amount due under the mortgage including costs. The property has now been sold and has proved insufficient.

The appellant is, we think, entitled, under Order XXXIV, rule 6 of the Code of Civil Procedure, to now have a personal decree against the respondents for the amount of costs not covered by the sale-proceeds, *viz.*, Rs. 223-0-11, with costs throughout.

(1) 30 M. 464; 17 M. L. J. 317; 2 M. L. T. 359.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL NO. 536 OF 1910.

March 21, 1912

Present:—Mr. Justice Kensington.

KHIDMAT RAI—DEFENDANT—APPELLANT

versus

ANANT RAM—PLAINTIFF AND ANOTHER—DEFENDANT—RESPONDENTS.

Pre-emption—Deposit of 1/5th of purchase-money plus *costs of improvements—Punjab Pre-emption Act (II of 1905), s. 19—Court-fee—Value of buildings.*

A pre-emptor, who has taken no steps to obtain an injunction against a vendee, who has been carrying on his building operations after the purchase of the pre-empted property and before the institution of the suit, is bound to pay Court-fee on the total value of the property as well as the improvements made thereon, and must deposit one-fifth of such total amount, under section 19 of the Punjab Pre-emption Act, II of 1905.

Muhammad Afzal Khan v. *Nand Lal*, 16 P. R. 1908: 13 P. W. R. 1907 (F. B.); 143 P. L. R. 1908 and *Abdul Rahman* v. *Charag Din*, 19 P. R. 1908; 38 P. W. R. 1908, relied upon.

Second appeal from the order of the Divisional Judge, Jullundur Division, dated the 16th April 1910, reversing that of the Sub-Judge, 2nd class, Jullundur, dated the 16th December 1909, rejecting the plaint.

Rai Sahib Pandit *Sheo Narain*, for the Appellant.

Lala *Rama Nand*, for the Respondents.

JUDGMENT.—This case is before me as an appeal from an order of remand passed under Order XLI, rule 23, Civil Procedure Code. The circumstances leading up to the appeal are as follows:—

On the 19th September 1908, the appellant bought a house for Rs. 400 and very shortly after he began re-construction on a much larger scale.

On the 10th May 1909, the plaintiff asserted a right of pre-emption and served the vendee with a notice to surrender the property. On the 15th May, the vendee declined to do so saying that he had rebulit the property at an expenditure of Rs. 4,000. Plaintiff had admittedly taken no steps to obtain an injunction while these building operations were in progress.

On the 18th May, plaintiff instituted the present suit for pre-emption claiming the house at Rs. 100 on an allegation that the sale price of Rs. 400 was fictitious.

On the 3rd June, the vendee objected that the house had been re-constructed for Rs. 2,500. A local Commissioner was, thereafter, appointed, apparently by order of 11th November, to ascertain the existing market-value. This was reported to be Rs. 2,512.

On the 3rd December, plaintiff was ordered to pay Court-fee on Rs. 2,512, and he had also been required to deposit 1/5th of the amount under section 19 of the Pre-emption

Act. These orders were to be complied with by the 16th December.

Instead of complying with the instructions of the Court, the plaintiff (or his legal adviser) took the, not uncommon, but very foolish, course of assuming that he knew more about the law than the Court. He deposited Rs. 80 only, as being 1/5th of the sale price of Rs. 400, and paid in no additional Court-fee. The Sub-Judge thereon rejected the plaint, by an order referring to the deposit money only, and saying nothing about the additional Court-fee as he should have done under Order VII, rule 11, Civil Procedure Code. The plaintiff then appealed to the Divisional Court which has overlooked the question of Court-fee altogether, and has treated the matter of deposit under section 19 of the Pre-emption Act as if this was still open to argument. I can see no good reason why the learned Divisional Judge should not have decided this matter at once instead of remanding to the lower Court if he thought it open to doubt, and on this ground alone his decision was improper.

But I am also quite unable to understand why the Divisional Court considered that the plaintiff had given a sufficient excuse for not obeying the orders of the Sub-Judge. He may have thought the orders given to him wrong, but a man, who engages in questionable litigation, should do what he is told and not assume the attitude that he is entitled to treat all orders given to him as open to argument. If he does assume that contentious attitude, he must take the risk of being in the wrong.

I have no difficulty in holding that plaintiff has put himself entirely in the wrong. The Sub-Judge's orders were correct on the questions both of Court-fee and deposit, see the Full Bench rulings, *Muhammad Afzal Khan* v. *Nand Lal* (1) and *Abdul Rahman* v. *Charag Din* (2), and the wording of section 19 (1), Pre-emption Act. The Sub-Judge's order rejecting the plaint was defective in so far as it dealt with the question of deposit only, but this will not help the plaintiff, who has deliberately avoided obeying orders.

I have considered whether any further opportunity should be given to plaintiff of complying with the Court's orders, and decline to do so. The vendee-defendant is entitled to benefit by plaintiff's refusal to obey orders, and should not be further harrassed by a pre-emption suit after being allowed to re-build his house without timely remonstrance by plaintiff.

The appeal is accepted. The lower Appellate Court's order of remand is set aside, and that of the first Court rejecting the plaint is restored. Plaintiff will pay the costs of the vendee-defendant, Khidmat Rai, in the lower Appellate Court and in this Court. Pleader's fee Rs. 32 in this Court.

Appeal accepted.

(1) 16 P. R. 1908; 73 P. W. R. 1907 (F. B.); 146 P. L. R. 1908.

(2) 19 P. R. 1908; 38 P. W. R. 1908.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 379 OF 1910.

August 23, 1212.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Napier.

PARVATANENI VENKATRAMIAH AND OTHERS—PLAINTIFFS—APPELLANTS

versus

PARVATANENI NARAYUDU AND OTHERS—DEFENDANTS—RESPONDENTS.

Minor Inam—Kudivaram *right, presumption as to —Right to eject tenant.*

The terms of a grant were: "We have granted 2½ *kattis* of *manyam* lands..... after having the said land measured and the boundaries marked:"

Held, that the lands themselves were not granted as *inam*.

If a *zemindar* himself has no *kudivaram* rights in land, he cannot grant such land as *inam*.

In re Gullapalli Bhabrayya, 21 M. L. J. 803; 10 M. L. T. 54; 11 Ind. Cas. 545, followed.

To establish his *kudivaram* right and necessarily his right to eject the tenants, an *inamdar* must show that he let in the tenants at the beginning of their occupation.

Second appeal against the decree of the Court of the Temporary Subordinate Judge of Masulipatam, in Appeal Suit No. 104 of 1910, preferred against the decree of the Court of the District Munsif of Gudivada, in Original Suit No. 257 of 1908.

Mr. *T. Prakasam*, for the Appellants.

Mr. *V. Ramadoss*, for the Respondents.

HIRA SINGH v. LAHORI MAL.

JUDGMENT.—The only question in this case is whether the plaintiff who is a minor *inamdar* is also entitled to the *kudivaram* right in the lands from which he seeks to eject the defendants.

It has been decided in *In re Bhabrayya Gulapalli* (1) that when a minor *inam* has been carved out of a *zemindari*, as in this case, the presumption is that only the *melvaram* right was granted as an *inam* (see also Appeal Suit No. 137 of 1908). The *inam* register and the *cazalet's* register (Exhibits F and G) do not prove that the lands themselves were granted as *inam* and it is not probable that the lands themselves were so granted when the *zemindar* himself had presumably no rights in the *kudivaram*. In all these cases, the *inamdar* ought to show that he himself let the defendants as tenants at the beginning of their occupation of the land if he wishes the Court to hold that he owned *kudivaram* right also and was, therefore, entitled to eject the defendants.

The distinction sought to be drawn by the appellant's learned Counsel, Mr. T. Praksam, between the presumption to be drawn in respect of *inam* grants by *zemindars* prior to the Permanent Settlement and of such grants subsequent to the Permanent Settlement, is not borne out by the decided cases, and we are not prepared to hold that *zemindars* owned any *kudivaram* rights before the Permanent Settlement, or that rights were taken away at that time or by the decisions of Courts subsequently.

The second appeal, therefore, fails and is dismissed with costs.

Appeal dismissed.

(1) 21 M. L. J. 803; 10 M. L. T. 54; 11 Ind. Cas. 545.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 922 OF 1910.

July 22, 1912.

Present:—Mr. Justice Shah Din and Mr. Justice Beadon.

HIRA SINGH—DEFENDANT—APPELLANT

versus

LAHORI MAL AND OTHERS—PLAINTIFFS—

DIWAN SINGH AND OTHERS—DEFENDANTS—RESPONDENTS.

Custom—Alienation—De facto guardian mortgaging minor nephew's property—Suit for possession—Right of nephew and sons of mortgagor to resist claim on the ground of no necessity—Joint and several liability—Necessity—Ground of attack in plaint but not pressed in appeal—Part of consideration for mortgage not for necessity—Incomplete mortgage—Incompetency of mortgagee to get possession.

In a suit for possession as mortgagee against the sons of an agriculturist, before the mortgagee can succeed, he must show that the mortgage was with consideration and for necessity.

A mortgage by the guardian of a minor is not valid unless it is proved that the minor's property was mortgaged for his benefit.

Where a minor's uncles undertake to pay his father's just debt by including it in their own bonds, and afterwards mortgage their share as well as that of the minor in the ancestral land, in consideration of that bond debt, the mortgage cannot be enforced so far as the minor's share is concerned, as such an alienation cannot be considered for his benefit.

Khaira v. *Maula*, 49 P. R. 1911; 136 P. W. R. 1911, 212 P. L. R. 1911; 11 Ind. Cas. 191, followed.

Where a portion of the consideration for a mortgage by a male proprietor of his ancestral holding is not for necessity, the mortgage is incomplete so far as his reversioners are concerned and on his death the mortgagee cannot maintain a suit for possession of the property on the strength of that mortgage against the reversioners.

A ground of attack, mentioned in the plaint in respect of which no issue was drawn by the first Court and which was not repeated either in the written grounds of 1st or 2nd appeal, cannot be raised at the time of argument before the Chief Court.

Second appeal from the order of the Divisional Judge, Jullundur, dated 21st May 1910, reversing that of the District Judge, Jullundur, dated 13th December 1909, dismissing plaintiffs' suit.

Mr. *Kanwar Narain* and Rai Sahib Pandit *Sheo Narain*, for the Appellants.

Rai Bahadur Bakhshi *Sohan Lal*, for the Respondents.

JUDGMENT.—This appeal and the Cross-Appeal No. 1123 of 1910 can be conveniently disposed of by one judgment. The following

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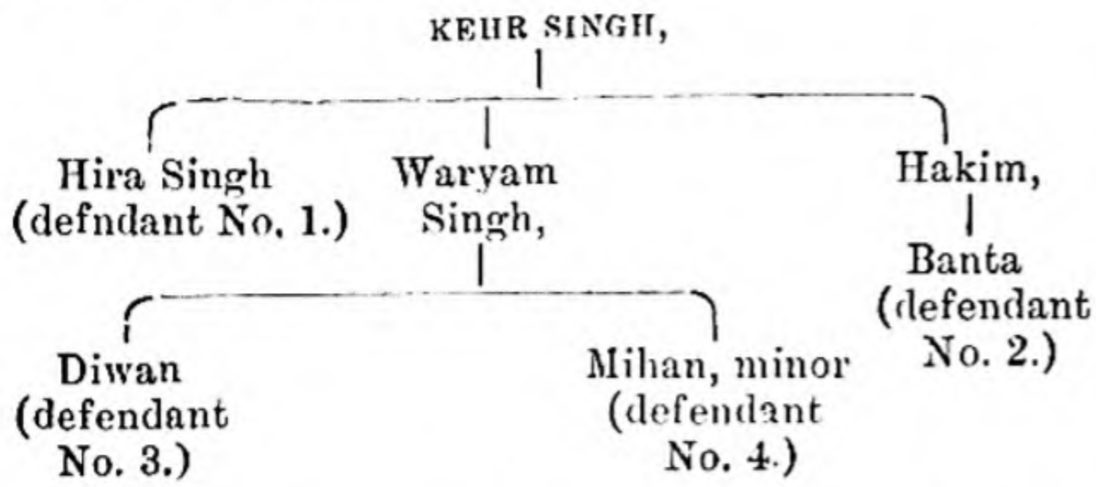
pedigree-table will help to an understanding of the facts of the case:—



By a registered deed, dated the 3rd October 1895, Hira Singh and Waryam Singh for themselves and as guardians of their nephew, Banta, who was then a minor, mortgaged 71 *kanals*, 5 *marlas* of their ancestral land to one Bura Mal for Rs. 3,700. The mortgage was one without possession, but it was stipulated that if the mortgagors failed to pay interest on the mortgage-money at the rate of 3 pies per cent. per mensem for two successive harvests, the mortgagee shall be entitled to take possession. It was further agreed that in the event of Banta, minor, on attaining majority, refusing to be bound by the mortgage as regards his share of the mortgaged land, the adult mortgagors shall be bound to make good the deficiency in the mortgaged area out of *khasra* No. 85 of their other land in the village.

The plaintiffs, as heirs and representatives of the original mortgagee, Bura Mal, brought the present suit on the 5th June 1908, against Hira Singh and Banta and the sons of Waryam Singh for possession of the mortgaged land in lieu of Rs. 3,700 principal and Rs. 135-4-6 interest, alleging that the mortgagors had failed to pay the interest agreed upon for three successive harvests and that according to the terms of the mortgage-deed, the plaintiffs were entitled to possession of the land. They further prayed that in case Banta was held not bound by the mortgage, so far as his share in the land in suit was concerned, the deficiency might be made good out of the other land of the remaining mortgagors as provided for in the deed of mortgage. The defendants plead in substance that the suit was barred by limitation; that the mortgage was bad for want of consideration and legal necessity, and that, at any rate, it was not binding upon Banta as regards his share in the mortgaged area. The District Judge dismissed the suit as barred by limitation but on appeal the Divisional Judge held that it was within time and remanded the suit for decision on the merits. The District Judge again dismissed the suit holding that it was not proved that the mortgage had been effected for consideration and legal necessity. On appeal by the plaintiffs, the Divisional Judge decreed their claim in respect of Hira Singh's one-third share of the mortgaged land, but dismissed it as regards the two-third share of Banta and Waryam Singh's sons, and he further directed the plaintiffs to pay the costs of the defendants throughout.

Cross-appeals have been preferred by the parties to this Court, one by the defendant Hira Singh (No. 922) and the other by the plaintiffs (No. 1123). It would be convenient to deal first with the plaintiffs appeal. On their behalf, Bakhshi Sohan Lal has contended (1) that the Courts below ought to have decreed in favour of the plaintiffs' possession of the whole mortgaged land against all the defendants inasmuch as it was fully proved that the mortgage in dispute had been effected for consideration, and legal necessity; (2) that since the mortgage was an old one and full consideration was proved to have passed, legal necessity must be presumed to have existed for the transfer, and the *onus* lay upon defendants Nos. 2 to 4 to prove want of necessity; (3) that if it be held that Banta, defendant No. 2, is not bound by the mortgage, the other defendants must make good the deficiency in the mortgaged area out of their other land as provided for in the deed of mortgage.

The last contention can be disposed of in a few words. Although the question of the liability of Hira Singh and the sons of Waryam Singh to make good the deficiency out of their other land in case it was held that Banta was not bound by the mortgage as regards his share, was raised in the plaint, no issue was drawn on the point by the District Judge; and when the District Judge dismissed the plaintiffs' suit on the merits, this question was not raised by them in their grounds of appeal filed in the Divisional Court. Even in this Court the

point was not taken in the written grounds of appeal and it would be obviously unfair to the respondents, who appear in person, to allow the plaintiffs' Pleader to raise it at this late stage of the case. We, therefore, disallow the last contention set out above.

The first two contentions can be dealt with together. Although the mortgage was an old one, the mortgagors have been in possession of the mortgaged land throughout, and since the mortgagees seek to recover possession from them, it is for the mortgagees to prove a *prima facie* title to such possession. As regards Hira Singh, who is a party to the deed of mortgage which is a registered one and contains a formal acknowledgment of the receipt of the mortgage-money, there is a legal presumption in favour of the passing of consideration, and the *onus* of non-receipt of consideration clearly lies upon him; and obviously no question of legal necessity for the mortgage can arise in his case. As against him, therefore, the *prima facie* title of the plaintiffs to recover possession of the mortgaged property on breach of the condition of the mortgage is complete. As regards Banta and the sons of Waryam Singh, however, the case stands upon an entirely different footing. Banta was a minor at the time when his share in the land in suit was mortgaged by Hira Singh and Waryam Singh to Bura Mal, and the plaintiffs in order to succeed against him must show that the mortgage was for his benefit. Again although Waryam Singh was a party to the mortgage deed, his sons, defendants Nos. 3 and 4, are not bound by the mortgage, (the land in suit being admittedly Waryam Singh's ancestor's property) unless both consideration and legal necessity are shown to have existed for the mortgage in question so far as their share in the land in suit is concerned. Defendants Nos. 2, 3 and 4 are not seeking as plaintiffs to have the mortgage-deed in suit set aside; they are in possession of the land, and the mortgagees, who are the plaintiffs in this suit, must affirmatively prove that the mortgage, on the strength of which they are seeking to oust the defendants from possession of the land, is a valid one as against the latter, and that their right to possession was determined under the mortgage-deed. We now proceed to deal with the question of consideration and legal necessity for the mortgage in dispute.

The details of the mortgage-money as given in the deed are:—

	Rs.	a.	p.
(1) On account of bond, dated the 28th January 1892, executed by Waryam Singh (Exhibit P 3) ...	1,050	0	0
(2) On account of bond, dated the 29th November 1894, executed by Hira Singh (Exhibit P 3) ...	2,550	0	0
(3) Received in cash before registration ...	75	0	0
(5) Registration expenses ...	25	0	0
TOTAL ...	3,700	0	0

A copy of the transliteration of the book accounts filed by the plaintiffs shows that the dealings between Bura Mal and Kehr Singh began as early as *Sambat* 1934, and that balances were struck from time to time and bonds executed in lieu of the amounts found due to Bura Mal on those balances. The balances of 5th *Har*, *Sambat* 1935, 5th *Har*, *Sambat* 1936, 4th *Poh*, *Sambat* 1937 and 10th *Har*, *Sambat* 1940, have been referred to by the plaintiffs' Pleader, and he has called our attention to several bonds executed separately by Kehr Singh and his three sons on different dates in respect of the debts due to Bura Mal on *bahi* account.

On the 10th *Har*, *Sambat* 1944, a balance of Rs. 1,273 was struck, and three separate bonds were executed on the 11th July 1833, the details of which are—(1) bond (Exhibit P 14) executed by Hira Singh for Rs. 433; (2) bond (Exhibit P 23) executed by Hakam Singh for Rs. 433; (3) bond (Exhibit 7) executed by Waryam Singh for Rs. 399. The dealings between the parties continued, until on the 28th January 1892, the amount of the debt found due by Hakam Singh to Bura Mal was Rs. 528, that due by Waryam Singh was Rs. 634 and that due by Hira Singh was Rs. 1,110. As Hakam Singh had meanwhile died, the liability for his debt was undertaken in equal shares by Waryam

Singh and Hira Singh, and on the above-mentioned date, they both executed separate bonds in favour of Bura Mal for Rs. 898-13-6 and Rs. 1,374-0-0 respectively, which sums included the amount of Rs. 264, *i.e.*, half of Rs. 528, which each brother had undertaken to pay in liquidation of Hakam Singh's debt. Waryam Singh did not execute any other bond after January 1892, but Hira Singh executed another bond in favour of Bura Mal on the 29th November 1894, for Rs. 393. On the 3rd October 1895, when the mortgage-deed in dispute was executed, Waryam Singh owed Bura Mal, on the bond of 28th January 1892, Rs. 1,050 made up of Rs. 898 principal and Rs. 152 interest; while on the same date, Hira Singh owed him, on the bond of the 29th November 1894, Rs. 2,550, which consisted of Rs. 2,393 principal and Rs. 157 interest.

Now, as regards Banta's alleged liability under the mortgage-deed of 3rd October 1895, it is clear that since Hira Singh and Waryam Singh had, in January 1892, executed bonds in favour of Bura Mal agreeing to pay between them the sum of Rs. 528, which was then due by Hakam Singh to Bura Mal, Hakam Singh's debt was wholly wiped off and nothing was due by Banta to Bura Mal in October 1895. Whatever claims Hira Singh and Waryam Singh may have had against Banta in respect of the payment made by them towards Hakam Singh's debt, they had no power, assuming that they were Banta's *de facto* guardians, to mortgage on his behalf the one-third share of the land in suit, together with their own two-thirds share, to Bura Mal for a total amount of Rs. 3,700 by far the largest portion of which was due to Bura by themselves. This part of the appeal was not very seriously pressed by the plaintiffs' Pleader, and we have no hesitation in holding that the decision of the Divisional Judge as regards the non-liability of Banta's one-third share of the land is correct.

Coming now to the case of Waryam Singh's sons, it seems to us that, however praiseworthy it may have been for Waryam Singh to have undertaken the liability in respect of a half share of the debt due by Hakam Singh to Bura Mal on the 28th January 1892, his sons, defendants Nos. 3 and 4, are justified in urging that the payment of Rs. 264 by their father, by execution of a bond in liquidation of Hakam Singh's debt, did not constitute legal necessity, and that as the bond of 1892 formed the consideration for the mortgage of 1895, so far as their father was concerned, legal necessity for the sum of Rs. 410 (*i.e.*, half of the debt due by Hakam Singh in January 1892, *plus* interest thereon up to the date of mortgage—see page 6 of the paper-book) out of Rs. 1,050 is not established. In our opinion, this position is unassailable; and as the bond of 28th January 1892 had been executed by Waryam Singh in favour of Bura Mal, the mortgagee, the latter, as an antecedent creditor of the mortgagor, was fixed with knowledge of the nature of the debts included in the aforesaid bond, and which formed the consideration for the subsequent mortgage. Upon this view of the case, the recent ruling of this Court in *Khaira* v. *Maula* (1), is in favour of Waryam Singh's sons; and on the authority of that case, we hold that the plaintiffs have no right to the possession of the said defendant's share of the mortgaged land. The net result of the above findings is that the decision of the Divisional Judge, dismissing the plaintiff's suit as regards the two-thirds share of the land in dispute owned by Banta and the sons of Waryam Singh, is maintained, and Appeal No. 1123 of 1910, therefore, fails and is dismissed.

Coming now to Appeal No. 922, we do not see our way to accept the argument of the defendant's Counsel that since the plaintiffs' suit has failed against Banta and the sons of Waryam Singh, it ought to be dismissed against his client Hira Singh as well. The considerations which apply in ths case of Banta and in that of Waryam Singh's sons, obviously do not operate to absolve Hira Singh from the contract of mortgage so far as his share is concerned. The full consideration for the mortgage is, in our opinion, proved to have passed and according to the terms of the

(1) 49 P. R. 1911; 136 P. W. R. 1911; 212 P. L. R. 1911; 11 Ind. Cas. 191.

mortgage-deed, Hira Singh made himself jointly and severally liable with Waryam Singh for the entire mortgage-debt, and his one-third share of the land is validly chargeable with that amount. Because the plaintiffs have been held not entitled to the possession of the share of Banta and the sons of Waryam Singh on the ground of want of necessity for the mortgage so far as they are concerned, it does not follow that Hira Singh could also resist the plaintiffs' suit for possession as regards his share of the land. The contract of mortgage as between him and the plaintiffs is perfectly valid, and it can be enforced according to its terms against his share of the mortgaged land. The further contention that the share of Hira Singh could not be charged with more than one-third share of the mortgage money is untenable, inasmuch as his share of the mortgage-money was more than two-thirds of the total amount and the deed does not, expressly or by necessary implication, limit his liability to an amount less than Rs. 3,700. The appeal of Hira Singh is, therefore, also dismissed.

As regards costs, we think that as the plaintiffs had succeeded in part in his Court, the Divisional Judge was wrong in directing them to bear the costs of the defendants throughout. The most equitable order to pass, in the cirumstances, is to make the parties pay their own costs in both the lower Courts, and to dismiss both the cross-appeals in this Court with costs, and we direct accordingly.

Both appeals dismissed.

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 353 OF 1911.

August 16, 1912.

Present:—Mr. Justice Wallis.

In re SOMAYAJULU RAMAMURTHI—COUNTER-PETITIONER.

Legal Practitioners Act (XVIII of 1879), s. 36—Tout—Legal evidence necessary.

Before a person can be declared a tout under section 36 of the Legal Practitioners Act, there should be legal evidence to show that he is a tout or that he is reported as such. The mere report of a Bar Association is insufficient.

Petition, under section 115 of Act V of 1908, praying the High Court to revise the order of the District Court of Ganjam, dated 1st day of December 1910, in Law Touts Enquiry as regards No. 6 Somayajulu Ramamurthi.

Mr. *T. Ethiraja Mudaliar*, for the Petitioner.

JUDGMENT.—Under section 36 of the Legal Practitioners Act, I think there should be legal evidence that the individual in question is a tout or that he is reported such and that a mere report of the Bar Association will not do. The order is set aside and remanded to lower Court for disposal according of law.

Order set aside.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 870 OF 1911.

July 30, 1912.

Present:—Mr. Justice Chevis.

NABI BAKHSH AND OTHERS—PLAINTIFFS—APPELLANTS

versus

BHAGAT SINGH AND OTHERS—DEFENDANTS—RESPONDENTS.

Custom—Alienation—Necessity—Sale of whole ancestral holding for liquidating mortgage-money and purchasing a mare to acquire some squares of land on some canal.

The sale of the whole of *chahi* ancestral land, which, owing to its insufficiency to maintain the holders and their families, was under mortgage, in order to pay the mortgage-debt, and to purchase a mare by means of which a tenancy of two squares of land on the Jhelum Canal was acquired, is justifiable, and the transaction is not open to question at the instance of the sons and reversioners of the holders on the ground of absence of necessity.

Shah Nawaz v. *Azamat Ali*, 40 P. R. 1907; 163 P. W. R. 1907; *Sobha Singh* v. *Kishore Chand*, 65 P. R. 1907; 146 P. W. R. 1907; 10 P. L. R. 1908; *Nihal Singh* v. *Jawala*, 26 P. W. R. 1907 and *Gurbachan Singh* v. *Kura Mal*, Civil Appeal No. 486 of 1899, distinguished.

Pal Singh v. *Bur Singh*, 65 P. R. 1910; 111 P. W. R. 1910, 7 Ind. Cas. 480; 115 P. L. R. 1910, referred to.

Second appeal from the order of the Divisional Judge, Sialkot Division, dated the 16th February 1911, confirming that of the Subordinate Judge, Sialkot, dated the 15th February 1910, dismissing plaintiffs' claim.

The Hon'ble Mr. *Muhammad Shafi*, for the Appellants.

Rai Bahadur Bakhshi *Sohan Lal*, for the Respondents.

NABI BAKHSH *v.* BHAGAT SINGH.

JUDGMENT.—On 24th February 1903, Jhanda and his four brothers sold their land in *Mauza* Begowala, 41 *kanals*, 6 *marlas*, 6 *sarsahis*, for Rs. 2,000 0 0. In this suit, plaintiffs, sons of Jhanda, sue for a declaration that the sale shall not affect their reversionary rights. The lower Courts have dismissed the suit, holding the sale to be for consideration and necessity. Plaintiffs applied to this Court for revision, and as I saw no sufficient reason for holding the decision of the lower Courts to be incorrect except perhaps as regards the item of Rs. 936-0 0 paid in cash at time of registration, I admitted this case as an appeal under section 70 (1) (*b*) solely with regard to this item. The finding of the lower Courts is that the main portion of this sum of Rs. 936-0-0 was spent in purchasing a mare, by means of which Jhanda acquired the tenancy of two squares of land on the Jhelum Canal.

For the plaintiffs, it is urged that custom does not warrant the selling of proprietary rights in ancestral land in order to obtain the land as a tenant. Mr. Muhammed Shafi urges that Jhanda can never become full owner of the squares, that if the mare dies or is not kept in good condition, the tenancy may be forfeited ; also that Jhanda can sell the land with consent of the Collector, and so the sons are at the mercy of the father and have lost their right to control his actions. He urges that a sale of ancestral land has been held not to be justifiable in the following cases:—

(1) to take other land in mortgage [*Shah Nawaz* v. *Azamat Ali* (1)].

(2) to pre-empt other land [*Sobha Singh* v. *Kishore Chand* (2)].

(3) to take up a ferry contract [*Gurbachan Singh* v. *Kura Mal* (3)].

(4) to purchase land from a widow [*Nihal Singh* v. *Jawala Singh* (4)].

On the other hand, Mr. Sohan Lal defends the alienation as an act of good management, fully warranted by the circumstances in which the alienors found themselves. He refers to *Pal Singh* v. *Bur Singh* (5) in which a mortgage of ancestral land to raise funds for the alienor's wedding and to enable him to enlist in a Cavalry Regiment was upheld.

After considering the cases cited, I am of opinion that no hard and fast rules can be laid down to cover all cases, and that the facts of each particular case must be considered. No doubt, it may be said, as a general rule, that proprietary rights are superior to rights of occupancy, and that reversioners have a right to object to unnecessary alienations, the effect of which is to take away from them the power of controlling the dealings of the present holder of the estate. But, still, the main point to consider in each case is how far the circumstances justify the alienation. In the present case, it appears that the alienors, and their father before them, had been in debt for some time, and their financial position seems to have been getting worse and worse as time went on. The five brothers held 41 *kanals* of land, not a large holding; though it was nearly all *chahi*, but they had been reduced to mortgaging it. It is not alleged that any of the brothers was profligate or recklessly extravagant, or that they had any object in spiting their successors (two out of the five had children). Their chance of ever redeeming the land, so long as they stayed on in the village, seems to have been small indeed. Something had to be done, and the sale of a portion of the land to redeem the rest would probably have left too little land for the family to live on, which would have meant more debt and mortgage in the near future.

The arrangement come to by the family resulted in the acquisition of occupancy rights in two squares of land (a considerable area) on the Jhelum Canal, and I think the brothers were well advised in their action. As to the argument that the plaintiffs are at the mercy of their father, I note that, so far as I can see, it does not appear that Jhanda is at all likely to wish to deprive his sons of succession to him as tenant of the squares. Nor does it seem to me that Jhanda is in much danger of involuntarily losing his tenancy. The mare, no doubt, may die, at all events she will become old. But the land must yield a considerable

(1) 40 P. R. 1907; 163 P. W. R. 1907; 10 P. L. R. 1908.

(2) 65 P. R. 1907; 146 P. W. R. 1907.

(3) Civil Appeal No. 486 of 1899 decided on 14th October 1910.

(4) 26 P. W. R. 1907.

(5) 65 P. R. 1910; 111 P. W. R. 1910; 7 Ind. Cas. 480; 115 P. L. R. 1910.

income, and a new mare can be purchased. I do not believe that the Government is at all anxious to pounce down on respectable tenants, and seize the first possible opportunity of forfeiting the tenancy. Viewing all the circumstances, I agree with the lower Courts in regarding the transaction as justified by the circumstances, and I uphold the decision of the lower Courts dismissing the suit, and dismiss the appeal with costs.

Appeal dismissed.

MADRAS HIGH COURT.
SECOND CIVIL APPEAL No. 60 OF 1911.
August 7, 1912.
Present:—Mr. Justice Sundara Aiyar and Mr. Justice Sadasiva Aiyar.
MOOLINTI VEERANA GOWD—PLAINTIFF—APPELLANT
versus
DEVARINTI BHIMA REDDY—DEFENDANT—RESPONDENT.

Pattadar, *mortgage by—Relinquishment—Decree and sale by mortgagee after relinquishment, whether binds new* pattadar—*Contract Act (IX of* 1872), *ss.* 69, 70—*Assessment paid by mortgagee—Right to recover.*

A., to whom the Government granted a *patta*, executed a mortgage to plaintiff and later on relinquished the land to the Government, who subsequently granted a *patta* to the defendant. After this, the plaintiff sued on the mortgage after the relinquishment by *A.*, got a decree, purchased the land covered by the *patta* in execution and obtained a *patta* from the Revenue Authorities.

In a suit by the plaintiff to recover the land from the defendant on the strength of the *patta* granted to him:

Held, (1) that as *A.* relinquished in favour of Government before the plaintiff instituted the suit on the mortgage, the plaintiff's decree and sale could give him no right to recover the land against the defendant, who claimed under a title granted by Government;

(2) that the plaintiff could not recover from the defendant the assessment paid by him after he got his *patta*, because he did not make the payment on defendant's behalf.

Second appeal against the decree of the Court of the Subordinate Judge of Bellary, in Appeal Suit No. 130 of 1908, presented against that of the Court of the District Munsif of Bellary, in Original Suit No. 69 of 1907.

Mr. *S. Ranganadha Aiyar*, for the Appellant.

Mr. *T. Prakasam*, for the Respondent.

JUDGMENT.—This is a suit in ejectment. The Government granted a *patta* to one Veerappa. The *pattadar*, together with a brother of his, executed a mortgage in favour of the plaintiff in March 1893. On the 5th July, the *pattadar* relinquished the land to the Government. It lay waste for some time and the Government afterwards granted a *patta* to the defendant. The plaintiff instituted a suit on his mortgage after the land had been relinquished by Veerappa, got a decree and brought the land to sale in 1900 and was afterwards able to induce the Revenue Authorities to grant him a *patta*. He claims to be entitled to recover the land from the defendant on the strength of the *patta* granted to him. The District Munsif and the Subordinate Judge dismissed the suit. The Subordinate Judge observes that the relinquishment put an end to the plaintiff's right under the mortgage. It is not necessary to decide whether the opinion is sound. Assuming that the mortgage was unaffected by the relinquishment by Veerappa, this fact would be of no use to the plaintiff. Veerappa had executed a relinquishment in favour of Government before the plaintiff instituted the suit. The plaintiff's decree and sale can give him no right to recover the land against an individual, who claims under a title granted by Government. On this ground, we uphold the decree of the lower Courts.

The plaintiff claims also to recover the assessment he paid after he got his *patta*. He has no cause of action against the defendant. He did not make the payment on defendant's behalf. He paid the assessment voluntarily. The second appeal is dismissed with costs.

Appeal dismissed.

RADHE KISHEN *v.* BHOLU MAL.

PUNJAB CHIEF COURT.

CIVIL REVISION PETITION No. 1583 OF 1910.

July 24, 1912.

Present:—Mr. Justice Chevis.

RADHE KISHEN—PLAINTIFF—PETITIONER

versus

BHOLU MAL—DECREE-HOLDER—RESPONDENT.

Revision—Civil Procedure Code (Act V of 1908), *s.* 73 (2)—*Order of rateable distribution of judgment-debtor's assets among rival decree-holders in execution of decree.*

An order under section 73 (2) of the Civil Procedure Code, 1908, that a certain decree-holder is or is not entitled to share rateably in the assets realized from the judgment-debtor's property is not open to revision; it is immaterial whether the order has been actually carried out or not at the time of filing or hearing the revision.

Parma Nand v. *Municipal Committee Lahore*, 65 P. R. 1905; 130 P. L. R. 1905; *Punjab National Bank* v. *Salamat Singh*, 82 P. R. 1905; 199 P. L. R. 1905 and *Fazal Din* v. *Narain Singh*, 128 P. R. 1906; 153 P. W. R. 1906, followed.

The general policy of the law and the usual practice of the Superior Courts is not to interfere on the revision side except in cases where the petitioner has no other remedy or his only alternative remedy is so cumbrous or expensive that to refer him to it would be tantamount to denying him relief.

Abdulla v. *Amir-ud-Din*, 76 P. R. 1902, relied upon.

Petition, under section 70 (1) (*a*) and (*b*) of Act XVIII of 1884, as amended by Act XXV of 1899, for revision of the order of the District Judge, Amritsar, dated 2nd April 1910, ordering the rateable distribution of the sale money.

Mr. *Nand Lal*, for the Petitioner.

Rai Bahadur Lala *Sukh Dial*, for Bholu Mal, and Lala *Hukam Chand*, for Jagan Nath, Respondent.

JUDGMENT.—The facts are fully stated in the order of the learned District Judge. Rai Bahadur Sukh Dyal raises a preliminary objection that this Court should not interfere on revision because the petitioner will have a separate remedy under section 73. He quotes *Parma Nand* v. *Municipal Committee, Lahore* (1) and *Panjab National Bank* v. *Salamat Singh* (2) and *Fazal Din* v. *Narain Singh* (3).

Mr. Nand Lal objects that section 73 (2) is not applicable because the money has not yet been paid out to the various claimants. He attempts to distinguish *Fazal Din* v. *Narain Singh* (3) on the ground that the District Judge in the present case has not yet calculated and specified what sum each of the rival decree-holders should receive. This is only because proceedings have been stayed by this Court pending decision of this application. As soon as the records go back, the money will, no doubt, be distributed and then petitioner can pursue the remedy afforded by section 70 (2), *i.e.*, sue the respondents for refund.

Mr. Nand Lal also urges that the District Judge has acted with material irregularity and also without jurisdiction. Granting that this is so, this application for revision might succeed on the merits if I were to entertain it, but this does not touch the preliminary objection, which is that this Court should not interfere on revision because the petitioner has another remedy. As has been pointed out in *Abdulla* v. *Amir-ud-Din* (4), the general policy of the law and the usual practice of the Superior Courts is not to interfere on the revision side, except in cases where the petitioner has no other remedy or where his only alternative remedy is so cumbrous or expensive that to refer him to it would be tantamount to denying him relief. In the present case, I also note that any decision of this application on the merits would still, so far as I can see, leave it open to the party aggrieved to bring a regular suit.

I dismiss this application, but as it has not been heard on the merits, I pass no order as to costs.

Petition dismissed.

(1) 65 P. R. 1905;130 P. L. R. 1905.
(2) 82 P. R. 1905; 199 P. L. R. 105.
(3) 153 P. W. R. 1906; 128 P. R. 1906.
(4) 76 P. R. 1902.

KALAWANTI *v.* BUKHAN.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 1254 OF 1911.

February 20, 1912.

Present:—Mr. Justice Johnstone.

Musammat KALAWATI—DEFENDANT—APPELLANT

versus

BUKHAN—PLAINTIFF—RESPONDENT.

Restitution of conjugal rights—Hindu girl married during minority—Refusal to consummate marriage.

KALAWANTI v. BUKHAN.

A Hindu girl was married while under the age of puberty, but did not accompany her husband to his house and there was no cohabitation between the parties. On arriving at puberty, the girl refused to consummate the marriage:

Held, that the girl should be allowed freedom of choice and the husband was not entitled to a decree for restitution of conjugal rights.

Second appeal from the order of the Divisional Judge, Hoshiarpur Division, dated the 4th August 1911, reversing that of the District Judge, Kangra District dated the 8th May 1911, dismissing plaintiff's claim.

Rai Bahadur Bakhshi *Sohan Lal*, for the Appellant.

Bakhshi *Tek Chand*, for the Respondent.

JUDGMENT.—Neither party comes very well out of this case. The suit was one for restitution of conjugal rights as regards defendant No. 1 and an injunction as regards the other two defendants. The first Court held that the plaintiff's story was highly unsatisfactory; that he had not produced evidence which really elucidates facts; and that it is not definitely proved that plaintiff was married to defendant No. 1. The lower Appellate Court, however, decided that the *factum* of marriage was clear and that there was no sufficient reason for refusing a decree on the ground that there might have been some bad faith in connection with the reciprocal marriage spoken of by the parties. A decree having been thus passed in favour of plaintiff, defendant No. 1 again comes up to this Court, and, in my opinion, her appeal must succeed.

I have heard arguments and have carefully considered the evidence in the case. There can be no doubt that the plaintiff is a man whose word is not to be trusted at all. In his plaint, he prevaricates. In the original plaint, he stated that the girl's age was 18 at marriage and that she lived with him for a month after wedding. In his amended plaint, he repeats his other allegations but puts the girl's age at marriage of 14; and on the day after the presentation of that plaint, he stated orally that defendant No. 1 lived with him for six months after the marriage, which took place four years previously, and also six months during the past year. Now, it seems to me on reading the evidence that the marriage ceremony did undoubtedly take place; but I entirely disbelieve the evidence to the effect that the girl after that took up her abode with the plaintiff. The evidence of Jaimal, *Lambardar*, is very important. It appears quite certain from that evidence and from other indications in the case that immediately the marriage ceremonies had been performed, a question arose about payment of a sum of money and I am satisfied that because of this dispute, the girl, who is said to have been living with her husband, returned to her own home with her mother. This is a reasonable inference from the evidence of Jaimal, *Lambardar*, and it is expressly stated by Atru, *Chowkidar*, witness for the plaintiff. No doubt, there is some evidence of cohabitation, but I do not believe it at all. The girl herself denies the marriage and so does her mother. This, of course, is one of those foolish statements that people make in order to defeat the opposite party; and my opinion, therefore, is that the marriage took place but that no cohabitation followed.

It seems to me also that the girl must have been under the age of puberty at the time of marriage and that this in itself was the main reason why the girl did not accompany her husband to his house. Now, the girl having arrived at puberty, refuses to consummate the marriage. In these circumstances, this Court ordinarily allows the girl freedom of choice. It seems to me, therefore, that in the peculiar circumstances of the case, the plaintiff was not entitled to a decree at all.

For these reasons, I accept this appeal, set aside the decree given by the lower Appellate Court and dismiss the plaintiff's suit; but, in the circumstances, I direct that the parties do pay their own costs throughout.

Appeal accepted.

ANGLO-INDIAN TRADING CO., LD. v. GERALD FRANK BRIERLY.

MADRAS HIGH COURT.

ORIGINAL CIVIL APPEAL No. 44 OF 1910.

September 4, 1912.

Present:—Sir Ralph Benson, Kt., Offg. Chief Justice, and Mr. Justice Sankaran Nair.

THE ANGLO-INDIAN TRADING Co. LD. —APPELLANTS

versus

GERALD FRANK BRIERLY—RESPONDENT.

Consideration—Contract of management—No personal liability—Consideration for contract cannot be consideration for later pro-note.

One *S.* and the defendant obtained a manganese concession in Mysore and agreed to admit *E.* to a share of the profits arising therefrom. In consideration thereof, *E.* caused the plaintiff Company to undertake the management and development of the rights comprised in the said business and to finance the concern. The sums so advanced were to bear interest at 2 per cent. above the current Bank of Madras rate and were to be paid or deducted from the sale-proceeds of the ore as disposed of or shipped. The plaintiff Company were also entitled by way of remuneration to a commission. The Company found after some time that the mines were not working profitably and refused to make any further advance. *E*, who was really the plaintiff Company, represented to the defendant that he was bound to pay to the plaintiff Company a share of the monies alleged to be due to the Company and the defendant executed the suit promissory-note:

Held, (1) that there was no consideration for the promissory-note because under the agreement there was no personal liability on the part of the members to pay to the plaintiff Company the monies advanced by it;

(2) that the plaintiff Company did not make any advance on account of any request made by the defendant but only made an advance in consideration of the previous agreement and that the advance could not be treated as consideration for the promissory-note also.

Appeal from the judgment and decree of the Hon'ble Mr. Justice Wallis, dated the 27th day of September, 1910 in the Ordinary Original Civil Judicature of the High Court and made in Suit No. 66 of 1909:—*The Anglo-Indian Trading Company Limited* v. *Gerald Frank Brierly*, 8 Ind. Cas. 302; (1910) 1 M. W. N. 618; 9 M. L. T. 17.

Messrs. *Grant and Greatorex*, for the Appellants.

Messrs. *Short and Bewes*, for the Respondent.

JUDGMENT.—The suit is brought by the plaintiff, the Anglo-Indian Trading Company, to recover a sum of money due on a promissory note. The defendant pleaded that there was no consideration. The admitted facts are these; one Mr. Subba Row and the defendant had obtained a manganese concession in Mysore and they agreed to admit Mr. W. J. Eales to a share of the profits arising from this concern. In consideration thereof, Mr. Eales caused the Anglo-Indian Trading Company to undertake the management and development of the rights comprised in the said license and to finance the concern. The Company agreed to advance the monies required from time to time for working, prospecting, mining and developing the lands comprised in that license and also all monies for *kist* and other purposes. They promised also to maintain proper books of account, and it was further stipulated in the agreement entered into between the Anglo-Indian Trading Company on the one hand and Subba Row, Brierly and Eales on the other, "that all sums so paid or advanced by the said Anglo-Indian Trading Company, Limited, as aforesaid, shall bear interest at 2 per cent. above the current Bank of Madras rate for the time being and shall be taken to account monthly and be paid or deducted from the sale-proceeds of the ores as disposed of or shipped. The said Anglo-Indian Trading Company, Limited, shall be entitled by way of remuneration for their services to a commission of one rupee per ton of ore despatched from the Thasarapalle Railway Station, and shall be paid immediately after shipment." The Company found, after working the mines for some time, that they were not profitable and, therefore, closed the concern and refused to make any further advance. Mr. Eales, who was really the Anglo-Indian Trading Company, represented to the defendant that he was bound to pay to the Anglo-Indian Trading Company a share of the monies alleged to be due to the Company by him and he accordingly executed the promissory-note on which the suit was now filed. Wallis, J., decided that the promissory-note had no consideration because, under the agreement, dated 17th February 1908, above referred to, there was no personal liability on the part of Subba Row, Brierly and Eales to pay to the plaintiff Company the monies advanced by them. He also held that the pro-

missory-note cannot be treated in law as the consideration for the monies advanced by the plaintiffs because such monies were advanced really in consideration of the agreement of the 17th February 1903. On these grounds, he dismissed the suit.

On appeal, it is contended that the learned Judge is wrong on both these points. We are of opinion that the learned Judge is right. It was urged before us that the learned Judge has failed to consider the stipulation in Exhibit I, which is styled an indenture between Subba Row, Brierly and Eales that the management of the mining, etc., of the lands comprised in the license was to be in the hands of the Anglo-Indian Trading Company in accordance with the agreement, Exhibit A above referred to, and "That in the event of monies being advanced by the parties hereto or by any person or persons, company or companies on their behalf, the same shall be accounted for to or by the parties in the same proportion to which they are entitled to profits." Now, the Anglo-Indian Trading Company, the plaintiff, was not a party to this agreement, Exhibit I. The plaintiff is not bound by it and he cannot claim any rights under it. We may look at it, no doubt, to ascertain what the intention of the parties thereto was, but that intention had only reference to any mutual rights and obligations. Leaving this document, therefore, out of consideration, the intention of the parties as expressed in Exhibit A seems to be perfectly clear. The Anglo-Indian Trading Company had to find all the monies that were required and they were to take them back "from the sale-proceeds of the ores as disposed of or shipped and they were entitled to get a commission of one rupee per ton of ore despatched from the Railway Station. It seems to us quite clear that there was no intention to impose any personal liability on any of the parties and the probabilities also are in favour of that conclusion. Mr. Eales, besides being really the Anglo-Indian Trading Company, was also a partner with others, *i.e.*, Subba Row and Brierly, and if there is no personal obligation imposed upon him, there is no reason to suppose that it was intended that the others were to be personally liable.

We agree with the learned Judge also in his decision that the Anglo-Indian Trading Company did not make any advance on account of any request made by the defendant and Subba Row. They made such advances in consideration of the agreement of the 17th February 1908. We agree with him, therefore, that it cannot be treated as consideration for this promissory-note.

For these reasons, we dismiss the appeal with costs.

Appeal dismissed.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL NO. 2891 OF 1909.

August 12, 1912.

Present:—Sir Ashutosh Mookerjee, Kt., Judge, and Mr. Justice Beachcroft.

KULADA PROSAD PANDEY AND OTHERS—PLAINTIFFS—APPELLANTS

versus

HARIPADA CHATTOPADHYAYA AND OTHERS—DEFENDANTS—RESPONDENTS.

Hindu Law—Joint Mitakshara *family—Conversion of one member to Christianity, effect of—Migration from Oudh to Bengal—Presumption of carrying succession laws—Conversion not to affect right of inheritance—Family ceases to be joint—Separation of one co-parcener—No presumption that others remain united—Strict proof.*

When a person migrates from Oudh to Bengal, the presumption is that he carries with him the laws and customs as to succession and family relations prevailing in Oudh.

Parbati Kumari v. *Jagadis Chunder*, 29 C. 433; 29 I. A. 82 (P. C.); 4 Bom. L. R. 335; 6 C. W. N. 490, relied upon.

This presumption may be rebutted by proof that the family has adopted the law and usage of Bengal.

Surendra Nath v. *Hiramanee*, 12 M. I. A. 81; 1 B. L. R. (P.C.) 26; 10 W. R. (P.C.) 35; *Govind Chandra* v. *Radha Kristo*, 31 A. 477; 6 A. L. J. 591; 3 Ind. Cas. 533; and *Jagannath* v. *Narayan*, 34 B. 553; 12 Bom. L. R. 545; 7 Ind. Cas. 459, followed.

If one member of a joint *Mitakshara* family converted to Christianity, such conversion does not inflict on him forfeiture of rights or property or impair or affect in any way any right of inheritance. He retains his interest in the ancestral property. But the

family ceases to be a joint Hindu *Mitakshara* family. He becomes, upon his conversion to Christianity, at once severed from the family, and the Hindu Law ceases to have any continuing obligatory force upon him. He continues to hold the property as joint owner.

There may be no presumption that when one coparcener separated from the others, the latter remained united; the separation of one may be a virtual separation of all, and, in this sense, where it is asserted that the remaining members remained united or agreed to re-unite, the fact has to be established from all the circumstances of the case.

Appeal from the decree of the District Judge of Bankura, dated the 27th August 1909, confirming that of the Subordinate Judge of Bankura, dated the 29th June 1908.

Babus *Golap Chandra Sarkar* and *Dwarka Nath Mitter*, for the Appellants.

Babus *Harendra Narayan Mitter* and *Satis Chandra Mukherjee*, for the Respondents.

JUDGMENT.--The subject-matter of this litigation is ancestral immoveable property, owned at one time by a Hindu family of which one Amrita Lal Pandey was the head. The father of Amrita Lal Pandey, originally resident in Oudh, in 1857, migrated to Bengal, where he continued to live with his family in the District of Bankura, and acquired the properties now in dispute which passed after his death to his son. Amrita Lal had eight sons, of whom two, the husbands of the eighth and ninth defendants, respectively, died in his life-time in 1880 and 1883. Three other sons, the first and second plaintiffs and the fifth defendant, embraced the Christian faith; the first plaintiff became a convert in 1890, the second plaintiff in 1896, and the fifth defendant in 1904. On the 19th March 1900, Amrita Lal transferred the disputed property for a sum of Rs. 2,000 to the first four defendants, and he was joined in the execution of the conveyance by three of his sons, the fifth, sixth and seventh defendants. Amrita Lal died on the 26th December 1900. The third plaintiff, one of the sons of Amrita Lal, attained majority in 1905. On the 19th March 1907, the plaintiffs, the three sons of Amrita Lal, who had not joined him in the conveyance and of whom two were Christian at the time of the transfer while the other was and is still a Hindu, commenced the present action for a declaration that the transfer was not operative against them in respect of a three-sevenths share of the property, and for recovery of possession and mesne profits. The plaintiffs founded their claim on the assumption that the transfer had been effected for the satisfaction of illegal and immoral debts of their father, which they would not otherwise be presumably liable to satisfy out of their share of the ancestral property. The purchasers defendants contested the claim and alleged that the plaintiffs, who had embraced Christianity, had lost all interest in the ancestral property, that the other plaintiff who was still a Hindu was liable to satisfy the debt, and that in any event his claim was barred by limitation as he had attained majority in 1902 and had failed to obtain cancellation of the conveyance within three years thereof. The Courts below have concurrently dismissed the suit. They have found that the debts satisfied by the consideration for the conveyance were neither illegal nor immoral, and that, consequently, the father could make a valid alienation of the ancestral property for the discharge of those debts. The plaintiffs have appealed to this Court and on their behalf the decision of the District Judge has been assailed on two grounds, namely, *first*, that the two plaintiffs, who had embraced Christianity during the life-time of their father, had, by reason of their conversion to the Christian faith, ceased to be members of a joint Hindu family and were, consequently, not liable to satisfy any debts incurred by their father; and, *secondly*, that the effect of the conversion of the first two plaintiffs to Christianity, was a complete dissolution of the family, and, that, from this point of view, it was not competent to Amrita Lal to alienate the share of the third plaintiff who did not join him in the conveyance and could not do so as he was an infant at the time. These positions have been controverted on behalf of the respondents as unsound in law, and it has further been suggested that the plaintiffs have sought to put forward a case inconsistent with that set out in the plaint, though it has not been disputed that it is in some measure conformable to the position taken up by the defendants in their written statement. Before we deal with the questions argued at the Bar, it is necessary to premise that the family must be taken, before the conversion of the first plaintiff to Christianity, to have been governed by the *Mitakshara* law. When the grandfather of the plaintiffs migrated from Oudh to Bengal, the presumption is that he carried with him the laws and customs as to

succession and family relation prevailing in the Province from which he came: *Parbati Kumari* v. *Jagadis Chunder* (1). This presumption might have been, but has not been, rebutted by proof that the family has adopted the law and usage of the place to which it has migrated: *Surendra Nath* v. *Hiramanee* (2), *Gobind Chandra* v. *Radha Kristo*(3), *Jagannath* v. *Narayan*(4). We start, therefore, with the position that, in 1890, there was a Hindu family, consisting of Amrita Lal Pandey and his six sons, and owning immoveable property which had descended from the father of Amrita Lal. In 1890, one of the sons of Amrita Lal, the first plaintiff Kulada Prosad, became a convert to Christianity. What was the legal effect of this incident upon the family and upon the rights of Kulada Prosad himself? In so far as the latter question is concerned, it is clear that under the Caste Disabilities Removal Act (XXI of 1850), the conversion did not inflict on him forfeiture of rights or property or impair or affect in any way any right of inheritance. The inference is, therefore, irresistible that, notwithstanding his conversion, the first plaintiff retained his interest in the ancestral property. In so far as the question of the status of the family is concerned, it is equally indisputable that it ceased to be a joint Hindu *Mitakshara* family. This position has not been seriously controverted; but it has been ingeniously argued that, notwithstanding the conversion of one of the members to Christianity, they continued to hold the ancestral property subject to the operation of the rule of survivorship and of the principle which imposes a pious obligation on a Hindu son to pay his father's debts. This view, in our opinion, is opposed to the decision of the Judicial Committee in *Abraham* v. *Abraham* (5), where Lord Kingsdown, referring to the position of a member of a Hindu family who has become a convert to Christianity, observed as follows: "He becomes at once severed from the family and is regarded by them as an outcast. The tie which bound the family together is, so far as he is concerned, not only loosened but dissolved. The obligations consequent upon and connected with the tie must be dissolved with it. Parcenership may be put an end to by a severance effected by partition; it must equally be put an end to by severance which the Hindu Law recognises and creates. Upon the conversion of a Hindu to Christianity, the Hindu Law ceases to have any continuing obligatory force upon the convert. He may renounce the old law by which he was bound, as he has renounced his old religion, or, if he thinks fit, he may abide by the old law, notwithstanding he has renounced the old religion." Stress, however, has been laid by the respondents upon the concluding sentence of this passage, and it has been argued that a Hindu family converted to Christianity may continue to be joint even after conversion, and if the fact be established, effect will be given to it. In support of this position, reference has been made to *Francis Ghosal* v. *Gabri Ghosal* (6). This doctrine, even if it be assumed to be well founded, is of no assistance to the respondents; but it is worthy of note that there is divergence of judicial opinion on the subject: *Tellis* v. *Saldanha* (7). Here the whole family was not converted to Christianity, and this circumstance differentiates the present case from *Jalbhai* v. *Louis Manoel* (8) and *Lastings* v. *Gonsalves* (9). If all the members of the family had become Christians, the position might possibly have been supported that, notwithstanding conversion, they adhered to the old law, and that, consequently, the rights of co-parcenership were not affected by their renunciation of the old religion. In the present case, such a theory cannot possibly be maintained; one of the members renounced the old religion, the others continued their adherence to the ancestral faith. If the family is deemed to have continued as a joint family with right of survivorship among the coparceners, it could only have been by common consent of all the members; but there is no indication that the members of the family had, or indeed could have, any such intention. We must hold, then, that the first plaintiff, upon his conversion to Christianity, became at once severed from the family, and this view is supported by the cases of *Govind*

(1) 29 C. 433; 29 I. A. 82 (P. C.); 4 Bom. L. R. 365; 6 C. W. N. 490.

(2) 12 M. I. A. 81; 1 B. L. R. (P. C.) 26; 10 W. R. (P. C.) 35.

(3) 31 A. 477; 6 A. L. J. 591; 3 Ind. Cas. 563.

(4) 34 B. 553; 12 Bom. L. R. 545; 7 Ind. Cas. 459.

(5) 9 M. I. A. 195 at p. 241; 1 W. R. (P. C.) 1.

(6) 31 B. 25; 8 Bom. L. R. 770.

(7) 10 M. 69.

(8) 19 B. 680 at p. 687.

(9) 23 B. 539 at p. 543.

Krishna v. *Abdul Quayyum* (10) and *Khunni Lall* v. *Gobind Krishna* (11), where their Lordships of the Judicial Committee reversed the decision in *Gobind Krishna* v. *Khunni Lall* (12). In so far, therefore, as the first plaintiff is concerned, he is not bound by the conveyance of the 19th March 1900, and it is inoperative in respect of what was his share in ancestral property in 1890. His claim to recover possession thereof is also plainly not barred by limitation. By reason of his conversion, he ceased to be a member of the joint Hindu family, but thenceforward he continued to hold the property as joint owner. There is no evidence of his exclusion or assertion of hostile title against him, such as is essential to constitute adverse possession between co-owners, *Jogendra Nath* v. *Baldeo Das* (13), before the conveyance of the 19th March 1900, when his father professed to deal with the property, though he was not competent to do so under the law. No question of limitation, therefore, arises, as the suit has been commenced within twelve years from the date of the conveyance The first plaintiff is thus entitled to recover possession of an one seventh share of the property on the basis that in 1890, upon the dissolution of the family which consisted at the time of Amrita Lal and his six sons, the plaintiff became entitled to such share.

We next proceed to consider the case of the second plaintiff who became a convert to Christianity in 1896. It has been contended on behalf of the appellant that when the first plaintiff became a convert in 1890, the legal effect was not merely his severance from the rest of the family but a complete dissolution of the entire family, and that from that time onwards, all the members must be taken in law to have been no longer members of the joint family. In support of this proposition, reference has been made to the decision of their Lordships of the Judicial Committee in the cases of *Ram Pershad* v. *Lakhpati Koer* (14), *Bala Bux* v. *Rukhmabai* (15), and *Balkishen* v. *Ram Narain* (16). These cases are, in our opinion, distinguishable and are of no assistance to the appellants. No doubt, there may be no presumption that when one co-parcener separates from the others, the latter remain united ; the separation of one may be a virtual separation of all, and, in this sense, where it is asserted that the remaining members remained united or agreed to re-unite, the fact has to be established from all the circumstances of the case. In the case before us, the inference is irresistible that after the conversion of the first plaintiff to Christianity in 1890, the remaining members continued to form a joint Hindu family. In 1896, therefore, when the second plaintiff Gopeshwar embraced Christianity, he ceased to be a member of the joint family, and it became thereafter incompetent to his father to alienate his one-seventh share by the conveyance of the 19th March 1900. The second plaintiff is thus not bound by that conveyance, and, so far as he is concerned, no question of limitation arises, because his severance from the family took place within twelve years of the commencement of the suit. But a question of considerable nicety arises as to the terms, if any, subject to which he should be allowed to recover his share of the property. The debts, for the satisfaction whereof the conveyance was executed, were in part incurred on the 18th March 1892, and 3rd August 1895, under mortgage-bonds executed by his father Amrita Lal. When in 1896 he became a convert to Christianity, he was liable to satisfy these debts, some of which in fact were charged upon the ancestral property. Consequently, he may, in our opinion, be justly called upon to bear a share of these debts. Reliance, however, has been placed by the appellants upon the cases of *Krishnasami* v. *Ramasami* (17) and *Rathna* v. *Aiyanachariar* (18), to show that it is not open to a Hindu father to deal with the property of his divided son so as to bind the latter,

(10) 25 A. 546; (1903) A. W. N. 127.

(11) 33 A. 356; 38 I. A. 87; 15 C. W. N. 545 (P. C.); 8 A. L. J. 552; 13 C. L. J. 575; 13 Bom. L. R. 427; 10 M. L. T. 25; (1911) 2 M. W. N. 432; 21 M. L. J. 645; 10 Ind. Cas. 477.

(12) 29 A. 487; 4 A. L. J. 365; A. W. N. (1907) 151.

(13) 35 C. 961; 12 C. W. N. 127; 6 C. L. J. 735.

(14) 30 C. 231; 30 I. A. 1; 7 C. W. N. 162; 5 Bom. L. R. 103.

(15) 30 C. 725; 30 I. A. 130; 5 Bom. L. R. 462; 7 C. W. N. 642.

(16) 30 C. 738; 30 I. A. 139; 5 Bom. L. R. 46; 7 C. W. N. 578.

(17) 22 M. 519.

(18) 18 M. L. J. 599; 4 M. L. T. 277.

even though it be in respect of an antecedent debt. This doctrine, if it be assumed to be well founded, is, as is explained in the first of the cases mentioned, subject to the important qualification that the severance had not been made with a view to defraud or delay creditors. It is further worthy of note that the case of *Krishnasami* v. *Ramasami* (17) was distinguished in *Ramachandra* v. *Kondayya* (19). In the case before us, we are clearly of opinion that the plaintiff ought not to be allowed to recover his one-seventh share of the property except upon payment of a proportionate share of the debts due under the bonds of the 18th March 1892 and 3rd August 1895 and of other debts which could be recovered by sale of his share of the ancestral property at the time of his conversion in 1896. This amount we have approximately determined to be Rs. 210. The second plaintiff is entitled to a decree on these terms.

We have finally to consider the case of the third plaintiff. He is plainly not entitled to any assistance from the Court. The theory that in 1890 or 1896, there was a complete disruption of the family and each member continued thereafter to live as a separate unit, has already been found unsustainable. Amrita Lal, therefore, was competent in 1900 to alienate the ancestral property in his hands, not merely in respect of his own interest but also that of his sons other than the first two plaintiffs. The third plaintiff must, consequently, be deemed bound by the conveyance of 1900.

It is worthy of note that an objection as to misjoinder of causes of action might possibly have been taken in the Court of first instance, if the case had been presented in that Court from the point of view developed here. No such objection, however, was taken, and it is obvious that the parties have not been prejudiced by the frame of the suit; consequently, as explained in the case of *Sarala Sundari* v. *Srada Prasad* (20), effect could not be given to the objection of misjoinder even if it had been urged before us.

The result is that this appeal is allowed and the decrees of the Courts below discharged. The first plaintiff will have a decree for possession of one-seventh share of the disputed property with mesne profits only from the date of the suit, the amount to be determined by a supplementary proceeding in the Court of first instance. The second plaintiff will similarly have a decree for one-seventh share of the property with mesne profits from the date of the suit; but, in his case, the amount of mesne profits will be reduced by Rs. 210 which, we have held, is payable by him to the contesting defendants. The claim of the third plaintiff will stand dismissed. Under the circumstances, we direct all the parties to bear their own costs of this litigation in all the Courts.

Appeal allowed.

(19) 24 M. 555.
(20) 2 C. L. J. 602.

MADRAS HIGH COURT.

APPEALS NOS. 215 OF 1907 AND 22 OF 1908 AND CIVIL MISCELLANEOUS PETITION NO. 519 OF 1909.

August 23, 1912.

Present:—Mr. Justice Miller and Mr. Justice Abdur Rahim.

IN APPEAL NO. 215 OF 1907.

NARAYANASAMI AIYAR—APPELLANT

versus

JANAKI AMMAL AND ANOTHER—RESPONDENTS.

IN APPEAL NO. 22 OF 1908

JANAKI AMMAL—APPELLANT

versus

NARAYANASAMI AIYAR AND ANOTHER—RESPONDENTS.

IN C. M. P. NO. 519 OF 1909

NARAYANASAMI AIYAR—PETITIONER

versus

JANAKI AMMAL AND ANOTHER—RESPONDENTS.

Estate, manager of—Late production of accounts by—Whether evidence of dishonesty—Receiver.

The late production of accounts and documents by the manager of an estate is not sufficient evidence of dishonest dealing with the estate to warrant the appointment of a Receiver.

Obiter:—The High Court will not deal with any material which was not before the original Court.

Appeals against the decree of the Subordinate Judge of Mayavaram at Kumbakonam, in Original Suit No. 30 of 1907.

C. M. P. No. 519 OF 1909,

Petition praying that, for the reasons set forth in the affidavit filed therewith, the High Court may be pleased to admit the account-book filed by the 1st respondent in this Court as Receiver on the 16th

November 1908, as additional evidence in Appeal No. 215 of 1907 on the file of this Court.

Mr. *T. R. Ramachandra Iyer*, for the Appellant.

Mr. *K. Srinivasa Iyengar*, for the Respondents.

JUDGMENT.

APPEAL No. 215 OF 1907 AND CIVIL MISCELLANEOUS PETITION No. 519 OF 1909.—The principal ground on which the appellant asks us to appoint a Receiver in this case is the gift of Rs. 10,000 by the 1st defendant, the widow in possession, to the 2nd defendant, her mother-in-law. We are, however, of opinion that, in the circumstances in which that gift was made, we ought not to consider it a ground for depriving the first defendant of the control of the securities and investment which she inherited from her husband. We agree with the Subordinate Judge that she made the gift under pressure as the then best apparent way of securing possession of the documents, many of them unregistered, which formed a considerable part of the estate. These documents were, it is clear, in the possession of the 2nd defendant and her son-in-law V. Ramaswami Iyer with or without the knowledge of the 1st defendant's relations. Exhibit M indicates that on the 11th of August, the 1st defendant knew that the 2nd defendant or Ramaswami Iyer or both were attempting to collect outstandings and shortly afterwards, on 17th August, the complaint of theft of documents was prepared. Whether that complaint was borne out or false, that is to say, whether or not Ramaswami Iyer or 2nd defendant had taken possession of the documents with the knowledge of the first defendant and her father, or, as the 1st defendant alleges, without their knowledge, its principal aim and object was the recovery of the documents which the 2nd defendant and her son-in-law were holding, apparently, in the hope of securing a satisfactory provision for the 2nd defendant and effecting the adoption by the 1st defendant of the plaintiff's son, an adoption on which the evidence indicates the 2nd defendant had set her heart. It is necessary to examine the evidence of the negotiations which followed immediately on the threat of criminal proceedings. The 2nd defendant's son-in-law in the end agreed to restore the documents, if some land and Rs. 10,000 were provided for the 2nd defendant and the idea of the adoption appears to have been dropped at any rate for the time. The Subordinate Judge was justified on this evidence in coming to the conclusion that the payment of Rs. 10,000 or the agreement to pay it—for the 1st defendant afterwards tried to stop payment (Exhibit D) but failed—was not an act involving a disqualification for the management of the estate. The 1st defendant was at the time 19 years of age and her father and brother-in-law made an arrangement which at the time, no doubt, seemed forced upon them and possibly was better than leaving the documents in the hands of the 2nd defendant and her son-in-law. Of the other grounds dealt with by the Subordinate Judge, only one, the sale of paddy, was touched on in the argument, and we are not satisfied that the sales of paddy have not been properly accounted for. Mr. Ramachandra Iyer strongly urged on us that a Receiver ought to be appointed because the first defendant's brother-in-law who was managing her affairs did not produce, till a late stage of the suit, the documents and accounts which would show the extent of outstanding debts due to the estate. This, he urged, showed that the estate is not being honestly managed and he pointed to the difference between the estimate of outstandings given in the written statement (Rs. 45,000) and that given by the witnesses at different times; he also drew our attention to a list made by himself from the accounts and documents in the suit which showed that the amount should be about Rs. 67,000 and claimed that these discrepancies are indications of dishonesty on the part of the 1st defendant's agent. This part of the case, so far as it rests on the alleged understatement of assets in the written statement and oral evidence, does not appear to have been pressed upon the Subordinate Judge, as it has now been put before us, and we do not think we can satisfactorily deal with it. On the evidence before the Subordinate Judge of facts as they stood at the date of the plaint, we should not be disposed to hold that any case for a Receiver has been made out, or that the amount of outstandings was deliberately suppressed or understated; and, so far as the case is based on allega-

tions of misconduct, evidenced by acts during the pendency of the suit and subsequent to its disposal during the pendency of the appeal, we do not think it desirable now to deal with any material which was not before the Subordinate Judge ; and we do not take any evidence of such acts into consideration in disposing of the appeal or express opinion as to their effect.

The evidence contains in different places various different estimates by different people: it is not said that any documents have been suppressed or that the list made out now by Mr. Ramachandra Iyer is not exhaustive. In these circumstances, we do not think the late production of the accounts and documents affords sufficient evidence of dishonest dealing with the estate to warrant our taking the management out of the hands of the widow.

There is not sufficient ground for appointing Receiver and we dismiss the appeal and the petition.

There will be no order as to costs.

APPEAL No. 22 OF 1908.—The appeal attacks two declarations made in the decree of the Subordinate Judge: (1) a declaration that "the plaintiff is the next reversionary heir of the deceased Ramayyer" and (2) a declaration that "the arrangement to pay Rs. 10,000 to the 2nd defendant by the 1st defendant is not binding on the plaintiff. As to the first, we think it may remain in the decree. The question whether the plaintiff was entitled to sue as next reversionary heir of Ramayyar was fought out in the suit and much evidence taken: the Subordinate Judge decided it on the evidence and though the declaration asked for in the plaint was not essential and he might have dismissed the suit, yet the peculiar circumstances of this class of suits seem to make it not undesirable that it should remain to prevent further litigation on the question between the plaintiff and the 1st defendant, should the former find it necessary to attack again the latter's management of the estate. The 2nd declaration was not asked for and appears to be of no practical value; it may be struck out.

The decree of the Subordinate Judge will be modified.

There will be no order as to costs.

Decree modified.

CALCUTTA HIGH COURT.

REGULAR CIVIL APPEALS NOS. 352-1 AND 352-2 OF 1909.

July 23, 1912.

Present:—Sir Ashutosh Mookerjee, Kt., Judge and Mr. Justice Holmwood.

DINABANDHU NANDI—PLAINTIFF—APPELLANT

versus

MASHUDA KHATUN—DEFENDANT—RESPONDENT.

Guardian ad litem—Non-appearance of proposed guardian—Plaintiff's duty to ask Court to appoint guardian—Decree against minor not represented—Decree null and void—Transfer of Property Act (IV of 1882), s. 90—Personal decree against mortgagor—Essential elements—Second personal decree not to be made—Mortgage decree for sale and also personal decree—Not in conformity with Act, yet binding between parties.

Where the proposed guardian of a minor defendant does not enter appearance, the plaintiff ought to ask the Court to appoint one of its officers as guardian *ad litem*. If this is not done and the minor is wholly unrepresented, a decree made against him is absolutely null and void.

Narsingh Narain v. *Sheikh Jahi Mistry*, 13 Ind. Cas. 414; 15 C. L. J. 3, relied upon.

Three essential elements must be established before a decree under section 90 of the Transfer of Property Act can be obtained; namely, *first*, that though there has been a decree for sale and the mortgaged property has been exhausted thereunder, the sale-proceeds have proved insufficient to pay the amount due to the plaintiff; *secondly*, that the balance is legally recoverable from the mortgagor otherwise than out of the property sold, and, *thirdly*, that a personal decree has not previously been made.

Purna Chandra v. *Radha Nath*, 33 C. 867; 4 C. L. J. 141, relied upon.

If the decree-holder has obtained a personal decree against the judgment-debtor, he cannot subsequently invite the Court to repeat the operation already performed and thus obtain a second personal decree against the mortgagor.

Dina Nath v. *Bejoy Krishna*, 7 C. W. N. 744 and *Sadho Singh* v. *Maharaja of Benares*, 29 A. 12; 3 A. L. J. 606; A. W. N. (1906), 251, followed.

A mortgage-decree, which is not merely the usual decree for sale but also a personal decree against the defendant mortgagor in the event of non-satisfaction of the mortgage dues by sale of the mortgaged properties, is not in strict conformity with the provisions of the Transfer of Property Act.

Lal Behary v. *Habibar Rahman*, 26 C. 166; 3 C. W. N. 8; *Raja Ram Ranjina* v. *Indra Narayan*, 33 C. 990; 10 C. W. N. 862; *Damodara* v. *Vyanku*, 31 B. 244; 8 Bom. L. R. 199; *Badri Das* v. *Inayat Khan*, 22 A. 404 and *Abbakke* v. *Krishnayya*, 32 M. 534; 5 M. L. T. 246; 4 Ind. Cas. 1120, followed.

But such a decree is a good and valid decree as between the parties thereto.

Bechu Singh v. *Bichharam Sahu*, 1 Ind. Cas. 677; 10 C. L. J. 91, relied upon.

DINABANDHU NANDI *v.* MASHUDA KHATUN.

And the decree-holder, who has obtained that decree and has executed it, cannot be permitted to turn round and contend that the decree is inoperative and ask for a second personal decree against the mortgagor.

Appeals from the decree of the Subordinate Judge of Burdwan, dated the 21st December, 1908.

Babus *Ram Chandra Mazumdar*, *Biraj Mohan Mojumdar*, *Atul Chandra Dutt* and *Bejoy Krishna, Bhattacharjee*, for the Appellant.

Babu *Joges Chandra Dey* (for Babu *Ram Charan Mitra*) and Moulvi *Nuruddin Ahmed*, for the Respondent.

JUDGMENT.—This is an appeal on behalf of the plaintiff against a decree in a mortgage suit whereby a decree previously made therein under section 90 of the Transfer of Property Act has been discharged.

The plaintiff sued to enforce a mortgage security and obtained a decree on the 28th January 1897. This was not merely the usual decree for sale but also a personal decree against the defendant-mortgagor in the event of non-satisfaction of the mortgage dues by sale of the mortgage properties. That this decree was not in strict conformity with the provisions of the Transfer of Property Act is clear from a long series of judicial decisions: *Lal Behary* v. *Habibur Rahman*(1), *Raja Ram Ranjin* v. *Indra Narayan* (2), *Damodara* v. *Vyanku* (3), *Badri Das* v. *Inayat Khan* (4) and *Abbakke* v. *Krishnayya* (5). The decree, for sale, was, however, repeatedly executed, and the mortgage properties were exhausted. The decree-holder then proceeded, in one instance at least, to execute the personal decree, apparently without objection on the part of the mortgagor judgment-debtor. Thereafter, the judgment-debtor died. For some unexplained reason, the decree-holder did not take any further steps to execute the decree he held; but at a time when an application for execution of that decree would have been successfully met by the plea of limitation, he applied under section 90 of the Transfer of Property Act for a personal decree against the infant representatives of the judgment-debtor, then living under the protection of their maternal aunt. It is a matter for controversy between the parties, whether notice of this application was duly served upon the infants and their proposed guardian as it ought to have been served, on the principle explained in *Abdul Sattar* v. *Satya Bhushan Das* (6). The Subordinate Judge has found that the story of service of notice is an invention; but it is not necessary for our present purpose to pronounce any opinion upon that question, because even if we assume that the notice was duly served, it is obvious that the proceedings under section 90 were wholly infructuous as against the infants. The proposed guardian did not enter appearance, and did not accept the office of guardian. The result was that the infants, even if it be assumed that they were duly served, were not represented at the hearing, yet a decree under section 90 was made against them. They subsequently applied to the Court to cancel this decree as improperly made; this application was granted, and the decree was discharged. We are now invited to hold that the decree ought not to have been set aside. It is impossible, in our opinion, to accede to this contention. No effective steps were taken for the representation of the infants in the proceeding under section 90, which was essentially a proceeding in a pending suit for a supplementary decree. *Purna Chandra* v. *Radha Nath* (7), *Rahmat Karim* v. *Abdul Karaim* (8). Where the proposed guardian did not enter appearance, the Court ought to have been asked by the plaintiff to appoint one of its officers as the guardian *ad litem* of the infants. This was not done and the infants were wholly unrepresented at the hearing of the application. That a decree, made under these circumstances, is absolutely null and void, in so far as the infants are concerned, is clear from the case of *Narsingh Narain* v. *Sheikh Jahi Mistry* (9), where the earlier decisions on the point will be found analyzed and reviewed. This decree, which does not bind the infants and cannot be executed against them, has, consequently, been very properly discharged. This conclusion is sufficient for the disposal of the appeal. But, if the appeal be dismissed on this ground alone, the decree-holder will still

(1) 26 C. 166; 3 C. W. N. 8.
(2) 33 C. 990; 10 C. W. N. 862.
(3) 31 B. 244; 8 Bom. L. R. 199.
(4) 22 A. 404.
(5) 32 M. 534; 5 M. L. T. 246; 4 Ind. Cas. 1120.
(6) 35 C. 767.
(7) 4 C. L. J. 141; 33 C. 867.
(8) 6 C. L. J. 119; 34 C. 672; 11 C. W. N. 674.
(9) 15 C. L. J. 3; 13 Ind. Cas. 414.

be free to revive his application under section 90 of the Transfer of Property Act and proceed with it after he has taken steps for the proper representation of the infants. We are of opinion, however, that this litigation should not be further protracted, and we, therefore, proceed to examine the grounds mentioned in the judgment of the Subordinate Judge.

It has been argued on behalf of the decree-holder that as this mortgage-decree was not in conformity with the provisions of the Transfer of Property Act, it is open to him to repudiate that decree and to ask for a personal decree against the judgment-debtor or his representatives in terms of section 90. This position is clearly untenable. The original decree, though not strictly in conformity with the provisions of the Transfer of Property Act, is a good and valid decree as between the parties thereto: *Bechu Singh* v. *Bichharam Sahu* (10). At any rate, the decree-holder who has obtained that decree and has executed it, cannot now be permitted to turn round and contend that the decree is inoperative. It is further clear that the decree under section 90 of the Transfer of Property Act cannot be made in the present case. As was pointed out in the case of *Purna Chandra* v. *Radha Nath* (7), three essential elements must be established before a decree under section 90 can be obtained, namely, *first*, that though there has been a decree for sale and the mortgaged property has been exhausted thereunder, the sale-proceeds have proved insufficient to pay the amount due to the plaintiff; *secondly*, that the balance is legally recoverable from the mortgagor otherwise than out of the property sold; and, *thirdly*, that a personal decree has not previously been made. If the decree-holder has obtained a personal decree against the judgment-debtor, he cannot subsequently invite the Court to repeat the operation already performed and thus obtain a second personal decree against the mortgagor: *Dina Nath* v. *Bejoy Krishna* (11), *Sadho Singh* v. *Maharaja of Benares* (12). In this view also, the decree under section 90, which was made notwithstanding the personal relief granted by the original decree, has been rightly set aside.

(10) 10 C. L. J. 91; 1 Ind. Cas. 677.
(11) 7 C. W. N. 744.
(12) 29 A. 12; 3 A. L. J. 606; A. W. N. (1906) 251.

The result is that the decree of the lower Court is affirmed and this appeal dismissed with costs.

It is conceded that this order will govern R. A. No. 352-2 of 1909, which is accordingly dismissed with costs.

As there was a consolidation order, there will be one hearing fee in the two Appeals Nos. 352-1 and 352-2.

The Appeal No. 368 of 1909 against the order in proceedings in execution of the decree under section 90, necessarily fails and is dismissed with costs. We assess the hearing fee at two gold *mohurs*.

Appeals dismissed.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 506 OF 1911.

August 6, 1912.

Present:—Mr. Justice Sundara Aiyar and Mr. Justice Sadasiva Aiyar.

SUBRAYA KINI—DEFENDANT—APPELLANT

versus

RAMAPPA ADIGE AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Usufructuary mortgage—Lease—Subsequent execution of mulgeni *lease to stranger—No change of character as lessee—Lessor entitled to possession—Merger.*

Sundara Aiyar, J.—Where, at the time of the execution of a usufructuary mortgage, the mortgagor takes a lease from the mortgagee of the mortgaged properties, the position of the mortgagor is that of a tenant of the mortgagee and the value of the possession is not changed, till the mortgage is redeemed, by the execution of a *mulgeni* lease or by the assertion of any *mulgeni* right in himself.

Second appeal against the decree of the District Court of South Canara, in Appeal Suit No. 329 of 1909, presented against that of the Court of the District Munsif of Udipi, in Original Suit No. 202 of 1908.

Mr. *K. Ramanatha Shenai*, for the Appellant.

Mr. *K. Y. Adiga*, for the Respondents.

JUDGMENT.

SUNDARA AIYAR, J.—There is no ground for interference in this second appeal. The members of the Kini family gave a mortgage to the plaintiff in 1860 and took a lease from

him of the mortgaged lands. Their possession, therefore, was that of tenants under the plaintiff. It was not shown that that possession came to a legal termination. Neither the execution of the *mulgeni* lease to Rahman nor the assertion of *mulgeni* right in Narayana Kini subsequently would have the result of changing the nature of the possession originally had in 1860 as lessees. Whether, therefore, the execution of the *mulgeni* has been properly proved or not, whether the *mulgeni* was valid or not, and whether it is a *mulgeni* lease that now subsists after the partition in the family of the Kinis and the allotment of the lands at that partition to persons, who subsequently sold the lands to others from whom the plaintiff derived his title, it is clear that until the mortgage is redeemed, the plaintiff is entitled to recover on the tenancy which came into existence at the time of the mortgage. The plaintiff is, therefore, entitled to recover possession. The District Judge has not recorded a finding on the question of notice. Whether that question was argued before him does not appear, but the Munsif's judgment on the point is obviously right. It is quite immaterial that the plaintiff, at the time of the first notice, Exhibit I, had not purchased the equity of redemption in a portion of the land. His right to give notice was as the lessor under the lease which was executed at the time of the mortgage. The second appeal must, therefore, be dismissed with costs.

SADASIVA AIYAR, J.—I am of opinion that the District Judge finds as a fact that the alleged *mulgeni* lease to Rahman is a myth. Even if his finding is wrong, and even taking it that there was a *mulgeni* lease to Rahman created by the Kinis, that *mulgeni* lease right, as it was transferred to Narayana Kini in 1878, when Narayana Kini and his brothers (the then heads of the Kini family) were undivided in interest, ceased to exist by merging in their own *mulgeni* right and this explains why Narayana Kini hypothecated the land itself under Exhibit III and not merely a *mulgeni* right in the land. When, therefore, at the partition of 1881, the property fell to the share of the plaintiff's vendor's husband, plaintiff's vendor's husband got title to the property itself subject only to the original usufructuary mortgage right in plaintiff's favour and not subject to the *mulgeni* right in any body else. No *mulgeni* right in any other person, therefore, existed at that time. No such right came into existence afterwards. In this view, the second appeal must be and is dismissed with costs.

Appeal dismissed.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEALS NOS. 1079 TO 1083 OF 1909.

May 17, 1912.

Present:—Sir Ashutosh Mookerjee, KT., Judge, and Mr. Justice Beachcroft.

AKTOWLI—DEFENDANT—APPELLANT

versus

TARAK NATH GHOSE—PLAINTIFF—RESPONDENT.

Bengal Tenancy Act (VIII of 1885), *s.* 105—*Proceeding may be instituted whether rent is or is not fixed by contract—Evidence Act (I of* 1872), *s.* 34—*Collection papers—Admissibility—Corroborative evidence—Absence of proof to show by whom rents had been collected—Collection papers, not admissible.*

A proceeding, under section 105 of the Bengal Tenancy Act, can be instituted not only when there is no rent payable by the tenant to the landlord under the terms of a contract between the parties, but also when rent is fixed by a contract.

Sheodhani Pandey v. *Maharani Beni Pershad Keori*, 16 C. L. J. 67; 16 Ind. Cas. 935, relied upon.

Certain collection papers were produced by an officer of the landlord who deposed that they were in his custody. No question was put to him as to who had written the papers, nor was there any evidence to show by whom the rents had been collected and when and by whom the entries in the collection papers had been made:

Held, that the papers were not admissible under section 34 of the Evidence Act.

Surnomoyi v. *Johur Mahomed Nashyo*, 10 C. L. R. 545, followed.

Belaet Khan v. *Rash Beharee Mookerjee*, 22 W. R. 549, not followed.

Appeals from the decrees of the Special Judge of Bhagalpur, dated January 22nd 1909, affirming those of the Settlement Officer of Bhagalpur, dated June 27th, 1908.

Babus *Provash Chandra Mitter* and *Susil Madhab Mallik*, for the Appellant.

Babus *Umakali Mukherjee* and *Naresh Chandra Sinha*, for the Respondent.

JUDGMENT.—This is an appeal on behalf of the tenants defendants in a proceeding under section 105 of the Bengal Tenancy Act. After the final publication of the Record of Rights, in which the

tenants were entered as occupancy-*raiyats*, the plaintiff landlord applied under section 105 for settlement of fair and equitable rents. The defendants resisted the claim principally on the ground that they held at fixed-rates of rent and their rent was, consequently, not liable to enhancement. This objection has been overruled by the Courts below and a decree made in favour of the plaintiff. In this appeal that decree has been assailed substantially on two grounds; namely, *first*, that the proceeding was not maintainable under section 105 of the Bengal Tenancy Act and that the proper remedy of the landlord was by way of a suit for enhancement of rent under section 30 of the Bengal Tenancy Act; and *secondly*, that the decision of the Settlement Officer, confirmed on appeal by the Special Judge, is based on evidence inadmissible in law.

In so far as the first of these contentions is concerned, there is clearly no substance in it. The appellants have contended that a proceeding under section 105 can be instituted only when there is no rent payable by the tenant to the landlord under the terms of a contract between the parties; in other words, that the provisions of section 105 are applicable only when no rent has been fixed by agreement of parties. This view is negatived by sub-section 4 of section 105 which provides that in settling rents under the section, the Revenue Officer shall presume, until the contrary is proved, that the existing rent is fair and equitable and shall have regard to the rules laid down for the guidance of the Civil Court in increasing or reducing rents, as the case may be. The appellants have contended that the rejection of their view leads to an anomaly, namely, whereas a decree in a suit for enhancement of rent under section 30 is liable to be challenged by way of a first and a second appeal, an order for settlement of rent under section 105 can be challenged by way of a first appeal only, as provided in section 109A of the Bengal Tenancy Act. In our opinion, there is really no anomaly involved in this result. The Legislature intended that as in a proceeding under section 105, the rent is settled by a Revenue Officer, his decision should not be treated in the same way as the decree of a Civil Court under section 30. The view we take is in accordance with that adopted by Mr. Justice Carnduff in the case of *Sheodhani Pandey* v. *Maharani Beni Pershad Reori* (1). The first contention of the appellants, therefore, fails.

In so far as the second contention of the appellants is concerned, it is necessary to premise that their defence was that they held at fixed-rates of rent. They produced rent receipts for 20 years in order to prove that they held at a uniform rate of rent for that period, and they relied upon the presumption mentioned in sub-section 2 of section 50 of the Bengal Tenancy Act; because, notwithstanding the final publication of the Record of Rights, it was competent to them to do so as laid down by a Full Bench in the case of *Pirthi Chand Lal* v. *Basarat Ali* (2). As these rent receipts were believed by the Court, the defendants became entitled to avail themselves of the statutory presumption mentioned in section 50. The plaintiff, thereupon, produced his collection papers to show that the rent had varied from time to time at an earlier period of the tenancy. The main question raised in this appeal relates to the admissibility of these collection papers. They were produced by an officer of the landlord who deposed that they were in his custody. No question was put to him as to who had written the papers, nor is their any evidence on the record to show by whom the rents had been collected and when and by whom the entries in the collection papers had been made. Under these circumstances, it has been contended by the appellants that these collection papers are not admissible under section 34 of the Indian Evidence Act; reliance has been placed on their behalf upon a number of judicial decisions to which we shall presently refer, while it has been suggested on behalf of the respondents that there is a conflict of judicial opinion upon this subject.

The cases to be found in the books may be grouped into two classes; namely, *first*, those that relate to *jamabandi* papers, and, *secondly*, those that relate to *jamawasilbaki*

(1) 16 C. L. J. 67; 16 Ind. Cas. 935.
(2) 37 C. 30; 13 C. W. N. 1149; 10 C. L. J. 343; 3 Ind. Cas. 449.

papers. For our present purpose, there is no difference between these two classes of papers, though they are not identical in their nature. *Jamabandi* papers show the quantity of land held by each cultivator, its different qualities, its rate of rent for each kind, the total rent for all the lands in each cultivator's possession, and, lastly, the grand total of all the lands of every kind held by him. The *jamawasilbaki* papers, on the other hand, are yearly accounts showing the total rent demandable for the current year, the balance of the previous year, the amounts collected during the year, and the balance due. With regard to *jamabandi* papers, it was held by this Court under Act II of 1855 that they were not independent but merely corroborative evidence: *Chamarnee Bibee* v. *Ayenoollah Sirdar* (3), *Gajjo Koer* v. *Syed Ally Ahmed* (4), *Dhanookdharee* v. *Toomey* (5) and *Kishore Doss* v. *Pursun Mahtoon* (6). The case of *Chamarnee Bibee* v. *Ayenoollah Sirdar* (3) arose out of a suit for enhancement of rent, and the collection papers were produced by the landlord to negative the presumption of fixity of rent, which arose in favour of the tenants upon proof of payment of rent at a uniform rate for the statutory period. In the case of *Beejoy Gobind Burral* v. *Bheekoo Roy* (7), Mr. Justice Jackson doubted whether these collection papers could at all be treated as books of account. That doubt, however, has not been shared by the learned Judges who decided the later cases. The decisions in *D'Silva* v. *Raj Coomar Dutt* (8), *Enayetoollah* v. *Nubo Coomar Sircar* (9), *Reazooddeen* v. *McAlepine* (10) and *Watson & Co.* v. *Mohendro Nath Paul* (11), which are discussed in the case of *Akshaya Coomar Dutt* v. *Shama Charan Patitanda* (12), where *Taru Patur* v. *Abinash Chunder* (13) was doubted, are not of any real assistance in the determination of the question before us, as there the question raised was, whether *jamabandi* papers prepared under Regulation VII of 1822 could be made the foundation for enhancement of rent, unless it was established that the rent as entered therein had been agreed to and accepted by the tenants. With regard to *jamawasilbaki* papers, it was ruled in the cases of *Gopal Mundul* v. *Nobo Kishen* (14), *Kheeromonee Dassee* v. *Beejoy Gobind Bural* (15), *Beejoy Gobind Burral* v. *Bheekoo Roy* (7), *Sheo Suhaye* v. *Goodur Roy* (16) and *Ram Lall Chuckerbutty* v. *Tara Soondari* (17), which were all decided under Act II of 1855, that these collection papers were not independent evidence of the condition under which the tenants held. Some of these cases, for instance, those of *Kheeromonee Dassee* v. *Beejoy Gobind Bural* (15), *Gopal Mundul* v. *Nobo Kishen* (14), and *Ram Lall Chuckerbutty* v. *Tara Soondari* (17), were suits for enhancement of rent in which the landlord relied upon entries in collection papers to negative the presumption of fixity of rent in favour of the tenant. The case of *Shib Persad Doobey* v. *Promothonath Ghose* (18) is of no assistance in the solution of the question raised before us, because there the only question was, whether, if the tenant called for the production of the papers of the landlord, he was not bound by all the entries found therein; and it was ruled that he was so bound, as was subsequently laid down by the Judicial Committee in the case of *Rajeswari Kuar* v. *Bal Krishan* (19). The question of admissibility was raised, after the Indian Evidence Act of 1872 had come into force, in the cases of *Bhugwan Dutt Jha* v. *Sheo Mungul Singh* (20), *Belaet Khan* v. *Rash Beharee Mookerjee* (21), *Surnomoyi* v. *Johur Mahomed Nashyo* (22), *Roushan Bibee* v. *Hurray Kristo Nath* (23), *Akhil Chandra Chowdhry* v. *Nayu* (24) and

(3) 9 W. R. 451.
(4) 14 W. R. 474; 6 B. L. R. Ap. 62.
(5) 20 W. R. 142.
(6) 20 W. R. 171.
(7) 10 W. R. 291.
(8) 16 W. R. 153.
(9) 20 W. R. 207.
(10) 22 W. R. 540.
(11) 23 W. R. 436.
(12) 16 C. 586.
(13) 4 C. 76 at p. 79.
(14) 5 W. R. Act X Rulings, 83.
(15) 7 W. R. 533.
(16) 8 W. R. 328.
(17) 8 W. R. 280.
(18) 10 W. R. 193.
(19) 9 A. 713; 14 I. A. 142.
(20) 22 W. R. 256.
(21) 22 W. R. 549.
(22) 10 C. L. R. 545.
(23) 8 C. 926.
(24) 10 C. 248.

Mahomed Mahmood v. *Safar Ali* (25). In the case of *Belaet Khan* v. *Rish Beharee Mookerjee* (21), Mr. Justice Markby held that section 34 of the Indian Evidence Act had substantially altered the law as contained in section 43 of Act II of 1855, and that in a suit for enhancement of rent, if the landlord relied upon the entries in the collection papers to negative the presumption of fixity of rent in favour of the defendant, no corroboration was needed, inasmuch as it could not be maintained that the statements were used as evidence to charge any person with liability. This view, however, was not accepted by Mr. Justice Prinsep and Mr. Justice Bose in the case of *Surnomoyi* v. *Johur Mahomed Nashyo* (22), where, as we find from an examination of the original record, enhancement was sought by the landlord and was resisted by the tenant on the ground that he held at a fixed-rate of rent. We further find that in the cases of *Roushan Bibee* v. *Hurray Kristo Nath* (23); *Akhil Chandra Chowdhry* v. *Nayu* (24) and *Mahomed Mahmood* v. *Safar Ali* (25), which arose out of suits for recovery of rent, Sir Richard Garth treated the collection papers as inadmissible under section 34 of the Indian Evidence Act. The only case, therefore, decided after the Indian Evidence Act had come into operation, which supports the contention of the respondent, is that of *Baleat Khan* v. *Rish Beharee Mookerjee* (21). We are not prepared to follow that decision in view of the dissent expressed in the case of *Surnomoyi* v. *Johur Mahomed Nashyo* (22), which has been treated as good law during a period of thirty years. If the question were *res integra*, it might, no doubt, have been contended with some force that the statements in the collection papers produced by the landlord are not sought to be used by him as evidence to charge the defendants with liability. At the same time, the view adopted by Mr. Justice Prinsep and Mr. Justice Bose may clearly be defended upon a liberal construction of section 34. To take one illustration, in a suit for rent, the matter for inquiry is, whether the rent is payable at the sum named by the landlord or at the figure alleged by the tenant. An entry in the collection papers that the rent, on a previous occasion, had been realized at a certain rate, does not by itself impose any liability upon the tenant; but taken along with the presumption mentioned in section 51 of the Bengal Tenancy Act, it leads to the result that the landlord is able to fix a liability upon the denfendant. In the same way, in a suit for enhancement of rent, the matter for inquiry is, whether, as alleged by the landlord, the tenancy is held at a variable rent, or, whether as asserted by the tenant, the land is held at a rent or rate of rent fixed in perpetuity. The entries in the collection papers of the landlord, which go to prove that the rent has varied from year to year, although they do not directly impose any liability on the defendant, yet ultimately lead to that result. From this point of view, the opinion expressed by Mr. Justice Prinsep and Mr. Justice Bose in the case of *Surnomoyi* v. *Johur Mahomed Nashyo* (22) may be supported, and we are not prepared at this distance of time to dissent from that view. At the same time, we are of opinion that there may be cases which show that the law as embodied in section 34 of the Indian Evidence Act is not identical with the law as laid down in section 42 of Act II of 1855. To take a concrete illustration: suppose a question arises, whether a person was on a particular date present in Calcutta. Evidence is adduced to show that in a book of account regularly kept in the course of business, there is an entry that he received a sum of money from X in Calcutta on that date. That entry would be admissible under the first part of section 34, and, apparently, no corroboration would be needed, as no liability is sought to be imposed upon him by virtue of that entry. But an entry of this character would not have been admissible under the terms of section 43 of Act II of 1855. We, therefore, hold that, in th case before us, the *jamabandi* papers were improperly received in evidence.

The question next arises, what course should be adopted in this view of the matter? On behalf of the appellants, it has been strenuously contended that the *jamabandi* papers should be excluded and that the claim for assessment should be dismiss-

(25) 11 C. 407.

ed. After anxious consideration, we have arrived at the conclusion that this course should not be pursued. The objection urged in this Court does not appear to have been taken in this precise form in the Court of first instance; and it has been forcibly argued on behalf of the respondent that if the objection had been taken, evidence of the description contemplated by section 34 might have been adduced to make the entries admissible under section 32 of the Indian Evidence Act. It was pointed out in the case of *Rampyarabai* v. *Balaji Shridhar* (26), that if a statement is admissible under section 32, corroboration would not be needed in terms of section 34. This view was accepted by this Court in the case of *Dukka Mandal* v. *Grant* (27) and is in accordance with the opinion expressed by Mr. Justice Norman so far back as 1857 in the case of *Kheeromoyee Dassee* v. *Beejoy Gobind Bural* (15).

The result is that this appeal is allowed, the decree of the Special Judge set aside, and the case remitted to the Court of first instance in order that the question of the fixity of rent of the defendants may be investigated again. The parties will be at liberty to adduce fresh evidence. The appellants are entitled to their costs in this Court. We assess the hearing fee at one gold *mohur*. This order will apply only to the cases of tenants who had produced rent receipts to prove payment of rent at a uniform rate for 20 years. In so far as the other tenants are concerned, the appeal must be dismissed with costs.

This judgment will govern the Appeals Nos. 1081, 1082 and 1083 of 1909 and similar orders will be drawn up therein. Appeal No. 1080 of 1909 is dismissed with costs. We assess the hearing fee at one gold *mohur*.

Appeals allowed: Appeal No. 1080 *dismissed.*

(26) 23 B. 294; 6 Bom. L. R. 50.
(27) 16 C. L. J. 24; 16 Ind. Cas. 467.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 1305 OF 1898.

January 21, 1901.

Present:—Mr. Justice Chatterjee and Mr. Justice Maude.

November 8, 1901.

Present:—Mr Justice Anderson and Mr. Justice Harris.

BASAWA SINGH—DEFENDANT—APPELLANT

versus

Sardarni BHAGWAN KAUR AND OTHERS REPRESENTATIVES OF *Sardar* DAYAL SINGH —PLAINTIFFS—RESPONDENTS.

Religious institution—Dharmsala *of Sri Tilok Nath, Tahsil Nurpur, District Kangra—Public or private—Suit to remove Granthi—Leave to sue—Religious Endowments Act* (*XX of* 1863), *ss.* 14, 18—*Court-fee for such a suit.*

A plaint containing a claim to remove the manager of a religious institution, based on the allegation that the institution is a private one and is founded and maintained by plaintiff's ancestors, and that the plaintiff alone has the power of appointing and dismissing the manager who refuses to leave it, requires *ad valorem* Court-fee and is not maintainable on a stamp of rupees ten only.

Bawa Mangal Das v. *Mahant Narinjan Das*, 58 P. R 1893, followed.

Bawa Mangal Das v. *Mahant Niranjan Das*, 56 P. R. 1895, referred to.

Where the object of a *Dharamsala* is that the *Granth* should be read there daily and no member of the Sikh Community who behaves with propriety can be excluded from participating in this service or forbidden from entering it where such recitation is being made, the *Dharamsala* is a Public Religious Institution, particularly where the *Granthi* is remunerated wholly or partly from a Government grant. It is immaterial whether the appointment or dismissal of the *Granthi* rests solely with the founder or his representative.

Sathappayyar v. *Periasami*, 14 M. 1, distinguished.

The *Dharmsala* of Sri Tilok Nath, Tahsil Nurpur, District Kangra is a Public Religious Institution and the *Granthi* of such an institution cannot be removed even by its founder except for good reason.

The provisions of section 14 and other sections of Act XX of 1863 apply to an institution of the above description, and its founder or his representative or any other person interested in the institution suing to remove the *Granthi* or Manager cannot maintain a suit for the purpose without first obtaining leave, under section 18 of the said Act, of the principal Court of Original Civil Jurisdiction.

Gokal Ram v. *Kanshi Ram*, 95 P. R. 1900; 6 P. L. R. 1901; *Sheorattan Kunwari* v. *Ram Pershad*, 18 A. 227; A. W. N. (1896) 37; *Muhammad Siraj-ul-Haq* v. *Imam-ud-Din*, 19 A. 104; A. W. N. (1896) 187; *Juggal Kishore* v. *Lachman Das*, *Raghunath Das*, 23 B. 659; *Dhurrum Singh* v. *Kishen Singh*, 7 C. 767; 9 C. L. R. 410 and *Jan Ali* v. *Ram Nath Mundul*, 8 C. 32; 9 C. L. R. 433, followed.

Maharanee Inder Jit Kooer v. *Chandemun Misser*, 16 S. W. R. 99 and *Protap Chandra Misser* v. *Brojo Nath Misser*, 19 C. 275, distinguished.

BASAWA SINGH *v.* BHAGWAN KAUR.

Second appeal from the order of the Divisional Judge, Hoshiarpur Division, dated the 4th July 1898, reversing that of the District Judge, dated the 4th Feburuary 1898, dismissing plaintiff's claim.

Bakhshi *Sohan Lal*, for the Appellant.

Lala *Lal Chand*, for the Respondents.

ORDER.

CHATTERJEE AND MAUDE, JJ.—A preliminary point is taken by the respondents, *viz.*, that the appeal is insufficiently stamped. In the lower Courts, Rs. 80 were paid but the petition of appeal to the Chief Court bears a stamp of only Rs. 10. *Bawa Mangal Das* v. *Mahant Narinjan Das* (1) and *Bawa Mangal Das* v. *Mahant Narinjan Das* (2) are quoted by respondents' Counsel in support of his contention. Mr. Sohan Lal argues that the plaintiff did not claim possession but only the removal of the defendant from the charge of the *Dharmsala* and cites certain judgments of the Allahabad and Madras High Courts to show that the suits of this nature cannot be valued, and that a stamp of Rs. 10 is, therefore, sufficient. We find, however, that plaintiff in his plaint alleged the institution to be a private one founded and maintained by his ancestors and asserts that he alone had the power of appointing and dismissing the manager and his cause of action was that defendant refused to leave when desired to do so by him. This is practically a suit for possession and, at any rate, the ruling of this Court first cited appears to be in point and is supported by the other authority quoted. Following these dicisions, we hold that the petition of appeal must bear a stamp of Rs. 80. We allow the appellant fifteen days to make good the deficieney. He must also pay Rs. 16 for respondent's Counsel's costs of this hearing which will be paid into Court before the next hearing.

JUDGMENT.

ANDERSON AND HARRIS, JJ.—This is an appeal by Basawa Singh against Sardarni Bhagwan Kaur, as representative of late Sardar Dyal Singh Majithia, for reversal of the order of the Divisional Judge of Hoshiarpur removing him from the management of the *Dharmsala* of Tilok Nath, Tahsil Nurpur, *Zila* Kangra.

Sardar Dyal Singh, claiming to represent the original founder of the *Dharmsala* and that he has the right to appoint the manager, sued to eject the defendant, his own nominee, on account of mismanagement, and, previous to suit, obtained an order from the District Judge of Kangra, under section 14 of Act XX of 1863. The defendant having joined issue on these allegations, plaintiff further claimed the right to dismiss defendant without assigning reasons.

The first Court (Mr. Martineau) held that the plaintiff held by custom the right of appointing the manager of the *Dharmsala*; that the institution had been founded by his ancestors for their private benefit and not for public worship, and that the trusts for it were of the nature of a private trust. He further held that although plaintiff need not have proceeded under section 14 of Act XX of 1863, his suit was not barred, as he had asked for other relief, and went on to hold that, though the institution was private, plaintiff could not claim the defendant's dismissal without assigning reasons and that, as the defendant had not been guilty of misconduct, he was not liable to dismissal.

The Divisional Judge (Captain Martindale) went further, and held that plaintiff had the power to dismiss defendant at his pleasure, and that although defendant had not technically been guilty of misconduct, his conduct had been such as to make his dismissal desirable.

In appeal, it is urged that both Courts erred in treating the *Dharmsala* as a private institution, inasmuch as it is maintained from a *Jagir* granted by Government directly to it, and that the Divisional Judge was wrong in holding that defendant could be dismissed when guilty of no misconduct. It was also made a ground that the Courts were bound to treat the suit as brought under the provisions of section 18 of Act XX of 1863, and that, in any case, section 14 of that Act had an application to the case, and that plaintiff should be taken as suing as a person interested in a religious institution of a public nature.

The documents on the file show that the Sikh Government originally granted *Jagirs* of Rs. 57,000, of which Rs. 18,000 were for *dharmarth*, to Sardar Desa Singh, the Governor of Kangra. Before retiring to Benares, his son, Sardar Lehna Singh, got new *sanads* from the Sikh *Durbar* at Lahore, before the annexation of the Panjab, and it is on a *sanad* of *Sambat* 1904, that plaintiff's Counsel relies to show his clients' right to interfere in

(1) 58 P. R. 1893.
(2) 56 P. R. 1895.

the affairs of this institution. The following words occur in it:—"As Rs. 1,300 have been granted for ever from the revenue of three villages specified below for the *Granthis* and *Pathis* of Sri Tilok Nath, it is right (*bayad*) that in accordance with the former practice Rs. 300 from *Mauza* Jindpurah *plus* Rs. 300 from *Mauza* Dhesyan and Rs. 700 from *Mauza* Lehri Gajran should be recognized by you as *Muafi* in favour of Bhai Kishen Singh *Granthi*."

Sardar Lehna Singh died at Benares and the Britiish Government on annexation made no objection to continuing the *Jagir*. The Deputy Commissioner of Gurdaspur (to which District the three villages belong) recommended the resumption of Rs. 1,000 in the event of Sirdar Lehna Singh's death, and continuance of Rs. 300 for the institution as sufficient considering the paucity of Sikhs in the neighbourhood of Tilok Nath, and addressed the Commissioner to that effect on 13th August 1851. It is not quite clear what occured next, but final orders do not appear to have been passed till 1863, when the Financial Commissioner, after reference to the Local Government, directed that the whole of the grant should be continued for the maintenance of the institution in the name of the *pujaris* and not of the Sardar.

In the Settlement proceedings of 1891, this order was referred to and the Settlement Officer arranged that the income should be divided into 28 shares, *viz.*, 27 for *Granthis* and one for maintenance of the institution here referred to as a *Mandir*. The order recited the proceedings of the Financial Commissioner and refers to the grant in these terms:—

"*Banam Pujarian Tilok Nath ta marzi Sirkar muaf hai, ab nizr sani men banam 27 kas mundaria khana No. 2 bamujib hukm 26 November* 1891 *Janab Sahib Muhtmim Bandobast ta marzi Sirkar muaf hai:*"

These documents lead us to the conclusion that the institution was one of a public nature. The Sikh Government in *Sambat* 1904 enjoined on Sardar Lehna Singh the duty of paying the money to Bhai Kishen Singh who was apparently the chief *Granthi*, possibly only '*primus inter pares*.'

The British Government, following the usual practice, treated the free grant as one for a religious purpose and, instead of resuming a portion as suggested by the Local Officer continued the whole, using the phrase *pujaris* which seems to indicate that the institution was regarded as a place of public worship of the Sikh communtiy to deprive which of its revenue would have caused that community some pain.

The Sardars of Majitha seem to have been formerly benefactors of the institution and to have taken an interest in it, and it was, no doubt, in consequence of their connection with it that the Deputy Commissioner of Gurdaspur, when deciding with whom he should deal as chief *Granthi* and representative of the body of *Jagirdars*, thought proper to consult Sardar Dyal Singh, the representative of that family, as he did in 1885.

The object of the institution manifestly was that the *Granth* should be read daily and, so far as we are aware, no member of the Sikh community who behaves with propriety could be excluded from participating in this service or forbidden to enter a building where such recitation was being made, when the reader is receiving his remuneration from a Government grant. Although the District Judge went carefully into the case, we do not agree with him in holding the ruling, *Sathappayyar* v. *Periasami* (3), applicable to the present case. In that case, the endowment of the *Matt* was derived from an undoubtedly private source, and we cannot suppose that it was the intention of Government in continuing this *Jagir* of Rs. 1,300 to supplement the private income of the Majitha family for a private religious endowment.

In this view of the case, regarding the institution as public, the plaintiff was bound to obtain sanction for filing the suit under the provisions of section 18 of Act XX of 1863, and it is unnecessary for us to decide whether defendant has been prejudiced by plaintiffs having been permitted to add an allegation of his right to dismiss defendant at will. Mr. Martineau held that this might be included in the prayer for alternative relief, a view in which we should be scarcely disposed to agree. *Jan Ali* v. *Ram Nath Mandal* (4) is an authority for holding that the provisions of section 14 of Act XX of 1863 applied to the present suit, and we have no doubt that Sardar Dyal Singh and

(3) 14 M. 1.
(4) 8 C. 32; 9 C. L. R. 433

his representatives had an interest in the institution justifying their proceeding against the Manager or Superintendent, if guilty of misconduct. In this connection, *Juggalkishore* v. *Lakshmandas Raghunath Das* (5), *Dhurrum Singh* v. *Kishen Singh*(6), *Sheorattan Kunwari* v *Ram Pergash*(7); *Muhammad Siraj-ul-Haq* v. *Imam ud-Din* (8) were also noted and *Gokal Ram* v. *Kahani Ram* (9) referred to as showing the applicability of the Act to the Punjab; *Maharanee Indurjeeit Kooer* v. *Ohandemun Misser* (10) and *Protap Ohandra Misser* v. *Brojo Nath Misser* (11), cited by other side, do not appear relevant to the present case. Both had reference to family idols, arrangements for the worship of which cannot but be a private matter.

Regarding defendant's conduct, there is a concurrent finding of the Courts in his favour and, after going through the evidence, we see no reason to doubt its correctness. After the death of Bhai Kishen Singh, it appears that for some years, no one held the position of chief *Granthi*. Since defendant's appointment, the condition of the institution appears to have improved rather than deteriorated.

It is unfortunate that the *Dharmsala* has no well defined constitution, but as its affairs have been supervised by the Revenue Authorities with regularity, and they have approved of defendant's management, very convincing evidence of misconduct would have been necessary to have justified a Civil Court in acceding to plaintiff's demand for dismissal.

Mr. Lal Chand suggested that a decree might be passed short of dismissal defining the relation of plaintiff to defendants, but the case before us resolves itself into the question whether plaintiff, as a person interested in a religious institution of a public character, can ask the assistance of the Court to dismiss the Manager or Superintendent for misfeasance, breach of trust or neglect of duty, and, as we are satisfied there was none such proved, we can do no more than set aside the order of the Divisional Judge and dismiss the suit, though not on exactly the same grounds as those taken by the District Judge.

The appeal is accepted and suit dismissed with costs throughout.

Appeal accepted.

(5) 23 B. 659.
(6) 7 C. 767; 9 C. L. R. 410.
(7) 18 A. 227; A. W. N. (1896) 37.
(8) 19 A. 104; A. W. N. (1896) 189.
(9) 95 P. R. 1900; 6 P. L. R. 1901.
(10) 16 W. R. 99.
(11) 19 C. 275.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 254 OF 1911.

August 12, 1912.

Present:—Mr. Justice Sundara Aiyar and Mr. Justice Sadasiva Aiyar.

ADUSUMILLI SINGARAYADU, MINOR, BY GUARDIAN RUNGANNA—DEFENDANT—APPELLANT

versus

SAYANI NARAYANASAMI—PLAINTIFF—RESPONDENT.

Contract of sale—Liability of vendee to pay interest on consideration money.

An agreement of sale provided for the payment of the consideration on a particular date and for the execution of the conveyance on the date of such payment. By a collateral agreement it was stipulated that if payment was not made on the day specified, interest was to be paid at one per cent. per mensem from the due date. The vendor, however, was not able to give a good title to the property until long after the appointed day as he had to institute a suit for clearing his title:

Held, that the vendee's obligation to pay interest and the vendor's obligation to execute a valid sale-deed were mutually dependent and that interest was payable only from the date on which the vendor could give a clear title.

Second appeal against the decree of the Court of the Temporary Subordinate Judge of Masulipatam, in Appeal Suit No. 207 of 1908, presented against that of the Court of the District Munsif of Gudivada, in O. S. No. 170 of 1906.

Mr. *T. Prakasam*, for the Appellant.

Mr. *P. Narayana Murthi*, for the Respondent.

JUDGMENT.—The finding that the plaintiff was not a *benamidar* for Brahmanandham in the agreement for sale cannot be questioned in second appeal.

The next point argued is that the defendant is entitled to recover from the plaintiff the expenses of the suit he instituted against Brahmanandham to recover the property from him. In that suit costs were decreed

to the defendant against Brahmanandham. There is no evidence that he has incurred any additional costs. The agreement must be construed as meaning that, if the defendant had to incur any costs out of his own pocket, he should be reimbursed by the plaintiff. This contention must, therefore, be overruled.

The next and last contention is, that the defendant is entitled, under the terms of the agreement with defendant, to interest from the 31st May 1903. The contract for sale, so far as it is material for this point, runs thus :—"I shall receive the money on any day you may bring the same within the 31st May 1903. . . on any day that you may bring the balance and give me within the due date, I shall execute on a proper stamp paper a sale-deed in your favour in respect of the property mentioned in the letters." There is no convenant in this agreement to pay interest, but in the letter, Exhibit I, we find the following statement:—

"If I fail to pay you the sale amount within the due date (that is the 31st of May 1903) and get the sale-deed executed, I shall pay to you the said sum with interest thereon at one rupee per cent. per mensem, from the due date and get the sale-deed executed." We may, therefore, take it that there was an express covenant to pay interest from the 31st of May 1903 but the defendant was also bound to execute a sale-deed at the same time. As a matter of fact, in this case the defendant was not able to establish a clear title until after he instituted his suit against Brahmanandham and obtained a decree. That decree was passed on the 26th April 1905. Notwithstanding the covenant to pay interest, the defendant would not be entitled to recover it unless and until he was able to make out a good title. Fry in his work on Specific Performance says:—"In a case where there was a stipulation that if, by reason of unforeseen or unavoided obstacles, the purchase should not be completed by the day fixed, the purchaser should from that day pay interest at 5 per cent. on his purchase-money and be entitled to the rents and the vendor did not show a good title till long after the specified day, Leach, V. C., held that the stipulation would not make interest run before the time when a good title was shown, but would only affect its rate." (See page 683, 5th Edition paragraph 1413). This rule commends itself to us as a reasonable one. The plaintiff's obligation to pay interest and the defendant's obligation to execute a valid sale-deed must be treated as mutually dependent covenants. In this case, after the defendant had established his title against Bramanandham, he refused to execute a conveyance in plaintiff's favour. He cannot, therefore, claim interest even for the period after his title was established against Bramanandham. We may, no doubt, award him interest from the date of the first Court's decree. He would at the same time be bound to pay mesne profits from the same date. He does not wish to have a decree for interest on these terms.

The second appeal is dismissed with costs.

Appeal dismissed.

ALLAHABAD HIGH COURT.
FULL BENCH.

FIRST CIVIL APPEAL No. 170 OF 1911.

November 5, 1912.

Present:—Sir Henry Richards, KT., Chief Justice, Sir George Knox, KT., Judge, Mr. Justice Banerji, Mr. Justice Tudball and Mr. Justice Chamier.

KHALIL-UD DIN AHMED—PLAINTIFF—APPELLANT

versus

Musammat BANNI BIBI—DEFENDANT—RESPONDENT.

Registration Act (III of 1877), *ss.* 32, 33—*Mortgage-deed executed by* parda nashin *lady—Presentation for registration by husband—Validity of presentation.*

A *parda nashin* lady executed a mortgage-deed. The deed was presented for registration to the Sub-Registrar by her husband who had no authority to make the presentation :

Held, that the presentation was a complete nullity.

Mujib-un-nissa v. *Abdur Rahim*, 23 A. 233; 28 I. A. 15, followed.

First appeal from the decision of the Subordinate Judge of Bareilly, dated the 10th of March 1911.

Dr. *S. C. Banerji* (with him Mr. *Ibn Ahmed*), for the Appellant.

KHALIL-UD-DIN *v.* BANNI BIBI.

Mr. *B. E. O'Conor* (with him Mr. *L. M. Banerji*), for the Respondent.

JUDGMENT.

RICHARDS, C. J.—This appeal arises out of a suit brought on foot of a mortgage dated the 11th of July 1893. Various defences were pleaded, and, amongst other things execution and consideration were denied. The Court below has found nearly all the issues in favour of the plaintiff. It has found that the bond was duly executed by *Musammat* Banni Bibi, the mortgagor, and that the consideration was duly paid to her. The Court, however, somewhat reluctantly found that the bond had not been duly registered. This question of registeration was the question which came before a Bench of this Court. It appears that on the day on which the mortgage purported to have been registered, the husband of *Musammat* Banni Bibi made an application to the Sub-Registrar of Bareilly Tahsil. The actual application is not before us but there is endorsed on the bond the following note: "This document was presented by Muiz-ud-din Ahmad on Wednesday, the 12th July 1893, between 8 and 9 A. M. in the office of the Sub-Registrar of *Parganah* and District Bareilly. He stated that *Musammat* Banni Bibi, the executant of the document, was a *parda nashin* lady. The document may be attested from the *Musammat* at her residence by means of a Commission. As the *Musammat* above-named resides within the local limits of the Municipality, this document may be sent to the Departmental Sub-Registrar of Bareilly for attestation. (Sd) Wasi Uddin, Sub-Registrar (Sd.) Muiz-ud-din Ahmad, the person presenting this document, in autograph".

It next appears that the Departmental Sub-Registrar of Bareilly went the same day to the lady's house. The lady was duly identified and she admitted execution of the deed. The money was paid over and the Departmental Sub-Registrar sent the document to the Sub-Registrar of Tahsil Bareilly who registered the same. It further appears from the endorsement upon the bond that the person who "presented" the document for registration to the Sub-Registrar of Tahsil Bareilly was the husband. It is clear that the Sub-Registrar understood the husband to be the person who was "presenting" the document to him for registration. In the Court below and in this Court, it was admitted that when Muiz-ud-din Ahmad, the husband, "presented" the document for registration, he was not authorised in the manner prescribed by sections 32 and 33 of the Registration Act of 1877, which was then in force. It was, however, strongly contended that what subsequently happened at the residence of the lady amounted to a good "presentation" within the meaning of the Act, and that the document ought, therefore, to be considered as having been duly registered.

At the first hearing of the appeal in this Court, it was never pointed out that the gentleman who attended at the residence of the lady was not the same Sub-Registrar who had, in the first place, received the document from her husband and the question which the Court considered it had before it was whether or not the lady having admitted execution and communicated to an officer competent to accept and register the document her desire to have it registered, the document was not sufficiently "presented" within the meaning of the Act. The Bench before whom the appeal came considered that it was desirable that the question should be decided by a larger Bench and the case was accordingly referred to the Bench as at present constituted.

The arguments in the first instance entirely proceeded upon the basis that the Departmental Sub-Registrar was entitled to receive the document for registration, if in fact it had been duly "presented" to him. It has now, at the very close of the arguments, been pointed out that the Departmental Sub-Registrar had no such authority, and the question which it was intended to have decided by this Bench does not really arise. It seems to me that we have now only to decide whether or not the "presentation" which was made by the husband can, from any point of view, be regarded as a good "presentation"; and, secondly, whether the fact that the Registrar received the deed for registration from an unauthorised person is merely a defect of procedure which might be disregarded under the provisions of section 87. It seems to me that the "presentation" by Muiz-ud-din Ahmad was a complete nullity. He had no authority whatever to present the document for registration, and, in my opinion, this question is

completely covered by the ruling of their Lordships of the Privy Council in the case of *Mujib-un-nissa* v. *Abdur Rahim* (1). I am also of opinion that, under no circumstances, can what subsequently happened at the house be deemed a good presentation because the gentleman who attended at the house had no authority to receive the document for registration. His authority was confined to ascertaining that the document had been duly executed, that is to say, to examine the executant under the provisions of section 38. I would dismiss the appeal.

KNOX, J.—I concur and have nothing further to add.

BANERJI, J.—I also agree in the conclusion at which the learned Chief Justice has arrived. In the case decided by the Privy Council, namely, the case of *Mujib-un-nissa* v. *Abdur Rahim* (1), their Lordships observed:—"It is clear that the power and jurisdiction of the Registrar only come into play when he is invoked by some person having a direct relation to the deed. It is for those persons to consider whether they will or will not give to the deed the efficacy conferred by registration. The Registrar could not be held to exercise the jurisdiction conferred on him if, hearing of the execution of a deed he got possession of it and registered it; and the same objection applies to his proceeding at the instigation of a third party who might be a busy body." In the present case, the document was not presented for registration by a person having a direct relation to the deed, and the subsequent admission of execution by the executant was before an officer who had no jurisdiction to accept the document for registration. Therefore, there was no presentation to a Sub-Registrar having jurisdiction, and the registration of the document must, according to the ruling of the Privy Council, be held to be invalid. I also would dismiss the appeal.

TUDBALL, J.—I fully concur and have nothing further to add.

CHAMIER, J.—I agree with the order proposed by the learned Chief Justice. It appears to me that there was neither in fact nor in law any "presentation" of this document by any qualified person to any person authorised to receive it for registration.

(1) 23 A. 233; 28 I. A. 15 (P. C.).

BY THE COURT.—The order of the Court is that the appeal is dismissed but without costs. The objection raised by the respondent as to costs is also dismissed without costs.

Appeal dismissed.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL NO. 2386 OF 1909.

September 5, 1912.

Present:—Sir Ashutosh Mookerjee, KT., Judge, and Mr. Justice Beachcroft.

CHATTURBHUJ PATNAIK AND OTHERS—PLAINTIFFS—APPELLANTS

versus

KRISHNA CHANDRA PATNAIK AND OTHERS—DEFENDANTS—RESPONDENTS.

Hindu Law—Mitakshara—Dasi—Dasi-putra—*Sudra*—*Permanent concubine.*

If a Sudra governed by the *Mitakshara* Law has a permanent, continuous and exclusive concubine who lives as a member of his family, she is a *dasi*, and a son born to him by her, who is brought up as a member of the family, is a *dasi-putra* within the meaning of that expression as used in the *Mitakshara.*

Jogendro Bhupati v. *Nityanand Mansingh*, 18 C. 151; 17 I. A. 128, relied upon.

Ram Saran v. *Tek Chand*, 28 C. 194, distinguished.

Appeal from the decree of the District Judge of Cuttack, dated the 28th June 1909, modifying that of the Subordinate Judge, Cuttack, dated the 23rd March 1907.

Babus *Baidya Nath Dutt* and *Tarakessur Pal Chowdhry*, for the Appellants.

Babu *Sures Chandra Chakrabarti*, for the Respondents.

JUDGMENT.—This is an appeal on behalf of the plaintiffs in a suit for declaration of title to a half share of the estate of one Dadhibahan Patnaik, who was the father of the first plaintiff and the grandfather of the other three plaintiffs. The defendants include the grandsons and great-grandsons of Dadhibahan, a widow of his deceased son, as also his illegitimate son. The sole question in controversy at this stage is, whether the fifth defendant, the illegitimate son, is entitled to a share of the estate left by Dadhibahan. The Subordinate Judge negatived his claim, but the District Judge has pronounced in his favour. The District

CHATTURBHUJ PATNAIK v. KRISHNA CHANDRA PATNAIK.

Judge has found that the parties are Sudras, that the mother of the fifth defendant was brought into the house of Dadhibahan as a maid servant, that she was his permanent and continuous concubine, that she has always lived in the family, and that her son, the fifth defendant, has been brought up in the family circle, as a member of the joint family. In this view, the District Judge has held that the fifth defendant is entitled to a half share of what would be allotted to a legitimate son. This view has been controverted on behalf of the plaintiffs, and it has been argued that the fifth defendant cannot be deemed a *Dasi-putra* within the meaning of that expression as used in the *Mitakshara*, which admittedly governs this family. The text of Yajnavalkya, which is the foundation of the claim of the illegitimate son, is in these terms:—"Even a son begotten by a Sudra on a female slave may get a share by the father's choice; but if the father be dead, the legitimate brother should make him partaker of half a share: one who has no legitimate brother, may take the whole in default of heirs down to the son of daughters" (Yajnavalkya, II, 134; Mandalik page 220). The word which is translated "a female slave" is in the original "*Dasi*." Upon this text, Vijnaneswar comments as follows (*Mitakshara* by Colebrooke, Chapter I, section 12): "The son begotten by a Sudra on a female slave obtains a share by the father's choice or at his pleasure. But after the demise of the father, if there be sons of a wedded wife, let these brothers allow the son of the female slave to participate for half a share; that is, let them give him half as much as is the amount of one brother's allotment. However, should there be no sons of a wedded wife, the son of the female slave takes the whole estate, provided there be no daughter or wife, nor sons of daughter; but if there be such, the son of the female slave participates for half a share only. From the mention of a Sudra in this place, it follows that the son begotten by a man of a regenerate tribe on a female slave, does not obtain a share even by the father's choice, nor the whole estate after his demise, but if he be docile, he receives a simple maintenance." The commentators on the *Mitakshara*, namely, the authors of the Subordhini and the Balambhatti, do not define the term *Dasi*, but the latter refers to the text of Manu to the following effect (*Mitakshara* by Setlur, Vol. I, page 717): "A son who is begotten by a Sudra on a female slave or on the female slave of his slave, may, if permitted by his father, take a share of inheritance: thus the law is settled" (Manu IX, 179). It will be observed that the commentators on the *Mitakshara* make no attempt to elucidate the term *Dasi*. Apararka, another commentator on Yajnavalkya, similarly takes the word as not standing in need of any explanation (Anandasram edition, page 740). But when we turn to the commentators on Manu (IX 179), we find that two of them, Medhatithi and Sarbajnanarain, do not take the word *Dasi* in the restricted sense of a "female slave." [Manu by Mandalik, page 1206]. It has been argued before us that the term signifies "a female slave," and that as slavery has been abolished in British India (Act V of 1843), there can no longer be any *Dasi-putra* in this country entitled to inherit under the rule laid down in the *Mitakshara*. We are not prepared to accept this contention as well founded. No doubt, slavery has been abolished in this country, but it does not follow that the term *Dasi* should be interpreted in the restricted sense contended by the appellants. The decisions in *Rahi* v. *Gavinda* (1), *Sidu* v. *Baiza* (2), *Krishnayyan* v. *Muttasami* (3), *Hargobind Kuari* v. *Dhiram Singh* (4) *Karuppannan* v. *Bulokam* (5), *Shesgiri* v. *Girewa* (6), *Ram Kali* v. *Jamna* (7), *Sarasati* v. *Mannu* (8), *Inderan Valungypuly* v. *Ramaswamy* (9), *Meenakshi* v. *Appakutti* (10), *Annayyan* v. *Chinnami* (11), all undoubtedly support, directly or by implication, a liberal interpretation of the text of the *Mitakshara*. Wilson in his Sanskrit Dictionary explains the term *Dasi* as signifying a fisherman, a servant, a slave, a Sudra or a man of the fourth tribe. The term *Dasi* is

(1) 1 B. 97.
(2) 4 B. 37.
(3) 7 M. 407.
(4) 6 A. 329; A. W. N. (1884) 100.
(5) 23 M. 16.
(6) 14 B. 282.
(7) 30 A. 508; 5 A. L. J. 620; A. W. N. (1903) 229.
(8) 2 A. 134.
(9) 13 M. I. A. 141; 3 B. L. R. 1 (P. C.); 12 W. R. (P. C.) 41.
(10) 33 M. 223; 7 M. L. T. 26; 20 M. L. J. 350; 4 Ind. Cas. 299.
(11) 33 M. 363; 7 M. L. T. 140; 20 M. L. J. 355; 5 Ind. Cas. 84.

defined by him as applicable to a female servant or slave, the wife of a slave or a Sudra. Monier Williams in his Sanskrit Dictionary explains *Dasi* as a female servant or salve, servant maid, whore, or harlot. To the same effect is the definition given in the Sanskrit Worterbuch by Bohtlingk and Roth, Vol. III, Col. 604, where numerous quotations are given to show that the term *Dasa* has a much wider meaning than a slave, and the same observation applies to the feminine form *Dasi*. Burnell in the Dayabhaga of Madhabhya observes that in Southern India the term *Dasi* is applied also to a female dancer attached to a temple. In fact, the whole difficulty has been created by the rendering of the word *Dasi* by the expression "female slave" by the earliest translators but, as Sir Michael Westropp points out in *Rahi* v. *Govinda* (1), Mr. Colebrooke when he translated the term *Dasi-putra* as the son begotten on a female slave, must have meant issue by a concubine (Strange on Hindu Law Vol. II, page 68). That the term *Dasi-putra* is capable of interpretation in a liberal sense is clear from the decision of their Lordships of the Judicial Committee in *Jogendro Bhupati* v. *Nityanand Mansingh* (12), which affirmed the decision of this Court in *Jogendro Bhuputi* v. *Nittyanund* (13). There is nothing to indicate that the claimant in that case was the son of a slave in the technical sense of the term; on the other hand, the dates mentioned in the proceedings negative any such presumption. Their Lordships of the Judicial Committee held that under the *Mitakshara*, among Sudras, where a father left a son by a wedded wife and an illegitimate son by a *Dasi* (variously translated as female servant or female slave), the ordinary rule of survivorship incidental to a family co-parcenary applies; so that the illegitimate son, having survived the legitimate, is entitled by survivorship to succeed, on the death of his brother without male issue, to the family estate, which was impartible and appertained to a *Raj*. This decision of the Judicial Committee must be pronounced to be erroneous if the contention of the appellants is correct. The case before the Judicial Committee, we observe, came from the same District as here, namely, the District of Cuttack, and the parties there, as here, were Sudras governed by the *Mitakshara* Law. We hold, therefore, that if a Sudra governed by the *Mitakshara* Law has a permanent, continuous and exclusive concubine who lives as a member of his family, she is a *Dasi*, and his illegitimate son by her, who is himself brought up as a member of the family, is a *Dasi-putra*, within the meaning of the rule laid down in the *Mitakshara*. It has been contended, however, that this view is opposed to the decision in *Ram Saran* v. *Tek Chand* (14), which is clearly distinguishable, because the only question which arose there for consideration was, whether an illegitimate son acquires by birth a right to the property of his Sudra putative father. There are, however, observations in the judgment which are, in our opinion, at variance with the decision of the Judicial Committee in *Jogendro Bhupati Nityanand Mansingh* (12), and when the precise question arises again, the matter will require re-consideration. Reference has also been made to the cases of *Narain Dhara* v. *Rakhal Gain* (15) and *Kirpal Narain* v. *Sukurmoni* (16); these cases were decided under the Dayabhaga law and are, consequently, not directly in point; but we reserve our opinion upon the question under that law when it arises for consideration.

The result is, that the claim of the fifth defendant has been rightly sustained by the District Judge and this appeal against his decree must be dismissed with costs.

Appeal dismissed.

(12) 18 C. 151; 17 I. A. 128.
(13) 11 C. 702.
(14) 28 C. 194.
(15) 1 C. 1; 23 W. R. 334.
(16) 19 C. 91.

MADRAS HIGH COURT.

CIVIL REVISION PETITION NOS. 277 TO 280 OF 1911.

September 12, 1912.

Present:—Mr Justice Sankaran Nair.

KANUMOORY NILADRI RAZU—PLAINTIFF—PETITIONER

versus

KASA SUBBIAH AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XVIII, r. 15 and O. XX, r. 1—Evidence and Vakil's arguments heard

RAJ MOHAN GUHA *v.* ALAM GAZI PATWARI.

by one officer—Judgment by successor without hearing arguments—Judgment pronounced without notice—Validity.

Where a Munsif recorded the evidence in a case and heard arguments of Counsel, but judgment was written and pronounced by his successor without hearing Counsel, or giving them notice of the date on which the judgment would be announced; *held*, that under Order XVIII, rule 15 of the Code of Civil Procedure, 1908, it was not necessary to hear Counsel again: but that the omission to notify the date on which judgment was to be pronounced, as required by Order XX, rule 1 of the Code, was a serious irregularity, if not an illegality, necessitating the setting aside of the judgment, and directing the Munsif to proceed afresh with the case according to law.

Jagramdas v. *Narain Lal*, 7 A. 857, cited.

Petition, under section 25 of Act IX of 1887, praying the High Court to revise the decree of the Court of the District Munsif of Narasapur, dated 28th day of September 1910, in Small Cause Suits Nos. 1352, 1358, 1368 and 1364 of 1909.

Mr. *T. Ramachandra Row*, for the Petitioner.

Mr. *V. Ramesam*, for the Respondents.

JUDGMENT.—The District Munsif reports that the allegations in the affidavit are substantially true. The evidence was taken by one Munsif who also heard the arguments of Vakils and reserved judgment. One of his successors read the evidence and, without hearing the parties or giving them notice, delivered his judgment. The first contention is that the Munsif may be entitled to deal with the evidence taken by his predecessor but he should have heard the Vakils on the evidence before pronouncing his judgment, and *Jagramdas* v. *Narain Lal*(1) is relied upon. I do not think this is necessary, under Order XVIII, rule 15 of the Code of Civil Procedure.

The next contention is that under Order XX, rule 1, notice of the date of pronouncing the judgment should have been given. This contention is valid and its omission is a serious irregularity, if not an illegality. It is unnecessary to consider whether, if it is only an irregularity, this Court should interfere with the decree on that account only, because the Munsif who decided the case was not the same person who heard the Pleaders and it is impossible to say what the result would be if the case had been argued. The case seems to be one in which the Pleaders should have been heard. I, therefore, set aside the decree, direct the Munsif to restore the cases to his file and deal with them according to law with reference to the above observations. The parties will bear their own costs in this Court. The costs in the lower Court will be dealt with in the final decree.

Decree set aside.

(1) 7 A. 857; A. W. N. (1885) 285.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL No. 2593 OF 1909.

August 22, 1912.

Present:—Sir Ashutosh Mookerjee, Kt., Judge, and Mr. Justice Batchcroft.

RAJ MOHAN GUHA—PLAINTIFF—APPELLANT

versus

ALAM GAZI PATWARI—DEFENDANT—RESPONDENT.

Bengal Tenancy Act (VIII of 1885), s. 108A, scope of—Power of Settlement Officer—Correction of bona fide mistake—Mistake of party—Inherent power of Court to correct obvious errors in record—Amendment of record after dismissal of appeal.

Section 108A of the Bengal Tenancy Act applies only to Revenue Officers specially empowered by the Local Government in that behalf. The section entitles the Settlement Officer to correct the record where there has been a *bona fide* mistake; such mistake need not necessarily be the mistake of the Settlement Officer; it may very well be a mistake made by one of the parties concerned. The section in substance authorises a Settlement Officer to re-consider the matter on the merits.

A Settlement Officer, in the exercise of a power inherent in every Court to correct obvious errors or incidental slips in its own record, may correct a clerical or an arithmetical error in the Record.

Mellor v. *Swire*, 30 Ch. D. 239 at p. 247; 53 L. T. 205; 33 W. R. 785; *Lawrie* v. *Lees*, 7 App. Cas. 19, at p. 35; 51 L. J. Ch. 209; 46 L. T. 210; 30 W. R. 185, and *Hatton* v. *Harris*, (1895) A. C. 547 at p. 559; 62 L. J. P. C. 24; 1 R. 1; 67 L. T. 722, referred to.

After the final publication of a Record of Rights, fair and equitable rent was settled in a proceeding under section 105 of the Bengal Tenancy Act, at the rate of one rupee per *bighi*. The tenant's appeal to the Special Judge was dismissed. Subsequently, it was discovered that the area had been erroneously recorded as 5 *bighas*, 17 *cottahs* instead of 7 *bighas*, 5 *cottahs*. Accordingly, the Settlement Officer amended the record, and a consequential alteration was made in the entry relating to the rent payable. Before the Special Judge on appeal, no question was raised as to the area:

Held, that the Settlement Officer had authority to correct the record.

Appeal from the decree of the District Judge of Tippera, dated the 10th August 1909, affirming that of the Munsif of Chandpur, dated the 23rd December 1903.

Babu *Upendra Lal Roy* (for Babu *Harendra Narain Mitra*), for the Appellant.

Babu *Brajendra Nath Chatterjee*, for the Respondents.

JUDGMENT.—This is an appeal on behalf of the plaintiff in a suit for rent. The plaintiff claims rent at the rate of Rs. 7-4 on account of 7 *bighas* and 5 *cottahs* of land in the occupation of the defendants. The defendants contend that they hold 5 *bighas* and 17 *cottahs* on a rental of Rs. 5-13-7 and, in support of their allegation, they rely upon an entry in a Record of Rights finally published on the 20th June 1904. The plaintiff, on the other hand, relies on that very record as subsequently amended by the Settlement Officer on the 2nd September 1907. The District Judge has refused to recognise the amendment of the record on the ground that it was made without jurisdiction. The question in controversy, therefore, is whether the alteration in the record was duly made.

It appears that after the final publication of the Record of Rights, fair and equitable rent was settled on the 21st December 1905 in a proceeding under section 105 of the Bengal Tenancy Act, at the rate of one rupee per *bigha*. The tenants were dissatisfied with this assessment and preferred an appeal to the Special Judge, which was dismissed on the 9th April 1906. Subsequently, it was discovered that the area had been erroneously put down as 5 *bighas* and 17 *cottahs* in the Record of rights. Accordingly, the Settlement Officer, on the 2nd September 1907, amended the record, so as to alter the entry about area from 5 *bighas*, 17 *cottahs* to 7 *bighas* and 5 *cottahs*; a consequential alteration was made in the entry relating to the rent payable. The District Judge has held that this alteration was unauthorised, *first*, because under section 108A of the Bengal Tenancy Act, an alteration of this description could be made only within one year from the date of the publication of the record; *secondly*, because such alteration could not be made after an appeal in a proceeding under section 105 had been heard and decided by the Special Judge. In our opinion, the view taken by the District Judge cannot be supported.

It was taken for granted in the Court below that the Settlement Officer proceeded under section 108A of the Bengal Tenancy Act; but there is no foundation for this assumption. The section applies only to Revenue Officers specially empowered by the Local Government in that behalf. It is not shown that the Settlement Officer in this case was so empowered. It is further clear that the Settlement Officer could not have acted under section 108A, because he amended the record more than a year after the date of the certificate of its final publication. It is worthy of note that section 108A has a much wider scope than the correction of obvious errors or incidental slips in a Record of Rights. It entitles the Settlement Officer to correct the record where there has been a *bona fide* mistake; such mistake need not necessarily be the mistake of the Settlement Officer; it may very well be a mistake made by one of the parties concerned. Section 108A, in substance, authorises a Settlement Officer to re-consider the matter on the merits. In the present case, where apparently a clerical or an arithmetical error had to be corrected, the Settlement Officer, even if he had been duly authorised, need not have availed himself of the provisions of that section. He may be deemed, therefore, to have acted in the exercise of a power inherent in every Court to correct obvious errors or incidental slips in its own record. Lord Justice Bowen observed in *Mellor* v. *Swire*(1), that "every Court has inherent power over its own record; as long as the records are within its power, it can set right any mistake in them; it would be perfectly shocking if the Court could not rectify an error which is really one of its own ministers." Equally emphatic are the observations of Lord Blackburn in *Lawrie* v. *Lees* (2) and of Lord Watson in *Hatton* v. *Harris* (3). Hence, the only question for consideration is, whether the Settlement Officer had authority to amend the Record of Rights at the stage he proceeded to set it right. It has been contended that his authority had

(1) (1885) 30 Ch. D. 239 at p. 247; 53 L. T. 205; 33 W. R. 785.

(2) (1881) 7 App. Cas. 19 at p. 36; 51 L. J. Ch. 209; 46 L. T. 210; 30 W. R. 185.

(3) (1895) App. Cas. 547 at p. 560; 62 L. J. P. C. 24; 1 R. 1; 67 L. T. 722.

terminated, because the Special Judge had already confirmed his order upon the question of fair and equitable rent in the proceeding under section 105. No doubt, the amount of fair and equitable rent must depend upon the area; but, it is plain, as stated by the District Judge himself, that the substantial matter in controversy before the Special Judge was, whether the rate of one rupee per *bigha* was or was not fair and equitable. No question appears to have been raised before the Special Judge as to whether the area was 5 *bighas*, 17 *cottahs* or 7 *bighas*, 5 *cottahs*. Under these circumstances, we must hold that the Settlement Officer had authority to correct the record on the 2nd September 1907. We are not concerned with the question whether the record as amended represented the true state of facts. The only effect of our decision is that the landlord is entitled to rely upon the corrected record under section 103B (*c*) of the Bengal Tenancy Act. But, it is open to the defendants to rebut this presumption and to establish, if they can, that the record as amended is erroneous. This aspect of the matter does not appear to have been considered in either of the Courts below.

The result is, that this appeal is allowed, the decrees of the Courts below set aside and the case remanded to the Court of first instance for re-trial. The Court will proceed on the assumption that the amended record is correct; but it will be open to the defendants to rebut this presumption. Each party will pay his own costs up to this stage of the proceedings.

Appeal allowed: Case remanded.

MADRAS HIGH COURT.

CIVIL SUIT No. 184 OF 1910.

July 29, 1912.

Present:—Mr. Justice Wallis

LAKSHMAMMAL—PLAINTIFF

versus

NARASIMHARAGHAVA IYENGAR AND OTHERS—DEFENDANTS.

Negotiable Instruments Act (XXVI of 1881), *s.* 87—*Material alteration—Private International Law.*

A suit was brought upon two documents executed in Mysore, and not stamped according to the Stamp Law of Mysore, and, consequently, were inadmissible in evidence and could not be acted upon there. The documents were described in the plaint as bonds, but in the documents themselves, they were described as promissory-notes; the documents were torn in several places and had been pieced together in such a manner that the name of the payee and the words "or order" were missing with the result that the documents could be described as bonds:

Held, that this was an alteration of a material character, whereby documents, which could not be sued upon in the only Court where any suit upon them was likely to be maintainable, were converted into documents which could be sued upon, and that, apart from the express provisions of section 87 of the Negotiable Instruments Act, the suit on these documents must fail.

The question whether the plaintiff's suit, which was not maintainable in Mysore owing to the failure to conform to the Stamp Law there, was maintainable in India, considered.

Mr. *V. V. Srinivasa Iyengar*, for the Plaintiff.

Mr. *V. Sadagopacharair*, for the Defendants.

JUDGMENT.—This is a suit brought by the plaintiff upon two documents, which were executed in Mysore by the father of the defendants who was at one time an Advocate and afterwards a District Munsif in Mysore, in favour of the plaintiff, who with her husband is also an inhabitant of Mysore; and the suit has been brought here merely owing to the accident that the defendants are at present residing in Madras for the purpose of prosecuting their studies.

In the plaint, these documents are described as bonds; but in the documents themselves, they are described as promissory-notes. It now turns out that these documents have been torn in several places and have been pieced together again but in such a way that the parts where the name of the payee and the words "or order" would ordinarily appear are missing, with the result that they can be described as bonds as they have been described in the plaint.

Now, it also turns out from an inspection of these documents that, according to the Stamp Law of Mysore, which is Regulation II of 1900 and which admittedly is identical in terms with our own Stamp Law, these documents being made payable more than a year after execution, under Article 13 (*c*) of the 1st Schedule require to be stamped in the same way as bonds; and have not been so stamped with the result that under section 35, if promissory-notes, they could neither be received in evidence nor acted upon in Mysore and they would, therefore, be entirely invalid in Mysore which, in the ordinary course of things, would be the place where they could

be sued upon, because the executant and his family were Mysoreans resident in Mysore.

Now, the first question which arises in that state of things is whether there has been a material alteration in these documents since their execution, because, if there has been, it is clear upon the express terms of the Negotiable Instruments Act, section 87, which we ought to presume under section 137, in the absence of evidence to the contrary, is also the law in Mysore, "any material alteration of a Negotiable Instrument renders the same void as against any one who is a party thereto at the time of making such alteration and does not consent thereto, unless it was made to carry out the common intention of the original parties." And, apart from the express provisions of section 87 of the Negotiable Instruments Act, it is a general principle of law which is applicable to all promissory-notes and further to deeds of all kinds. I may here refer to Daniel's well known work on Negotiable Instruments, paragraph 1373, where it is said:—"Any change in terms of a written contract, which varies its original legal effect and operation whether in respect to the obligation it imports, or to its force as matter of evidence, when made by any party to the contract, is an alteration thereof, unless all the other parties to the contract gave their express or implied consent to such change. And the effect of such alteration is to nullify and destroy the altered instrument as a legal obligation, whether made with fraudulent intent or not."

Having regard to the condition of these documents, it appears to me that there has been *prima facie* an alteration of a most material character. The materiality of the alteration was contested very courageously by Mr. Srinivasa Iyengar; but to say that an alteration which converts a document which cannot be sued upon in the only Court where any suit on it is likely to be maintainable into one which can be sued upon—to say that such an alteration as that is not material, is an argument which I am really unable to appreciate.

* * * * * *

Having come to that conclusion, there really is an end of the case, because the result inevitably follows that this suit must be dismissed. There were some other questions which were, however, argued and about which evidence was gone into. It was contended for the defendants that as these documents could not have been sued upon in Mysore owing to the provisions of the Mysore Stamp Law, neither could they be sued upon here. That is a question not free from difficulty. In England, under section 72 sub-section 1 (*a*) of the Bills of Exchange Act, mere failure of compliance with Foreign Stamp Law does not prevent bills being sued upon in England. But there is no section corresponing to that in the Negotiable Instruments Act. Section 19 of the Stamp Act does not seem to me to throw any light upon this question. We are, therefore, driven back to the Private International Law on the question, as to which it cannot be said that the leading text writers are all in agreement. If the view of Mr. Westlake, in his very careful consideration of the cases in paragraph 209, is to be followed, then it would seem that as no action could be brought where the contract was made, so no action can be brought here in the absence of an express statutory provision to the contrary. And Mr. Dicey, on the other hand, appears to rely upon the general principle that English Courts take no judicial notice of foreign Revenue Law, but the case which he refers to in *Bristow* v. *Sequeville* (1) was really a case that did not raise the question at all but merely raised the question whether a receipt which required to be stamped to make it admissible in the country in which it was made could be admitted as evidence of payment in England, although it had not been stamped according to the law of the country where it was made. It is pointed out by Mr. Westlake there was no question of any contract in that case. A receipt is not a contract. However, I do not find it necessary to express any final opinion on that question.

Then, the further question was raised and evidence was gone into, as to whether there was any consideration for these promissory-notes and I hold that the *onus* lay on the defendants to show that there was no debt just as it would have lain upon their father, the maker, if he had been alive and been sued on them. With regard to this part of the evidence, I would merely say that I am not satisfied

(1) 5 Ex. 275; 19 L. J. Ex. 289; 14 Jur. 674; 82 R.R. 664.

with the evidence for the plaintiff, that the plaintiff, who is the wife of Ranga Srinivasa Chari, ever had this money.

* * * *

In my opinion, the suit clearly fails on the ground of material alteration of the suit notes and, therefore, is dismissed with costs.

Suit dismissed.

[CALCUTTA HIGH COURT.
SECOND CIVIL APPEAL No. 1709 OF 1909.
September 5, 1912.
Present:—Sir Ashutosh Mookerjee, KT., Judge, and Mr. Justice Carnduff.
KEDAR NATH ROY AND OTHERS—PLAINTIFFS—APPELLANTS
versus
AMRITALAL MOOKERJEE AND OTHERS—DEFENDANTS—RESPONDENTS.

Hindu Law—Inheritance—Reversionary heir—Father's brother's daughter's son—Great-great-grandfather's great-grandson—Perferential title.

The father's brother's daughter's son has a preferential title as reversionary heir, as compared with the great-great-grandfather's great-grandson.

Guru Gobind v. *Anand Lal*, 5 B. L. R. 15; 13 W. R. (F. B.) 49 and *Digumber Roy* v. *Moti Lal*, 9 C. 563 (F. B.); [2 C. L. R. 204, followed.

Appeal from the decree of the District Judge of Birbhum, dated the 13th May 1909, confirming that of the Munsif, Bolepur, dated the 8th February 1909.]

Babu *Golap Chandra Sarkar* (with him Babu *Sajani Kant Sinha*), for the Appellants.

Babus *Ram Chandra Majumdar* and *Harendra Krishna Mookerjee*, for the Respondents.

JUDGMENT.—The subject-matter of the litigation which has culminated in this appeal is the estate of one Jogendra Chandra Ray. The plaintiffs-appellants are the great-grandsons of the great-great-grandfather of the deceased owner, while the defendant is the son of the daughter of the brother of his father. The question in controversy is, who has the preferential title as the reversionary heir. The Courts below have found in favour of the defendant, upon the authority of the Full Bench decisions in *Guru Gobind* v. *Anand Lal* (1) and *Digumber Roy* v. *Moti Lal* (2). It is not disputed that] if these cases were correctly decided, the claim of the plaintiffs must be negatived. But it has been argued that both the Full Benches took an erroneous view of the fundamental principles which underlie the Dayabhaga, and, consequently, arrived at incorrect conclusions. On this basis, Sastri Golap Chandra Sarkar has addressed to us an able and learned argument to induce us to have the matter re-considered by the Full Court. We have anxiously considered his argument, and we are of opinion that if the matter were *res integra*, the view put forward by the appellants would deserve consideration. At the same time, we are of opinion that, on well-established principles, the matter should not be re-opened. The law on the subject has been laid down authoritatively by two successive Full Benches, once in 1870 and again in 1883. Attempts have previously been made to re-open the matter, but have never been successful. [See, for instance, *Dino Nath* v. *Chundi Koch* (3), where in 1889 Mr. Justice Banerjee stated that the question must be deemed settled by authority]. In these circumstances, we are clearly of opinion that we should act on the principle stated by Lord Cranworth in *Young* v. *Robertson* (4) in the following terms: "There is another duty incumbent on all Courts, and pre-eminently upon a Court of ultimate appeal, and which has been invariably observed, namely, that as regards those rules which regulate the settlement and devolution of property, those Courts, which have to interpret instruments and acts of parties, must take care to be very guarded against letting any supposed notions as to the inaccuracy of any rule, which has in fact been acted upon, induce them to alter it so as to endanger the security of property and titles." This doctrine has been recognised by their Lordships of the Judicial Committee in *Sri Raja Rao Venkata Surya Mahipati* v. *Court of Wards* (5), though they did not apply the doctrine to that particular case, because there had not been such a long course of uniform

(1) 5 B. L. R. 15; 13 W. R. (F. B.) 49.

(2) 9 C. 563; 12 C. L. R. 204.
(3) 16 C. L. J. 14; 16 Ind. Cas. 349.
(4) (1862) 4 Mac. H. L. 314 at p. 325.
(5) 26 I. A. 83 at p. 96; 3 C. W. N. 415; 22 M. 383.

decisions as ought not to have been reversed and the law altered.

The result is that the decree of the District Judge is affirmed and this appeal dismissed with costs.

Appeal dismissed.

MADRAS HIGH COURT.

APPEAL AGAINST APPELLATE ORDER No. 94 OF 1910.

August 20, 1912.

Present:—Sir Ralph Benson, KT., Offg. Chief Justice, and Mr. Justice Napier.

SEPAHDAR KHAN SANTHOJI AND OTHERS—DEFENDANTS—APPELLANTS

versus

BADI BI—PLAINTIFF—RESPONDENT.

Partition Act (IV of 1893), s. 10—Whether applicable where preliminary decree has been made.

Section 10 of Act IV of 1893 is applicable to a case where a preliminary decree for partition has been made but the final partition has not been effected.

Appeal against the decree of the District Court of Cuddapah, in Appeal Suit No. 107 of 1910, dated 26th July 1910, preferred against that of the Court of the District Munsif of Cuddapah, in E. P. No. 121 of 1910, in Original Suit No. 847 of 1910.

Mr. *S. Gopalaswami Iyengar*, for the Appellants.

Mr. *T. Anantachari*, for the Respondents.

JUDGMENT.—The District Judge is in error in holding that the provisions of the Partition Act IV of 1893 do not apply to a suit like the present in which a preliminary decree for partition had been made but in which the final partition had not been effected. Section 10 of the Act makes this plain, as pointed out in *Kadir Bacha Sahib* v. *Abdul Rahiman Sahib* (1) followed in *Bai Hirakore* v. *Trikamdas Hirachand* (2).

We set aside the order of the District Judge on the preliminary matter and direct him to restore the appeal to the file and dispose of it according to law.

It is open to him to consider whether the application should be disposed of owing

(1) 24 M. 639.
(2) 32 B. 103; 10 Bom. L. R. 23; 3 M. L. T. 141.

to any laches on the part of the petitioner before the District Munsif or for any other cause. Costs will abide the result.

Order set aside.

CALCUTTA HIGH COURT.

MISCELLANEOUS CIVIL APPEAL No. 670 OF 1911.

September 2, 1912.

Present:—Sir Ashutosh Mookerjee, KT., Judge, and Mr. Justice Beachcroft.

Raja PADMANAND SINGH BAHADUR —JUDGMENT-DEBTOR—APPELLANT

versus

RAMA PRASAD MALVI—DECREE-HOLDER —RESPONDENT.

Maintenance—Right to receive money—Interest in estate out of which annuity paid—Personal right or interest in property—Saleable property—Civil Procedure Code (Act V of 1908), s. 60, cl. (n), proviso—Restraint on alienation—Involuntary sale—Payer's property vested in Court of Wards—Whether manager under Court compellable to bring money to Court month by month—Whether Receiver may be appointed.

A well marked distinction has been recognised between a right to receive a sum of money for purposes of maintenance properly so called, and a right or interest in property which really forms a fund or estate out of which an annuity is periodically paid to the grantee; in the former case, a purely personal right is created which may be properly deemed inalienable; in the latter case, an interest in property is created which can rightly be deemed alienable. Whether a particular grant falls within the scope of the one principle or the other, must depend upon its terms.

Asad Ali Molla v. *Haider Ali*, 6 Ind. Cas. 826; 12 C. L. J. 130; 38 C. 13; 14 C. W. N. 918 and *Tara Sundari* v. *Saroda Charan*, 7 Ind. Cas. 80; 12 C.L.J. 146, relied upon.

A father, finding himself unable to pay his creditors, conveyed to his son all his properties for the consideration of paying off his debts. The transferee agreed to pay to his father, the transferor, during his life a monthly sum and two annual sums. These sums were made first charges upon the estate in the hands of the son, subject to the then existing mortgages executed by the father. The deed contained a covenant that the allowances were payable to the vendor personally and would be absolutely incapable of transfer in any form whatever:

Held, that the right of the father to receive the annuity was a valuable interest in property and saleable property within the meaning of section 60 of the Civil Procedure Code of 1908, and could not be regarded as a right to future maintenance within the meaning of clause (*n*) of the proviso to that section; that the clause in the document seeking to impose a restraint on alienation, was illegal; that a restraint

PADMANAND SINGH BAHADUR v. RAMA PRASAD MALVI.

on voluntary alienation, even if validly imposed, did not necessarily imply a restraint against involuntary alienation, and that the restraint did not bar a compulsory sale at the instance of the father's creditors.

Rochford v. *Hackman*, 9 Hare 475; 21 L. J. Ch. 511; 16 Jur. 212; 89 R. R. 539; *Joel* v. *Mills*, 3 K. & J. 458 at p. 468; 112 R. R. 231; *Hatton* v. *May*, 3 Ch. D. 148; 24 W. R. 754; *Hunt-Foulston* v. *Furber*, 3 Ch. D. 285; 24 W. R. 756 and *Roper* v. *Roper*, 3 Ch. 714 at p. 721; 35 L. T. 155; 24 W. R. 1013, referred to.

The father's decree-holder is entitled to attach and sell the right to receive the allowance. The purchaser at the sale will acquire the right of the judgment-debtor. Before that event takes place, the manager under the Court of Wards, in whom the estate of the son has vested, cannot be called upon to pay the money into Court month by month.

Raja Padmanand v. *Rama Prasad*, 11 Ind. Cas. 422; 14 C. L. J. 127; 16 C. W. N. 14, relied upon.

Nor can a Receiver be appointed to receive the money month by month.

Lucas v. *Harris*, 18 Q. B. D. 127; 56 L. J. Q. B. 15; 55 L. T. 658; 35 W. R. 112; 51 J. P. 261, referred to.

Appeal against the order of the Subordinate Judge of Bhagalpur, dated the 20th December 1911.

Dr. *Rash Behary Ghose*, Babus *Bepin Behary Ghose* and *Debendara Nath Bagchi*, for the Appellant.

Mr. *S. P. Sinha*, Babus *Kshetra Mohan Sen* and *Nares Chandra Sinha*, for the Respondent.

JUDGMENT.—This appeal is directed against an order in execution proceedings. The antecedent history of the litigation may be briefly stated. On the 25th September 1905, the appellant conveyed all his properties in favour of his son for the payment of his debts. The conveyance provided that the purchaser would pay the vendor a monthly sum of rupees four thousand, the first payment to be made on the 1st October 1905, and the payment for every succeeding month, on the first day of the month following, between the hours of 1 A.M. and 6 A.M. The conveyance also provided for the payment of further sums of rupees two thousand and rupees twelve hundred annually in two equal instalments for specified purposes. The deed further contained a provision that the vendor would not, by mortgage or otherwise, seek to charge or alienate the allowance payable to him, and that, on no account and under no circumstances, was the allowance to become payable to or demandable by any person other than the vendor or his duly constituted attorney. There was also a provision that, so far as was consistent with the then subsisting mortgages executed by the vendor himself, the allowance payable was to be a first charge upon a specified share of the estate. The purchaser died sometime after this transaction, whereupon the properties transferred to him vested in his widow, Sashirama Kumari, and are now under the management of the Court of Wards on her behalf. On the 4th April 1910, the respondents before us, who held a decree for a large sum of money obtained against the appellant on the 13th November 1908, applied for execution thereof. They prayed for recovery of the judgment-debt by attachment of the monthly allowance of rupees four thousand from the date of application to the date of realisation. The judgment-debtor objected that the allowance could not be attached before it became due. The Subordinate Judge overruled this objection, and issued a prohibitory order upon the manager under the Court of Wards, directing him to withhold payment of the monthly allowance to the judgment-debtor and to deposit the amount in Court as it accrued due from month to month, till the decretal amount was satisfied. Upon appeal to this Court by the judgment-debtor, the order of the Subordinate Judge was discharged on the 23th June 1911, on the ground that an annuity not yet due, is not garnishable under the provisions of the law. *Raja Padmanand Singh* v. *Ramaprosad Malvi* (1). Thereupon, the decree-holders presented an application to the Court below on the 11th September 1911, in which they prayed that the right, title and interest of the judgment-debtor in the monthly allowance payable from and charged upon the estate of his daughter-in-law might be attached and sold. The judgment-debtor objected that the right to the annuity was not saleable property within the meaning of section 60 of the Civil Procedure Code of 1908 and was, consequently, not liable to be attached and sold. The Subordinate Judge has overruled this contention, and has not only directed attachment of the annuity but also issued a prohibitory order upon the manager under the Court of Wards directing him to bring into Court, month by month, the amount of allowance payable to the judgment-debtor. We are invited in this appeal to set aside this order as contrary to law.

(1) 14 C. L. J. 127; 16 C. W. N. 14; 11 Ind. Cas. 22.

The determination of the question raised before us, depends upon the nature of the right created in favour of the judgment-debtor by the indenture of the 25th September 1905. The deed recites the previous history of the family and the embarrasment of Raja Padmanand Singh when he found himself unable to pay his creditors, secured as well as unsecured. Under these circumstances, he conveyed to his son all his properties for consideration. The transferee assumed payment of specified debts, and agreed, as we have already stated, to pay to his father, the vendor, during his life, a monthly sum of rupees four thousand and two annual sums of rupees two thousand and rupees twelve hundred respectively. These sums were made first charges upon the estate in the hands of the son, subject to the then existing mortgages executed by the vendor himself. The deed contained a covenant that the allowances were payable to the vendor personally and would be absolutely incapable of transfer in any form whatever. On behalf of the appellant it has been argued that the vendor had no saleable interest in the annuity, that it was purely personal, and that it is in essence a right to future maintenance within the meaning of clause (*n*) of the proviso to section 60 of the Civil Procedure Code of 1908. On behalf of the respondents, it has been argued, on the other hand, that this right to receive the annuity, the payment whereof was secured by a first charge on the estate in the hands of the son, is a valuable interest in property, that the restraint upon alienation imposed thereon is contrary to law, and, that, in any event, a creditor of the annuitant is entitled, notwithstanding the clause against alienation, to seize the property in execution. This is the substantial point in controversy in this appeal. There is a subordinate point, which would require consideration, if the argument of the judgment-debtor fails, namely, if the right to receive the annuity be deemed saleable property liable to be attached and sold, it is not competent to the Court to issue a prohibitory order upon the manager and to direct him to deposit in Court the allowance as it falls due from month to month.

In so far as the primary question in the appeal is concerned, we have arrived at the conclusion, after anxious consideration of the matter, that the right of the judgment-debtor to receive the annuity is saleable property within the meaning of section 60 of Code of 1908 and cannot be regarded as a right to future maintenance within the meaning of clause (*n*) of the proviso to that section. The question whether a right to maintenance is assignable or not, was considered by this Court in the cases of *Asad Ali Molla* v. *Haider Ali* (2) and *Tara Sundari* v. *Saroda Charan* (3). The judicial decisions on the subject, which are by no means easy to reconcile, will be found reviewed in these cases. As was pointed out there, a well marked distinction has been recognised between a right to receive a sum of money for purposes of maintenance properly so called, and a right or interest in property which really forms a fund or estate out of which an annuity is periodically paid to the grantee; in the former case, a purely personal right is created which may be properly deemed inalienable; in the latter case, an interest in property is created which can rightly be deemed alienable. Whether a particular grant falls within the scope of the one principle or the other, must depend upon its terms. In the case before us, the substance of the transaction embodied in the indenture of the 25th September 1905, was that, although the appellant conveyed his entire estate to his son, he retained a substantial interest therein, namely, a right to receive therefrom rupees fifty-one thousand two hundred annually. It may be conceded that there was a personal undertaking by the son to pay this money to the father; but it cannot be overlooked that the due payment of the money was secured by a first charge upon the estate, a charge which, if necessary, could be enforced by sale of the estate. This plainly is not a mere right to future maintenance but a valuable interest in property. It has been contended, however, that the indenture states explicitly that the right to receive allowance is inalienable and that the allowance shall, on no account and under no circumstances, be payable to or demandable by any person other than the vendor or his duly constituted attorney. In our opinion, the clause mentioned seeks to impose a restraint on alienation, which must be deemed illegal, on the

(2) 12 C. L. J. 130; 38 C. 13; 14 C. W. N. 918; 6 Ind. Cas. 826.

(3) 12 C. L. J. 146; 7 Ind. Cas. 80.

same principle on which it has been ruled that where the income of trust property is to be paid to *A.* during his life, a direction that it shall be paid into his own hands or that he shall not alienate or anticipate it or that it shall not be liable for his debts, is void; *Brandon* v. *Robinson* (4) *Graves* v. *Dolphin* (5), *Barton* v. *Briscoe* (6), *Woodmeston* v. *Walker* (7), *Jones* v. *Salter* (8) and *Brown* v. *Pocock* (9). It may be conceded that there are observations in some of the cases on the subject in the books which may be difficult to reconcile, *Twopeny* v. *Peyton* (10), *In re Coleman*; *Henry* v. *Strong* (11), *In re Bullock*; *Good* v. *Lickorish* (12); but the principle recognised by the decisions is that whatever rights, legal or equitable, in property, a man has, those rights are alienable; whatever a man can demand from his trustees, that his creditor can demand from him. This view is not opposed to the observation of Lord Hatherley in *Chambers* v. *Smith* (13), where he did not mean to affirm that an alimentary provision is good in England, but that by the law of England, if a trustee has a right to charge the trusts of a fund against a *cestui que trust*, he has the same right against the *cestui que trust's* creditor. No doubt, alimentary funds, that is, spend-thrift trusts, are recognised in the law of Scotland, as appears from the authorities mentioned in the judgment of this Court in *Raja Padmanund Singh* v. *Rama Prasad* (1). There can be no question that they are not recognised in England, and Lord Justice Stirling observed, in *In re Fitzgerald*; *Surman* v. *Fitzgerald* (14), that he could not appreciate why the English owner of an alimentary provision, created by Scotch law, should be held to be incapable of making a disposition of it when it comes to his hands, inasmuch as the law of England does not in general recognise any restraint as regards the property of a man of full age. It is unnecessary, for our present purpose, to consider whether the English or the Scotch view ought to be deemed consistent with rules of justice, equity and good conscience. The indenture in the present case cannot, as we have already stated, be deemed as a provision for maintenance, and its object clearly is to place property beyond the reach of creditors. I am not unmindful that spend-thrift trusts have been vigorously defended, and probably the most forcible presentation of the doctrine of spend-thrift trusts is to be found in the judgment of Mr. Justice Miller in *Nichols* v. *Eaton* (15). The learned Judge maintains that the doctrine that the power of alienation is a necesssary incident to a life-estate in real property, or that the rents and profits of real property and the interest and dividends of personal property may not be enjoyed by an individual without liability for his debts being attached to it as a necessary incident to such enjoyment, is a modern doctrine engrafted upon the Common Law by the Court of Chancery for the benefit of creditors. But if the doctrine is modern, it is only because such trusts themselves are modern; the doctrine is merely an application of a principle older than Taltarum's case. As Professor Gray observes, these decisions are "a part of the struggle of the law against feudalism and against the attempt to give the enjoyment of wealth without its responsibilities; they are modern only because the special form of dishonesty, family pride and sentimentalism at which they aim, is modern." Gray on Restraints, section 168. In the case before us, it is further worthy of note that there is no provision in the indenture, against involuntary sale of the right to receive allowance, and it cannot be disputed that a restraint on voluntary alienation, even if validly imposed, does not necessarily imply a restraint against involuntary alienation; *Rochford* v. *Hackman* (16), *Joel* v. *Mills* (17); and the restraint, in our opinion, does not bar a compulsory sale at the instance

(4) (1811) 18 Ves. 429; 11 R. R. 226.
(5) (1826) 1 Sim. 66; 5 L.J.(o.s.)Ch. 45; 27 R.R. 166.
(6) (1812) Jac. 603.
(7) (1831) 2 Rus. and M. 197; 9 L. J. (o s.)Ch. 257; 34 R. R. 56.
(8) (1815) 2 Rus. and M. 208; 34 R. R. 60.
(9) (1833) 2 Rus. and M. 210; Coop. t. Borough 10; 4 L. J. Ch. 15.
(10) (1840) 10 Sim. 487; 9 L. J. Ch. 172; 4 Jur. 456; 51 R. R. 301.
(11) (1888) 39 Ch. D. 443; 58 L. J. Ch. 226; 60 L. T. 127.
(12) (1891) 60 L. J. Ch. 341; 64 L. T. 736; 39 W. R. 472.
(13) (1878) 3 App. Cas. 795.
(14) (1904) 1 Ch. 573 at p. 593; 73 L. J. Ch. 4 6; 90 L. T. 266; 52 W. R. 432; 20 T. L. R. 332.
(15) (1875) 91 U. S. 715; 1 Otto. 716; 23 Law. Ed. 254.
(16) (1852) 9 Hare 475; 21 L. J. Ch. 511; 16 Jur. 212; 89 R. R. 539.
(17) (1857) 3 K. and J. 458 at p. 468; 112 R.R. 231.

of the creditors ; *Hatton* v. *May* (18), *Hunt Foulston* v. *Furber* (19), *Roper* v. *Roper* (20). We must hold, therefore, that the right of the appellant to receive the allowance is liable to be attached under section 60 of the Civil Procedure Code of 1908. The substantial ground on which the appeal is based cannot, consequently, be supported.

It has been urged, however, on behalf of the appellant, that the Subordinate Judge had no jurisdiction to direct the manager under the Court of Wards to pay into Court, month by month, the allowance as it fell due. In our opinion, this contention is well founded and must prevail. The decree-holder is entitled to attach and to sell the right to receive the allowance ; the purchaser at the sale will acquire the right of the judgment-debtor ; but before that event takes place, the manager cannot be called upon to pay the money into Court month by month. If this were permissible, a decree-holder who has attached land might claim that the profits from the date of attachment be paid into Court. In fact, the direction that the money be paid into Court is directly contrary to our previous decision in this matter ; *Raja Padmanand* v. *Rama Prasad* (1) ; nor can a Receiver be appointed to receive the money month by month, *Lucas* v. *Harris* (21), as might have been done if it had been held that the amount of allowance payable for any month was liable to be attached before it fell due. We direct, accordingly, that the sums deposited by the manager be paid out to the appellant, because they have been brought into Court in contravention of the previous orders of the High Court.

The result is that this appeal is allowed in part ; the sums deposited by the manager will be returned to the appellant, but the decree-holder will be at liberty to bring to sale the right of the judgment-debtor to receive the allowance of Rs. 4,000 a month under the indenture of the 25th September 1905. As the victory has been a divided one, there will be no order for costs in this Court.

Appeal allowed in part.

(18) (1876) 3 Ch. D. 148; 24 W. R. 754.
(19) (1876) 3 Ch. D. 285; 24 W. R. 756.
(20) (1876) 3 Ch. 714 at p. 721; 35 L. T. 155; 24 W. R. 1013.
(21) (1886) 18 Q. B. D. 127; 56 L. J. Q. B. 15; 55 L. T. 658; 35 W. R. 112; 51 J. P. 261.

OUDH JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 33 OF 1912.

July 17, 1912.

Present:—Mr. Kanhaiya Lal, A. J. C.

MUBARAK ALI SHAH—PLAINTIFF—APPELLANT

versus

Babu ADITTYA PRASAD AND ANOTHER—DEFENDANTS—RESPONDENTS.

Vendor and purchaser—Whole sale price not paid—Sale pre-empted—Vendor paid by pre-emptor—Vendor again suing vendee for unpaid purchase-money—Lien, discharge of, by payment made by third person—Contract Act (IX of 1872), *ss.* 69, 70.

The plaintiff sold a certain village to the defendant. A portion of the sale price was paid by the defendant while the rest remained unpaid. The sale was the subject of two rival suits for pre-emption of which one suit was dismissed and the other was decreed. The pre-emptor whose suit was decreed paid the unpaid purchase-money to the plaintiff but that suit was ultimately dismissed on the ground that the purchase-money was not deposited in Court according to law. The plaintiff then brought a suit for the recovery of that very amount from the defendant who remained in possession of the property sold, the pre-emption suit having been dismissed:

Held, that the plaintiff was not entitled to bring a suit for the recovery of the same amount from the vendee when he had already received that sum from the pre-emptor. The plaintiff's cause of action, for the recovery of his unpaid portion of the purchase-money, was satisfied by the payment of the said money by the pre-emptor who had stepped into the shoes of the vendee. The mere fact that the decree for pre-emption had since been set aside did not revive the cause of action unless a claim was brought against the plaintiff for the refund of the said money and he was made to reimburse the same to one who had paid it.

Dakhina Mohan Ray v. *Saroda Mohan Ray*, 21 C. 142 (P. C.), 20 I. A. 160, referred to.

Appeal against order of the Subordinate Judge of Gonda, dated 21st December 1911.

Mr. *Wazir Hasan*, for the Appellant.
Mr. *A. P. Sen*, for the Respondents.

JUDGMENT.—This was a suit by a vendor for the recovery of his unpaid portion of the purchase-money from the vendee by the enforcement of a charge against the property sold. The sale-deed was executed by the plaintiff in favour of defendant No. 1 in lieu of Rs. 22,968 on the 3rd June 1905, out of which Rs. 11,850 were payable by the vendee to the vendor by the end of August 1905. The plaintiff admitted the receipt of the said amount with the exception of Rs. 6,419-0-6, which with interest thereon forms the subject-matter of the present suit.

MUBARAK ALI SHAH v. ADITTYA PRASAD.

The sale-deed was the subject of two rival suits for pre-emption, one of which was brought by *Musammat* Latif-un-nissa, who was unsuccessful in the Court of first instance, and the other by *Musammat* Ruqaiya, who obtained a decree and paid Rs. 6,419-0-6 thereunder to the plaintiff on the 28th June 1909 by executing, it is alleged, a promissory-note for that amount in his favour. The decree obtained by *Musammat* Ruqaiya was ultimately reversed on appeal and the claim of *Musammat* Latif-un-nissa was decreed by this Court. In pursuance of the latter decree, *Musammat* Latif-un-nissa paid Rs. 6,419-0-6, to the plaintiff but failed to deposit another part of the consideration money, in consequence of which her decree proved abortive. It is admitted by the plaintiff-appellant that he received Rs. 6,419-0-6 from *Musammat* Ruqaiya by means of a promissory-note executed by the latter in his favour and a similar amount from *Musammat* Latif-un-nissa in cash and that he has not yet refunded either of the said amounts. The only question for consideration in this appeal is whether, under the circumstances, he is entitled to bring a suit for the recovery of the same amount from the vendee, who has been successful in retaining the property sold against the onslaught of the rival claimants to pre-emption.

The lower Court dismissed the claim on the ground that there was no cause of action to the plaintiff until he refunded the money realized by him from *Musammat* Latif-un-nissa and *Musammat* Ruqaiya. Section 41 of the Contract Act provides that when a promisee accept performance of the promise from a third person, he cannot afterwards enforce it against the promisor, and sections 69 and 70 of the same Act impose upon the vendee a liability to reimburse the persons who had paid the money under the decrees which were afterwads set aside to the extent to which he was benefited by the said payment [see *Dakhina Mohan Ray* v. *Sarodar Mohan Ray* (1)].

The plaintiff had, undoubtedly, a good cause of action under the sale-deed for the recovery of his unpaid portion of the purchase-money from the vendee but that cause of action was satisfied by the payment of the said money by *Musammat* Latif-un-nissa and *Musammat* Ruquaiya, who, by virtue of the then subsisting decrees for pre-emption, had stepped into the shoes of the vendee. The mere fact that those decrees for pre-emption have since been set aside does not revive the cause of action unless a claim is brought against him for the refund of the said money and he is made to reimburse the same to those who had paid it. Till then, his lien for the unpaid purchase-money cannot be enforced because that lien was satisfied and the purchase-money cannot be said to be still lying unpaid. It is yet possible that *Musammat* Ruqaiya may go up to the Privy Council and ask to have the decision against her set aside and it is equally possible that *Musammat* Ruqaiya and Latif-un-nissa may take no steps to claim a refund of the monies paid, or said to have been paid by them within the period of limitation. It would be manifestly unfair, therefore, to allow the plaintiff to recover for the third time from the vendee what he has already recovered from *Musammat* Latif-un-nissa and Ruqaiya or to saddle the defendant with a liability so long as he is not released by *Musammat* Latif-un-nisa and *Musammat* Ruqaiya from a right to reimbursement for what they paid practically on his account. The learned Counsel for the appellant relied on *Saunders* v. *Leslie* (2), *Grant* v. *Mills* (3), and other English cases in support of his contention that a lien is not discharged by a receipt taken or payment made by a third person unless it was authorized or ratified by the debtor. But, as observed by Pollock (Pollock's Contract Act, page 225), it is not clear that the better modern opinion is not the other way (Leake on Contracts, 5th Edition, page 647). In any case no such reservation is contained in section 41 of the Contract Act and so long as the payments made by *Musammat* Latif-un-nissa and *Musammat* Ruqaiya subsist, the plaintiff has no right to recover the same amount over again from the respondents. It was open to him to make a refund to both of them either before or during the pendency of this suit He did not do so and a conditional decree cannot be passed in this case because *Musammat* Latif-un-nissa and *Musammat* Ruqaiya are not parties to the present proceedings.

(1) 21 C. 142 (P. C.); 20 I. A. 160.

(2) 12 R. R. 114; 2 Ball & B. 514.

(3) 13 R. R. 101; 2 V. & B. 307.

BINDHACHAL RAI v. GAYA RAI.

It is not necessary, under the circumstances, to go into the question of set-off raised by the defendants-respondents. The appeal, therefore, fails and is dismissed with costs.

Appeal dismissed.

ALLAHABAD HIGH COURT.
SECOND CIVIL APPEAL No. 314 OF 1912.
October 31, 1912.
Present:—Mr. Justice Tudball.
BINDHACHAL RAI AND OTHERS—PLAINTIFFS—APPELLANTS
versus
GAYA RAI AND OTHERS—DEFENDANTS—RESPONDENTS.

Res judicata—*Suit by or against manager of joint Hindu family—Effect of decree in such suit on other members of family.*

The manager of a joint Hindu family can both sue and be sued in his representative capacity and a decision fairly obtained against him is binding on the other members of the family and operates as *res judicata* in a subsequent suit.

Harilal v. *Nimman Kunwar*, 9 A. L. J. 819; 34 A. 549; 15 Ind. Cas. 126, *Madan Lal* v. *Kishun Singh*, 9 A. L. J. 844, 34 A. 572; 15 Ind. Cas. 138, followed.

Second appeal from the decision of the District Judge of Ghazipur, dated 16th December 1911.

Mr. *Mohanlal Sandal*, for the Appellants.

Mr. *M. L. Agarwala*, for the Respondents.

JUDGMENT.—The circumstances of the case out of which this appeal has arisen are as follows:—The present plaintiff Bindhachal Rai, major son of Lal Bahadur Rai, and the three minor plaintiffs formed with the defendants 2nd party Lal Bahadur Rai, etc., a joint Hindu family, the manager of the family being Lal Bahadur Rai. Lal Bahadur Rai and the other defendants of the 2nd party brought a suit in the Revenue Court for the ejectment of the defendants 1st party from two plots of land Nos. 549/2 and 551, claiming that the defendants 1st party were their sub-tenants and the land was their own *sir* land. The defence to that suit was that the defendants were proprietors and owners of plot No. 549/2 and occupancy-tenants of plot No. 551.

The Revenue Court decided all the questions which arose between the parties and held in favour of the defendants therein in respect of both plots. The present suit has been brought in the Civil Court by the remaining members of the joint family for the ejectment of the same defendants from this land and for joint possession together with the 2nd set of defendants. One of the pleas taken in defence was that the suit was barred by the rule of *res judicata*. The case was also contested on the merits. The Court of first instance held on the merits against the plaintiffs and also held that the suit was barred by the rule of *res judicata*. The lower Appellate Court on appeal only decided the question of law, and agreeing with the first Court dismissed the appeal. Hence this second appeal, the point raised being that the present suit is not barred by the rule of *res judicata*. There is no question that the family is joint and the property in question as claimed is the joint family property. The plaintiffs clearly ask for possession jointly with the defendants 2nd party. It is also not denied that Lal Bahadur Rai was the managing member of the family. There cannot be the slightest doubt that the first suit brought in the Revenue Court was brought by the adult members of the family and the managing member not on behalf of themselves alone but on behalf of the joint family. It seems, therefore, clear to my mind that the principle, on which decisions of the Full Bench in *Hari Lal* v. *Nimman Kunwar* (1) and that of *Madan Lal* v. *Kishun Singh* (2) rest, applies with equal force in the present case The former suit having been brought by the managing member of the family on behalf of that family and the decision therein having been obtained fairly and without fraud is binding on the other members of the joint family who were duly represented in the former litigation. It is unnecessary, in my opinion, to mention other previous decisions of this and other High Courts in India in reference to the same point. It must be taken as finally and definitely settled that the manager of a joint Hindu family can both sue and be sued in his representative capacity, and decisions fairly obtained against him are binding on the other members of the family who were fully represented by him in the former litigation. There is no question that the

(1) 9 A. L. J. 819; 34 A. 549: 15 Ind. Cas. 126.
(2) 9 A. L. J. 844; 34 A. 572; 15 Ind. Cas. 138.

former decision by the Revenue Court is binding as against those persons who were plaintiffs in that suit, and as the present plaintiffs were fully represented in that litigation, they are fully bound by that decision. In this view, the present suit is barred, and the plaintiff's appeal in the lower Court was rightly dismissed. This appeal, therefore, fails and is dismissed with costs including fees on the higher scale.

Appeal dismissed.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 2053 OF 1910.

July 19, 1912.

Present:—Sir Ralph Benson, Kt., Offg. Chief Justice, and Mr. Justice Napier.

PONNAMBALA CHETTI—APPELLANT

versus

MUTHUSAMI PILLAI AND OTHERS—RESPONDENTS.

Mortgage—Redemption—Prior mortgagee obtaining decree for sale without impleading puisne mortgagee—Purchase of property in execution by prior mortgagee—Suit for redemption by puisne mortgagee—Amount due—Interest.

Where a prior mortgagee has obtained a decree for sale without impleading the puisne mortgagee in his suit, and has in execution of the decree purchased the mortgaged property himself, the puisne mortgagee, when seeking to redeem the prior mortgage, is bound to pay the prior mortgagee interest at the mortgage rate and not at the decree rate.

The puisne mortgagee cannot treat the prior mortgagee as a mortgagee for one purpose and a decree-holder for another.

Thenappa Chettiar v. *Marimuthu Nadan*, 31 M. 258; 18 M. L. J. 344; 4 M. L. T. 293 and *Umes Chander Sircar* v. *Zahur Fatima*, 18 C. 164; 17 I. A. 201, followed.

Mahomed Ebrahim Hussain Khan v. Ambika Pershad Singh, 39 C. 527; 11 M. L. T. 235; (1912) 1 M. W. N. 367; 9 A. L. J. 332; 14 Bom. L. R. 231; 16 C. W. N. 505; 15 C. L. J. 411; 22 M. L. J. 438; 14 Ind. Cas. 406, explained, distinguished and not applied.

Second appeal from the decree of the Court by the District Court of Tanjore, in A. S. No. 874 of 1904, preferred against that of the Court of the Subordinate Judge at Kumbakonam, in O. S. No. 15 of 1903.

Mr. *P. R. Ganapathi Aiyar*, for the Appellant.

Messrs. *T. Rangachariar* and *V. Narasimha Aiyangar*, for the Respondents.

JUDGMENT.—The facts of this case, so far as they are necessary for the disposal of this appeal, are as follows:—

The 1st and 2nd defendants mortgaged the suit properties first to the 3rd defendant and then to the assignor of the present plaintiff. The 3rd defendant brought a suit in Original Suit No. 41 of 1887 against the mortgagors without making the puisne mortgagee a party; in execution of that decree, he brought the property to sale and bought it. The plaintiff then brought a suit against the 3rd defendant claiming to redeem.

The 5th and 6th issues in the suit were as to the amount that the plaintiff should pay to the 3rd defendant in redemption. The District Judge on appeal called for findings on those issues as the parties conceded that they were necessary and the Subordinate Judge, on the authority of the case in *Thennappa Chettiar* v. *Marimuthu Nadan* (1), decided that the account should be taken on the footing that the prior mortgage of the 3rd defendant was still in existence, and calculated the amount due accordingly. Against that basis, the plaintiff did not appeal but confined himself to objecting to the rate of interest allowed and the calculation of the profits accrued to the 3rd defendant since his possession under the sale. He renews those objections here in second appeal, but in addition seeks to take other grounds. The first additional ground is that the Court should have given him a decree for redemption without ascertaining the amount due. We decline to allow him to raise this contention as the 5th and 6th issues were sent down for a finding with his concurrence. The other additional ground is that the decision in *Thennappa Chettiar* v. *Marimuthu Nadan* (1) is wrong and all that he can be called on to pay is the amount found due under the decree obtained by the 3rd defendant in his suit with subsequent interest at the decree rate, and he urges that there is a decision of the Privy Council to that effect since the date when he filed his grounds of appeal in the lower Appellate Court. We have allowed him to raise it. It has now to be seen whether his contention is correct. The decision referred to is reported

(1) 31 M. 258; 18 M. L. J. 344; 4 M. L. T. 293.

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Mahomed Ibrahim Hussain Khan v. *Ambika Pershad Singh* (2). The passages relied on are on pages 558 and 559. The Board lay down that the puisne mortgagee is entitled to redeem the prior mortgage on payment of the principal and interest in respect of which the property was sold to him under the decree for sale. The Privy Council do not say that the amount decreed is to be paid. There is no argument on this point; the head-note does not treat these words as a decision to this effect, and lastly the Privy Council do not purport to be overruling their prior decision on this point reported as *Umes Chander Sircar* v. *Zahur Fatima* (3). This case was most carefully considered by this Court in the case above referred to [*Thenappa Chettiar* v *Marimuthu Nadan* (1)] and the following passage is extracted from it in the judgment of this Court:—"The plaintiff comes to take away from the prior mortgagee the benefit of her decree. It would be unjust if he could use the decree to cut down her interest while he deprives her of the whole advantage of it. * * * If she is still a mortgagee, she should be allowed such benefit as the mortgage gives her." On this passage, this Court held that there was no room for the contention that the puisne mortgagee ought to be allowed to choose whether to adopt or disregard the account directed by the decree. We are of a like opinion that the question is precluded by the authority of the Privy Council and the principle on which it proceeds is clearly enunciated. The prior mortgagee has lost the right arising out of his decree and purchase in execution sale by reason of his failure to make the puisne mortgagee a party as required by section 85 of the Transfer of Property Act. He is reverted to his position as a mortgagee and is now liable to lose the property by being redeemed. He is, therefore, sufficiently penalised and the puisne mortgagee cannot treat him as a mortgagee for one purpose and a decree-holder for another. There is nothing in the later judgment of the Privy Council which is inconsistent with the reasoning of their Lordships in this case, and we are bound by it. That objection, therefore, fails. As to the two grounds taken in appeal, both in the lower Appellate Court and before us, we agree with the lower Appellate Court in its construction of the 3rd defendant's mortgage as to the evidence of the compound interest and we are also of opinion that if the provision is penal, it is not in excess of what would constitute reasonable compensation. The result is, that this second appeal is dismissed with costs.

Time for redemption is extended to three months from this date.

Appeal dismissed.

(2) 39 C. 527; 11 M. L. T. 265; (1912) 1 M. W. N. 367; 9 A.L.J. 332; 14 Bom. L. R. 280; 16 C.W.N. 505; 15 C.L.J. 411; 22 M.L.J. 468; 14 Ind. Cas. 496 (P.C.).

(3) 18 C. 164; 17 I. A. 201.

ALLAHABAD HIGH COURT.

CIVIL REVISION PETITION No. 150 OF 1911.

November 4, 1912.

Present:—Mr. Justice Rafique

BIRJ LAL—APPLICANT

versus

BUA RAM AND OTHERS—OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908), O. XLI, r. 19—Appeal dismissed in absence of both parties—Restoration—Notice to other side, whether necessary.

If an appeal is dismissed on account of both the appellant and respondent being absent on the day of hearing, no notice to the respondent is necessary before passing an order of restoration of appeal.

Civil revision against a decree of the Additional Subordinate Judge of Cawnpore, dated the 28th of August 1911.

Mr. *Benode Behari*, for the Applicant.

Mr. *Govind Prashad*, for the Respondents.

ORDER.—This is an application in revision under section 115 of the Code of Civil Procedure against the order of the learned Additional Subordinate Judge of Cawnpore, restoring the appeal of the opposite party which had been struck off for default. It is contended on behalf of the applicant that the order of the lower Court restoring the appeal is bad inasmuch as no notice was sent to or served upon the applicant to show cause why the appeal of the opposite party should not be restored. It is further contended that the affidavit filed by the opposite party in the lower Court explaining his absence on the day of hearing of the appeal is insufficient and does not excuse his absence. The order of the lower Court was passed under rule 19, Order XLI of the Code of Civil Procedure.

That rule does not require any notice to be issued to the respondents prior to making an order of restoration of an appeal, struck off for default. But, it is said for the applicant that under section 107 clause 2, the provisions of the Code of Civil Procedure applicable to Courts of first instance are also applicable to the Appellate Courts and under the rules applicable to the Courts of first instance, no suit dismissed for default can be restored without notice to the defendant. The rules on the subject of dismissal and restoration of suits are given in Order IX of the Code. If a suit is dismissed in the absence of both the plaintiff and the defendant, the suit can be restored on the application of the plaintiff without issuing any notice to the defendant. But in cases where the plaintiff is absent and the defendant is present, the law requires that notice should be given to the defendant before restoring the suit. Even if the contention of the applicants that under section 107, clause 2, the rules under Order IX, applicable to the Courts of first instance, are also applicable to the Appellate Courts be conceded, it does not show that the order of the lower Court is erroneous. For it appears from the record that neither party was present on the day of hearing of the appeal, when the order of dismissal of the appeal was passed. In a suit dismissed under similar circumstances, no notice would be required to be issued to the defendant before passing an order of restoration of the case. The second contention that the affidavit of the opposite party does not disclose sufficient reason for his absence on the day of hearing of the appeal is not made out. If the allegations made in the affidavit are correct, and there is no reason to believe otherwise, the opposite party was unavoidably absent on the day of hearing of the appeal. The application fails and is dismissed with costs.

Application dismissed.

MADRAS HIGH COURT.

CIVIL REVISION PETITIONS Nos. 159, 161 AND 231 OF 1911.

August 16, 1912.

Present—Mr. Justice Wallis.

NACHIAPPA GOUNDAN—PETITIONER

versus

PONNUSAMY NAICKER—RESPONDENT.

Civil Procedure Code (Act V of 1908), ss. 47 (2), 50—Execution—Suit for money due under order against legal representative—Objection by legal representative to procedure—Jurisdiction of execution Court to convert suit against legal representative into execution proceedings.

An order for payment of *batta*, recoverable as in execution, was passed by a Court and the petition in execution for its recovery was transferred to another Court. Subsequently, the party against whom the order was made died. A suit for recovery of the money was then filed in the second Court against his legal representative, who objected that the matter was one for execution and under section 50, Civil Procedure Code, he could only be brought in by the Court which passed the order. The executing Court decided to treat the suit as an execution petition and the legal representative as a party to it, and proceeded to make an order against him:

Held, (1) that the order was wrong;

(2) that the legal representative had not been brought in under section 50, Civil Procedure Code, and could not be proceeded against in execution;

(3) that the Court, which passed the order sought to be executed, could only bring the legal representative on the record.

Petitions, under section 115, Act V of 1908, praying the High Court to revise the orders of the District Court of Salem, in Appeal Suits Nos. 189, 193 and 223 of 1909, respectively, preferred against those of the Court of the Principal District Munsif of Salem, in E. P. Nos. 299, 300 and 301 of 1909, respectively, in O. S. No. 176 of 1902, on the file of the Court of the Additional District Munsif of Salem.

Mr. *T. M. Krishnaswami Aiyar*, for the Petitioner.

Mr. *B. Sitarama Rao*, for the Respondent.

JUDGMENT.—The Additional District Munsif's Court at Salem passed an order under section 182 of Act XIV of 1882 (Order XVI, rule 4 of Act V of 1908) for payment of *batta*, which is recoverable as in execution under rule 13 of Order XVI of the Code of Civil Procedure.

The petition in execution was transferred to the Principal District Munsif's Court. Subsequently, the party against whom the order had been made died, and a suit was filed in the same Court against his legal

repersentative, who appeared and objected that the matter was one for execution and that, under section 50 of the Code of Civil Procedure, he could only be brought in by the Court that passed the order. The District Munsif, under section 47 of the Code of Civil Procedure, decided to treat the suit as an execution petition and the legal representative as a party to it and proceeded to make an order against him. I agree with the District Judge that this was wrong, as the legal respresentative had not been brought in under section 50, Civil Procedure Code, and the fact that he appeared and objected to the suit and to the right of the Court to bring him in shows that he never waived his right.

The petitions are dismissed with costs.

Petitions dismissed.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 940 OF 1911.

November 1, 1912.

Present:—Sir George Knox, KT., Judge, and Mr. Justice Rafique.

JAISARI SINGH AND OTHERS—PLAINTIFFS—APPELLANTS

versus

JAISARI SINGH AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. IX, r. 5, O. XVII, r. 3—Summons returned unserved—Time given to appellant to take further steps—No steps taken within time—Power of Court to proceed to decide appeal.

A second appeal was filed in the High Court. Summonses to the respondents were returned unserved. Time was granted to the appellants to take further steps in the matter. No steps were taken within time. The Court ordered the appeal to be put up in ordinary course for hearing:

Held, (1) that under Order XVII, rule 3, the Court could proceed to decide the appeal, and that Order IX, rule 5, did not apply to the case;

(2) that Order IX, rule 5, did not give appellants the right to apply for a fresh summons at any time within a period of one year from the date of the return made to the Court by the serving officer.

Second appeal from the decision of the Subordinate Judge of Azamgarh, dated the 9th of June 1911.

Mr. *Haribans Sahai*, for the Appellants.

JUDGMENT.—Before we proceed to consider the points raised in this appeal, it is necessary to set out step by step the various stages through which the appeal has passed up to the present date. The petition of appeal was admitted on the 11th of November 1911 and an order was given to fix a date under Order XLI, rule 11 of the Code of Civil Procedure. The petition came up on the 25th of November 1911 in pursuance of the last order and the order then passed was: "Let the record be sent for at the appellants' expense." The necessary fee for carrying out this order was not deposited till the 6th of December. The case was put up again on the 20th of January 1912 and the order passed on that date was: "Let notice go." The notice was to the effect that the 7th of March was the date fixed for the hearing of the appeal. It is a custom in this Court to issue notices upon respondents only. So far as the appellants are concerned, information of the date is given to the learned Vakils, who represent them, by notices fixed upon a Notice Board in the centre of the Court building. The notices for the respondents left this Court on the 6th of February. They went in due course by post to the District of Azamgarh and from there by means of a process-server to the respondents. The return made by the process-server to the Court at Azamgarh in the case of certain respondents, who happened also to be appellants, was to the effect that these men were imprisoned in the Azamgarh Jail. The Azamgarh Court returned the notices to this Court as insufficiently served. They reached this Court upon the 1st of March and on the 7th of March, the papers were put up with a report which runs as follows:—

"To-day is the date fixed for the hearing of this appeal. Notices issued to the respondents have been received duly served except those intended for respondents Nos. 1 and others (Jaisri Singh and others), which have been returned unserved with a report to the effect that they are imprisoned in the Azamgarh Jail." This report was presumably noted by those who appeared for the appellants and on that report, they asked this Court for further time. The fact that Jaisri Singh was in Jail was thus prominently brought to the notice of the learned Vakil for the appellants on the 7th of March 1912. A period of one month was granted and it was pointed out that no further grace will be given unless the Court is satisfied that immediate action is taken and good cause is shown by affidavi

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So far as we can see, there would have been no difficulty in the learned Vakil for the appellants having notice conveyed to the Azamgarh Jail that the Court demanded prompt action and getting from the clients the necessary information for having notices served. On the 10th of April, the file was again put up and attention called to the fact that up to that date no steps had been taken. The learned Judge of this Court, before whom the papers came, directed that the appeal should be put up in the ordinary course for hearing and it was so put up on the 1st of May. The case then stood out for a week, but nothing was done by the appellants until the 10th of May when they asked this Court to issue fresh notices and they supported their petition by an affidavit. The affidavit is noted as solemnly affirmed by Jaisri Singh. He sets out that he is a member of a joint Hindu family and the *karta* of the family, that he and the next senior member of the family were imprisoned on the 17th of February 1912 and were released on the 16th of March, that there was no other member acquainted with the facts of the case, and, in consequence, no information or necessary costs were supplied to the learned Vakil, that neither he nor his next senior member had any information of the orders of this Court till a letter was received from the office of the learned Vakil, dated the 11th of April 1912 and that this letter reached about the 3rd week of April 1912. A learned Judge of this Court, before whom this appeal came in the ordinary course, passed an order on the 7th of June 1912, referring the appeal for disposal to a Bench of two Judges and it is thus that the appeal has reached this Bench.

In his referring order, he points out that on the 27th of May 1912, the appellants presented an application, the gist of which was that by reason of the provisions of Order IX, rule 5, Civil Procedure Code, the appellants were entitled as of right to apply for issue of fresh notices within any period up to one year from the 7th of March 1912, the date on which the notices originally issued were returned unserved. The learned Judge adds that he has little doubt personally that the provisions of Order IX, rule 5, cannot be applied to appeals in the manner contended for. We agree with him. We would go further and add that Order IX, rule 5 does not, as the appellants contend, give them a right of applying for a fresh summons at any time within a period of one year from the date of the return made to the Court by the serving officer. If we were to hold this, it would follow that every appeal could be held up at the pleasure of the appellant for a whole year. Order IX, rule 5 is an order enabling Courts to pass an order of dismissal at the time and upon the conditions set out in the rule. There is not a word in the rule which gives a right to the appellants to do or to abstain from doing any thing. In reality, it has no application whatever to the circumstances of the present case.

The facts then briefly summed up are as follows:—

The appellants instituted an appeal Notice was duly conveyed to the learned Vakil who appears for them pointing out that the appeal will be heard on the 7th of March. It also came to the knowledge of the learned Vakil for the appellants in ample time that his clients were confined in the Azamgarh Jail and it was presumably on this knowledge that he asked for further grace within which to issue notices upon the respondents. The period of one month was granted to him and, so far as the record goes, there is nothing to show that either he or his clients took any steps of any kind within the period allotted. The case then falls within the four corners of Order XVII, rule 3. It was necessary for the further progress of the appeal that notices should be served on the respondents. Time was granted for this very purpose and as no action was taken within the time allotted, this Court determined to proceed with the appeal. As we have already said, there is absolutely nothing on the record which points to any action taken in pursuance of our order of the 7th of March 1912. The learned Vakil for the appellants tells us, and we have not the slightest reason for doubting his word, that he did send letters to his clients. We understand him to say that he sent letters to the village in which they ordinarily reside. Knowing that they were at the time imprisoned in the Azamgarh Jail, these letters ran considerable danger of being neglected. Anyhow, the letters appear to have been treated with neglect and we do not see any reason why we should not, as the law permits, proceed to decide the appeal.

As regards the appeal itself, the findings

of fact are entirely against the appellants. The appeal fails and is dismissed.

Appeal dismissed.

OUDH JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL NO. 31 OF 1912.

August 30, 1912.

Present:—Mr. Piggott, J. C.

Musammat GAYA KUNWAR—DEFENDANT—APPELLANT

versus

DAL SINGH—PLAINTIFF—RESPONDENT.

Hindu Law—Presumption as to jointness—Separation, burden of proof as to—Pleadings, effect of failure to prove facts alleged in.

Where a Hindu family, and more particularly a family consisting of two brothers, is once proved or admitted to be joint, there is a clear presumption in favour of the continuance of such jointness until the contrary is proved.

The failure of a party to prove the particular allegations of fact set up in pleadings does not necessarily involve the failure of that party's case.

Appeal against an order of the Additional Judge, Hardoi, dated 1st December 1911.

Babu *Ishwari Prasad*, for the Appellant.

Babu *Bisheshar Nath*, for the Respondent.

JUDGMENT —In this case, the plaintiff Dal Singh had a brother Bhola Singh, who died in September 1908.

The brothers were possessed of *zemindari* property in the village of Mawaiya which appears to have been recorded in the Revenue papers as belonging to the two of them in equal shares. Mutation of names in respect of Bhola Singh's share was effected in the name of his widow *Musammat* Gaya Kunwar, without any opposition on the part of Dal Singh. About the beginning of the year 1911, *Musammat* Gaya Kunwar instituted a suit for profits against Dal Singh in the Rent Courts which ended in a decree in her favour. The plaintiff brings the present suit to recover possession of the share standing in the name of his widowed sister-in-law, though he admits that the decree in his favour may be made subject to an order allowing the defendant for her maintenance such sum as the Court may deem proper. The plaintiff's case is that he and his brother Bhola Singh were members of a joint undivided Hindu family up to the death of the latter when he himself became by survivorship the owner of the entire property which had previously belonged to the two of them. According to the plaintiff, *Musammat* Gaya Kunwar was entitled to nothing more than maintenance, and was never given anything more, although out of courtesy and consideration for her feelings, the plaintiff acquiesced in her being recorded in the village papers as having succeeded to the ownership of Bhola Singh's share. His case is, that for a couple of years or so after Bhola Singh's death, she lived on amicable terms with him, during which time he was himself in possession of the property in dispute, only maintaining the defendant in a manner suitable to her position ; but that disputes arose owing to *Musammat* Gaya Kunwar's mind being poisoned against him by a co-sharer in the village, named Dulam Singh, who was an enemy of the plaintiff and who has persuaded *Musammat* Gaya Kunwar to make him her general attorney. Hence the latter was induced to bring the suit for profits, and the result of this suit is treated by the plaintiff as virtually effecting his dispossession from the property in dispute in favour of *Musammat* Gaya Kunwar, so that he dates the origin of the cause of action from the 9th of May 1911, when the decree for profits was passed by the Rent Court. The defence, of course, was that Bhola Singh was separate from Dal Singh at the time of the former's death, and that *Musammat* Gaya Kunwar has been since September 1908 in lawful possession as a Hindu widow of her late husband's share. The learned Subordinate Judge, who first took cognizance of the suit, fixed two issues, one as to the question of jointness or separation between the plaintiff and Bhola Singh, and the other as to the sum which could be awarded to *Musammat* Gaya Kunwar by way of maintenance in the event of the plaintiff's having succeeded in establishing his title. The suit came up for hearing in the presence of the successor of the Subordinate Judge who had originally fixed the issues, and the latter thought it necessary, before commencing to record the evidence, to re-cast the first issue in the case so as to make it clear at the outset where the burden of proof lay. He stated the main issue in the case in the following form :—" Whether

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Bhola Singh, husband of the defendant, separated from the plaintiff 4 ½ years ago ?" The period mentioned in this issue is with reference to an express plea taken in the defendant's written statement that there was a separation between the brothers somewhere about the beginning of the year 1907; that is to say, between 1½ and 2 years prior to the death of Bhola Singh. The learned Subordinate Judge has found against the defendant and in favour of the plaintiff on the issue thus framed ; he has accordingly decreed the plaintiff's suit subject to an obligation laid upon the latter to pay a sum of Rs. 12 per mensem to the defendant by way of maintenance. In the memorandum of appeal to this Court, there is a plea that the amount of maintenance fixed is in any case insufficient ; as to this, I can only say that it appears to me a very suitable sum, regard being had to the value of the property in suit and the position of the parties. The main question, however, raised by the appeal is as to the finding of the Court below on the issue of jointness or separation. The appellant makes it matter of complaint that the issue was re-cast in such a form as to lay the burden of proof on the wrong party, and also that the defendant was required to produce her evidence immediately after the re-casting of the issue.

I notice that in the Court below, after the defendant had examined all the witnesses she had originally arranged to produce at the first hearing, she obtained from the Court an adjournment to enable her to produce further evidence and actually examined five fresh witnesses on a subsequent date to which the hearing was adjourned. The defendant, therefore, was in no way prejudiced by the procedure adopted by the learned Subordinate Judge.

On the pleadings, it was, in my opinion, rightly held that the defendant must produce her evidence first. It is quite true that in a suit for ejectment the burden lies in the first instance on the plaintiff of proving both title and possession within limitation : but in all suits the frame of the issues and the allocation of the burden of proof does not depend on the plaint alone but on the pleadings of both parties. In this case, the defendant admitted that the property in suit had within limitation belonged to the plaintiff and to his brother Bhola Singh jointly, as members of a joint undivided Hindu family : the death of Bhola Singh had occurred within less than three years of the institution of the suit, and from no possible point of view, could any bar of limitation be pleaded against the plaintiff's suit. In order to establish his title, the plaintiff had only to prove that he and Bhola Singh remained joint up to the time of the death of the latter ; the defendant in her written statement admitted that they were joint less than two years before the time of Bhola Singh's death, and from this admission a presumption arose that this jointness continued unless and until the contrary was proved. The law on this point was very clearly laid down by a Bench of this Court in *Suraj Baksh* v. *Raghuraj Kunwar* (1). This ruling is, perhaps, open to criticism in some matters of detail, particularly with regard to certain remarks on page 389 of the report where the judgment in *Badamoo Koer* v. *Wazeer Singh* (2) is quoted, apparently with approval. This ruling goes too far and can no longer be regarded as good law since the decision of their Lordships of the Privy Council in *Appovier's* case (3), as was remarked by the learned Judges of the Calcutta High Court in *Joy Narain Giri* v. *Goluck Chundar Mytee* (4). I have thought it worth while to notice this point, as it has more than once been made matter of argument before me ; but I have no desire to dissent from the general principles laid down by this Court in the ruling in question. I have no doubt that where a Hindu family, and more particularly a family consisting of two brothers, is once proved or admitted to be joint, there is a clear presumption in favour of the continuance of such jointness until the contrary can be proved. The only criticism to which the procedure of the learned Subordinate Judge in the present case seems to be fairly open is as to the precise form in which the main issue was re-cast. I do not see myself why the learned Judge of the Court below should not have been content with leaving the issue as framed by his predecessor, and merely

(1) 11 O. C. 381,
(2) 5 W. R. 78; 1 Ind. Jur. (N. S.) 144.
(3) 11 M. I. A. 75 at p. 92; 8 W. R. 1 (P. C.).
(4) 25 W. R. 355.

pointing out that, on the pleadings, the burden of proof was laid upon the defendant, inasmuch as the presumption of law already referred to would have entitled the plaintiff to succeed if no evidence had been tendered by either side. The form of issue actually laid down is open to this objection, that it suggests that the defendant's case must fail unless she was in a position to prove that a separation between Bhola Singh and Dal Singh took place at the precise time alleged in the defendant's written statement. This would not, in my opinion, be a perfectly correct statement of the law applicable to the case. The fact of separation between two brothers, who were at one time admittedly living as members of a joint undivided family, is one which, like all other facts, is susceptible of proof either by direct or by circumstantial evidence. It could be proved by direct evidence, if the party alleging such separation were in a position to satisfy the Court that upon some definite occasion the two brothers met together and made by common consent a certain disposition of the joint family property which was intended by both of them to effect from that moment a separation in law. It is, however, quite conceivable that a party alleging separation to have taken place might not be in a position to satisfy the Court as to the precise manner in which, or the precise occasion on which, such separation was effected: but it might, nevertheless, be possible to adduce evidence of conduct on the part of either or both of the brothers, or of admissions made by them, so inconsistent with the idea of jointness as to satisfy the Court that, on or before some definite date, separation must have taken place. This is what I mean by proving the fact of separation by circumsatntial evidence. The circumstances of the present case were, no doubt, peculiar, in that separation was pleaded by a defendant who was in a position to have full and detailed knowledge as to the circumstances of the family and the proceedings of the two brothers, and was, moreover, expressly alleged in the pleadings to have taken place at or about a certain definite time and to have been effected by a single definite transaction. Nevertheless, I should be quite prepared in the present case to give the defendant the benefit of the general principle of law that failure to prove particular allegations of fact set up in the pleadings does not necessarily involve the failure of a party's case. The plaintiff's position in this very suit furnishes an illustration of the principle to which I refer. The plaintiff, undoubtedly, came into Court with the allegation that *Musammat* Gaya Kunwar did not obtain separate possession of Bhola Singh's share immediately upon the death of the latter, that the mutation of names effected in the defendant's favour was a mere paper transaction and not in accordance with the actual facts, and that the plaintiff's possession over the whole of the joint family property continued until he was virtually dispossessed as regards Bhola Singh's share by the decree of May the 9th, 1911. As I shall have occasion to point out more in detail presently, the plaintiff's suit does not necessarily fail if it be found that he has not established these precise allegations to the satisfaction of the Court. The long and the short of the matter is, that the one substantial issue in the case is whether Bhola Singh did or did not continue up to the time of his death in a state of jointness with his brother Dal Singh. This issue was fully tried out in the Court below and both parties were allowed every reasonable opportunity of producing evidence. I have simply to consider that evidence in the light of correct principles of law and to record my finding thereon. The defendant undertook, first of all, to prove that a definite separation took place between Bhola Singh and Dal Singh somewhere about the beginning of the year 1907 A. D. She went into the witness-box herself and called a number of witnesses. This evidence has been adversely criticised by the learned Subordinate Judge and entirely discredited by him. I have been taken through it in detail and I feel no hesitation in concurring with the opinion of the lower Court on this point. The two principal witnesses were Pitam (D. W. No. 6) and Umrai (D. W. No. 7) who alleged that they themselves, along with two other persons, acted as *Panches*, or arbitrators, in effecting a definite separation and partition of goods between the two brothers at the request of both of them. The learned Subordinate Judge has laid stress upon a number of discrepancies in the statements of these two witnesses, both as between themselves and as between either of them and the defendant *Musamma*

GAYA KUNWAR v. DAL SINGH.

Gaya Kunwar. I concur in the opinion that these discrepancies are numerous and important and in themselves sufficient seriously to discredit the evidence. It is impossible to regard contradictions upon a question of such importance as whether the alleged partition was or was not accompanied by any memorandum in writing, and as to the nature of the written memorandum, if any, so prepared, as matters of merely subsidiary importance or explicable upon such suggestions as failure of memory on the part of the witnesses. I am, moreover, most unfavourably impressed by the statements of these two witnesses as a whole. Pitam in particular showed himself shifty and unreliable to a degree: he repeatedly varied his statement on a number of points, and on the question as to whether any matters in connection with the partition were or were not reduced to writing, it seems to have been exceedingly difficult to pin him down to any definite assertion. He finished by admitting that he had been sued for arrears of rent by the plaintiff Dal Singh, and that he had set up a defence in that suit utterly inconsistent with all the allegations of fact made by him in his evidence before the Court. He cannot escape from this dilemma, that he either gave false evidence in Court, or set up a defence in the rent suit which was false to his knowledge. Umrai began his evidence in a singularly unconvincing manner by assuring the Court that he had nothing to say except what Pitam had already stated. He was obviously anxious to avoid being cross-examined as to details, and, considering the contradictions in which he involved himself when he was so cross-examined, this seems to me by no means surprising. I regard these two witnesses as having completely broken down. The rest of the oral evidence for the defendant is, on the very face of it, all but worthless. As regards a number of her witnesses, the learned Pleader who very ably argued her case before this Court was compelled to state that he did not rely upon them; and it would in fact be doing more than justice to the defendant's case to exclude the evidence of these witnesses from the record altogether for some of them [for instance Zalim Singh (D.W. No. 2), Hardeo Bakhsh (D.W.No. 3), Durga Prasad (D.W. No. 11) and Dal Singh (D.W. No. 13)] either made statements favourable to the plaintiff's case, or broke down in a manner calculated to throw discredit upon other evidence produced by the party whose witnesses they were. The remaining witnesses seem to me to call for very little notice. Rohan Singh (D. W. No. 4) endeavoured to prove separation between the brothers in mess, residence and business, that is to say, in the cultivation of their fields. He broke down completely over the question of separate cultivation. As regards residence, he either proves nothing or proves separation ten years prior to the institution of the suit, which is not the defendant's case. Separation in mess he has only noticed as between the plaintiff and the defendant since the death of Bhola Singh. D. W. No. 5, Balwant and D. W. No. 14, Narpat, endeavoured to prove separate transactions by the two brothers supposed to be inconsistent with the idea of jointness. The cross-examination of these witnesses makes it apparent that there is very little in this evidence. Balwant Singh speaks of receiving payments on account of the interest on a certain debt separately from the brothers, but he says the separate payments began about "7 or 8 years ago," that is to say, at a time when the two brothers were admittedly joint. The witness Shankar (D.W. No. 10) endeavoured to prove separate cultivation, but showed in cross-examination that he had exceedingly little knowledge as to the facts. In short, the oral evidence produced by the defendant broke down and cannot be said to have done her case anything but harm. In so far as the defendant has any case at all, it must be based upon the transactions which followed on the death of Bhola Singh, upon the attitude taken up by the plaintiff Dal Singh when he was sued for arrears of profits, and upon particular admissions made by Dal Singh in the written statement filed by him as a defendant in the profits suit. Some of the arguments addressed to me on these points are by no means without real force. I quite admit that the mere fact that mutation of names in respect of Bhola Singh's recorded share was effected in favour of *Musammat* Gaya Kunwar after her husband's death does raise a certain presumption, in fact and in law, that she was permitted to take actual possession in respect of that portion of the family property

which represented the share which her husband would have obtained on partition. I also admit that the correct defence which Dal Singh might and ought to have set up against the suit for profits would have been a denial of *Musammat* Gaya Kunwar's title, and that this defence was not raised. I admit further that certain allegations of fact in the written statement filed by Dal Singh before the Rent Court as to debts contracted by Bhola Singh, as to the separate cultivation of *sir* lands by himself and by *Musammat* Gaya Kunwar, and, more particularly, a vague allegation at the end of his written statement to the effect that he was meditating the institution of a suit against *Musammat* Gaya Kunwar on account of her extravagant expenditure, are more or less inconsistent with the position taken up by the plaintiff on the present suit. On every one of these points, however, there is something to be said on the other side. There is, of course, no suggestion that the decree in the suit for profits, operates as *res judicata* in the present case; nor is there anything in Dal Singh's conduct in connection with that suit upon which a plea of estoppel can fairly be raised in the present case. It is merely a question of rightly estimating the effect of certain admissions which the defendant is in a position to prove against the plaintiff. I note that when *Musammat* Gaya Kunwar sued Dal Singh for arrears of profits she, at or about the same time, applied to the Revenue Courts for partition of her share; now, although Dal Singh omitted to base his defence in the suit for profits upon a denial of the plaintiff's title, he did meet with such denial the claim for partition. There is force in the suggestion that Dal Singh's pleadings in the suit for profits were based upon bad advice upon a question of law, and an erroneous belief that a plea in denial of the plaintiff's title would not be accepted by the Rent Court in face of the record of *Musammat* Gaya Kunwar's possession in the village papers. I take it to be clearly established law that in the Province of Oudh, the presumption raised by the entry of a person's name in the Revenue Records as proprietor of a certain share is a rebuttable presumption, even in a suit for profits; but the circumstances of this case were peculiar, and it is conceivable that an erroneous impression as to the possibility of raising such a plea may have been founded upon a misunderstanding of such principles of law as were laid down by this Court in *Sitla Bakhsh* v. *Musammat Umed Koer* (5). What chiefly impresses me, however, regarding this part of the case is that the defendant's evidence goes but a small way towards establishing the vital fact of a separation between Dal Singh and Bhola Singh *in the life-time of the latter*. I find from the evidence that Bhola Singh was some 14 years older than the plaintiff. It seems clear also that he had incurred, in his capacity as manager of the family property, considerable debts, so that the income of the property was hypothecated and a portion of it was in the enjoyment of usufructuary mortgagees. I notice that in the suit for profits, Dal Singh expressly pleaded that the actual income receivable from the *khalsa* lands, after putting aside the *sir* and the plots in the possession of mortgagees, was barely sufficient to cover the Government demand on account of land revenue and on account of certain *takavi* advances which Bhola Singh had taken. I do not say that these pleas are fully established by the evidence before me, but there seems at least some foundation for them. It may well have been that, under the circumstances, Dal Singh was easily induced to consent to such arrangements being made on the death of his elder brother which did virtually amount to an assumption by that elder brother's widow of some sort of possession in respect of the family property going beyond what she was strictly entitled to in law. The entry of the name of a widow in the Revenue Records "for purposes of consolation," as the phrase goes, is not a very uncommon thing in this Province, even in cases where the family was really joint. Dal Singh was bound, in any case, to maintain his elder brother's widow in a suitable manner; he may well have felt reluctance about coming to an open rupture with her immediately after his brother's death, and such considerations as these would sufficiently account for most, if not all, of the circumstances which are now relied upon on behalf of *Musammat* Gaya Kunwar as proving that

(5) 1 O. C. 143.

there must have been a separation between the brothers in Bhola Singh's life-time. It must be remembered that I only put forward these considerations after having fully considered the direct evidence produced by the defendant to prove the fact of separation and having rejected that evidence as unreliable. What remains in the defendant's case is an attempt to establish the fact of separation by what I may call circumstantial evidence. The defendant, in effect, endeavours to show that certain things were said and done by Dal Singh after Bhola Singh's death, in respect of which it is argued that it is inconceivable that Dal Singh should have so acted if Bhola Singh had in fact died in a state of union. When it comes to estimating the effect of circumstantial evidence, it is always necessary for the Court to consider how far the facts put forward justify the inferences sought to be drawn from them, and this necessarily involves considering also whether the alleged facts are not fairly open to other inferences. If it had been necessary for the plaintiff to prove affirmatively that the mutation of names in favour of *Musammat* Gaya Kunwar on the death of Bhola Singh was a mere paper transaction, and that no sort of possession in respect of the joint family property had been allowed to the defendant after her husband's death, I might have felt considerable doubt about recording a finding in the plaintiff's favour. This, however, is not the position of the parties on the pleadings. Even if it were proved up to the hilt (which it is not) that *Musammat* Gaya Kunwar had assumed, immediately upon Bhola Singh's death, complete possession of a share in the family property representing the half share which would have been Bhola Singh's upon partition, the present suit would still be within limitation, and the plaintiff would still have established his title if the Court were satisfied that Bhola Singh and Dal Singh were in a state of jointness when the former died. A man in the position of the present plaintiff might well be prepared to allow considerable latitude to his elder brother's widow, and to submit, up to a certain point, to encroachments on her part, so long as the two continued on good terms and the general management of the family property remained in the plaintiff's hands, yet he would be perfectly entitled to stand upon his full real rights when circumstances arose which appeared to him to render such a course necessary, and any previous acquiescence on his part would not debar him from proving his title so long as the defendant was not in a position to plead limitation. There is one more circumstance about this case which I think worth noticing. After the defendant had closed her case, Dal Singh himself went into the witness-box. He also called one witness, an important one, namely, the Patwari of the village, in rebuttal of the defendant's case. I feel bound to attach a certain importance to the fact that no cross-examination of Dal Singh on behalf of the defendant was attempted. What the precise reason for this may have been is not altogether apparent from the record, but the fact itself is clear. The case is one in which the defendant relies largely upon admissions, and upon evidence of conduct amounting to admissions, on the part of the plaintiff to prove her case; under such circumstances, it was peculiarly incumbent on the defendant to press the plaintiffs upon these points in cross-examination. When the defendant made no attempt to do this, she seems to me, under the peculiar circumstances of this case, to have virtually thrown up the sponge so far as the Court below was concerned. It almost amounts to an admission that, upon the issue as framed by the learned Subordinate Judge, and on the view of the law which that Court was evidently prepared to take, the defendant felt it useless to contest the matter further. This appears to be a reason why the pleas in the memorandum of appeal to this Court are mainly directed towards the contention that the main issue in the case was wrongly framed in the Court below and that the decision of that Court proceeded upon an erroneous view of the law. I have already admitted that the precise form in which the issue was laid down by the Court below is open to question, but I am quite unable to hold that the defendant was in any way prejudiced thereby, inasmuch as she was allowed every opportunity of producing her entire evidence on the essential points in dispute. I have re-considered the evidence on the record carefully in the light of what I hold to be the correct law applicable to the facts and pleadings, and I still find

myself in substantial agreement with the decision of the Court below. I am unable to hold that there was any separation in law between Bhola Singh and Dal Singh prior to the death of the former; it is admitted that they were living jointly within two years of Bhola Singh's death and the only finding I can come to is that this state of jointness continued so long as Bhola Singh was alive. This appeal therefore, fails and I dismiss it with costs.

Appeal dismissed.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 527 OF 1911.

October 26, 1912.

Present:—Sir Henry Richards, KT., Chief Justice, and Mr. Justice Banerji.

SHIAM LAL—PLAINTIFF—APPELLANT

versus

ANANT RAM AND ANOTHER—DEFENDANTS—RESPONDENTS.

Agra Tenancy Act (II of 1901), s. 202—Defendant to Civil suit establishing his tenancy in Revenue Court, during the pendency of Civil suit—Civil Court bound by decision of Revenue Court—Sir, *whether it loses its character as such by planting groves thereon.*

A defendant to a Civil suit pleaded tenancy and, while the Civil suit was still pending, got his tenancy determined by the Revenue Court by means of a separate suit:

Held, that the decision of the Revenue Court was binding on the Civil Court.

The planting of trees on a *sir* holding does not necessarily mean that the land loses its character as such.

Second appeal from the decision of the Subordinate Judge of Agra, dated the 31st of May 1911.

Dr. *Satish Chandra Banerji*, (with him Messrs. *Benode Behari* and *S. K. Dar*), for the Appellant.

Mr. *Mohan Lal Sandal*, for the Respondent.

JUDGMENT.—This appeal and Appeal No. 164 of 1912 can be conveniently disposed of by one judgment. It appears that the plaintiff in the present appeal brought a suit to recover possession of certain immoveable property. He alleged his title to be that of an auction-purchaser, who had purchased the property at a sale made by the Court in execution of the mortgage-decree. It was pleaded by the defendants that the particular property, the subject-matter of the suit, was, not included in the mortgage and that it was not purchased by the plaintiff at the auction-sale. A number of issues were struck which were all decided in favour of the plaintiff. On first appeal, a new point was raised, namely, that the defendants were ex-proprietary tenants of the land in question. The Appellate Court, while agreeing with the finding of the Court of first instance generally, remanded the suit so as to enable the defendants to go in to the Revenue Court and have the question whether or not they were tenants there decided. An appeal against this order of remand was taken to this High Court and this Court set aside the order of the remand and directed the Subordinate Judge to proceed to determine the case upon the issues originally struck. These issues, as already mentioned, have already been decided for the most part in favour of the plaintiff and the only issue which remained was the question of mesne profits. In the meantime, however, and before the Subordinate Judge could make a decree in the plaintiff's favour, the defendants had brought a suit in the Revenue Court in which they had succeeded in getting a declaration that they were ex-proprietary tenants of the land in question. This decision of the Revenue Court was taken in first appeal to the District Judge who confirmed the decision of the Court of first instance. The Second Appeal No. 164 of 1912 arises out of this last mentioned suit. The decision of the Revenue Court, subsequently affirmed by the District Judge, was given effect to by the Subordinate Judge and on the strength of that decree, he dismissed the plaintiff's claim for possession.

It is argued, in the first place, that the Subordinate Judge ought to have paid no regard whatever to the decree of the Revenue Court on the ground that when the case was remanded by the High Court, the only matter left for disposal was the question of mesne profits. In our opinion, this contention is not sound. It is quite true that this High Court, by setting aside the order of remand of the Subordinate Judge, refused to allow the defendants any time to bring their suit in the Revenue Court. The defendants, however, were able to get this decree in their favour from the Revenue Court before the Civil suit was disposed of, and we, therefore, think that the Civil Court was bound to take

cognizance of the decree of the Revenue Court in a matter which it was competent and had full jurisdiction to decide. Had it not done so, the result would have been that a new suit would be brought and the parties involved in further litigation.

The next point which was urged is, that the Revenue Court and the learned District Judge were both wrong in coming to the conclusion that the property in question was the *sir* of the defendants in the present suit. So far as this question is a question of fact, we are bound by the finding of the District Judge in second appeal. It is contended, however, that he was wrong in point of law and it was strongly urged by the learned Vakil for the appellants that the land in question, although originally *sir*, having been planted with trees lost its character of *sir* land and became a grove, and that, consequently, the defendants could not be ex-proprietary tenants thereof. We agree with the Assistant Collector and also the District Judge that the planting of trees does not necessarily mean that the land, which admittedly was *Sir*, loses its character as such. "*Sir*" has the same meaning in the Tenancy Act as it has in the Land Revenue Act, and in the Land Revenue Act, *sir* is defined as meaning not only land which has been continuously cultivated but also land which was recorded as *sir* before the commencement of the Act and has continued to be so recorded. There is a further definition which would include land which, according to the custom of the village, is treated as the special holding of a co-sharer. There can be very little doubt that the land in question was and is held as the *sir* of the defendants, and furthermore there can be no doubt that it has always been treated as their special holding. We, therefore, agree with the finding of the Revenue Court and the District Judge that the land in question was the *sir* of the defendants. This being so, it is absolutely clear that under the provisions of the Tenancy Act, on the sale of the proprietary title of the defendants on foot of the mortgage, they became ex-proprietary tenants of the land in question. The dismissal of the plaintiff's suit for possession was, therefore, quite correct.

As the objection was not taken as early as it might have been, we think that both parties ought to pay their own costs of the appeal. We accordingly dismiss the appeal but without costs.

Appeal dismissed.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEALS NOS. 36 AND 37 OF 1910.

July 11, 1912.

Present:—Mr. Lindsay, J. C., and Mr. Stuart, A. J. C.

Saiyed ABDUL GHAFUR—DEFENDANT—APPELLANT

versus

Mahant SHIAM SUNDAR DAS—PLAINTIFF, SAHIB MIAN AND OTHERS—DEFENDANTS—RESPONDENTS.

Endowment—Waqf, *proof of*,—*Question of law or fact*—*Appropriation of income, whether sufficient proof*—*Case to be made out by plaintiff*—*Question of law or fact.*

The mere appropriation of the rents and profits of a particular property to the up-keep of a religious foundation is not sufficient proof that such property is endowed property.

Kanwar Doorganath Raj v. *Ram Chunder*, 2 C. 341, followed.

The question whether a specified property is or is not *waqf* property, is a question of law or, at any rate, a mixed question of law and fact.

A plaintiff, who sues in ejectment for recovery of property alleged to have been appropriated by way of endowment for the up-keep of an endowed property, must make out just as strong a case as a plaintiff who seeks to set aside an alienation of endowed property.

Appeal against an order of the Additional Judge, Fyzabad, dated 22nd November 1909, upholding that of the Munsif, Fyzabad, dated 6th May 1909.

Messrs. *Wasim* and *Sami-ullah Beg*, for the Appellant.

Pandit *Gokaran Nath Misra* and Babu *Mahendra Deo*, for the Respondents.

JUDGMENT.—The facts of the case out of which these appeals have arisen are sufficiently stated in our order of the 1st December 1911, by which an issue was remitted for trial to the Court of the Subordinate Judge of Fyzabad. Briefly put, the case was one in which the plaintiff-appellant, Syed Abdul Ghafur, brought a suit for recovery of possession of nine *kothris*, a graveyard with two *Maqbaras* and some *keora* trees. All this property is situated within an enclosure in the town of Ajudhia and is in close proximity to a mosque which is

said to have been built many years ago by one Hyder Ali Beg. The most important issue in the case was the right of Syed Abdul Ghafur to maintain the suit. When the case was last up before a Bench of this Court, it was decided that the right of Abdul Ghafur to maintain this suit for recovery of possession depended upon the question whether the property in suit was *waqf* or not. As no finding on this specific issue had been come to by either of the Courts below, we decided to have the matter settled and for that purpose we remanded the case to the Subordinate Judge for determination of this issue and with directions to take all such evidence as the parties might choose to produce. The finding of the Subordinate Judge has now been received with all the evidence which was recorded. That evidence is to the effect that the income of the *kothris* in suit and the money derived from the sale of the *keora* flowers have been appropriated for the expenses of the mosque and that the graveyard in suit has been used as a public graveyard. In the opinion of the Subordinate Judge, these facts were sufficient to constitute the property *waqf* property. This finding of the Subordinate Judge is attacked here and we have allowed the matter to be discussed, for it appears to us that the question whether the specified property is or is not *waqf* property is a question of law or, at any rate, a mixed question of law and fact. We have listened to a lengthy argument on both sides and to a detailed criticism of all the evidence which has been given in the case and have come to the conclusion that the finding of the Subordinate Judge is not correct. Our conclusion, after consideration of the evidence, is that the plaintiff has failed to establish that the property in suit is *waqf* property. Before proceeding to consider in detail the evidence produced by the plaintiff, we may usefully refer to a decision of their Lordships of the Privy Council reported as *Konwar Doorganath Roy* v. *Ram Chunder* (1). In that case, their Lordships made certain observations as to the *quantum* of proof which is required in order to establish that any particular property put in suit was endowed property. It was laid down that a plaintiff who seeks to set aside an alienation of lands upon the ground that they are *debutter*, that is, dedicated in perpetuity to support the worship of an idol, must give strong and clear evidence of the endowment. It was also laid down that the mere fact that the rents of a particular *mahal* had been applied for a considerable period to the worship of an idol was not sufficient proof that the *mahal* was *debutter*. These observations would apply with equal force to a case in which it was claimed that the property in suit had been appropriated by way of endowment for the up-keep of a mosque and it seems to us that a plaintiff, who sues in ejectment for recovery of such property, has got to make out just as strong a case as a plaintiff who seeks to set aside an alienation of endowed lands. In the course of the judgment, their Lordships of the Privy Council, dealing with the evidence in the case before them, remarked of it that it was extremely vague and extremely loose. They stated their opinion that very strong and clear evidence must be produced in order to justify a finding that any property in dispute is endowed property. The learned Subordinate Judge has referred to this case and appears to have distinguished it from the present case on the ground that the evidence in the suit now before us was not open to the imputation of being "extremely vague and extremely loose." We are, however, unable to agree with the lower Court that any distinction between the two cases can be drawn on this ground. It appears to us that the evidence brought forward by the plaintiff may, with perfect justice, be described in the language which their Lordships of the Privy Council used with respect to the evidence which was led in the case above referred to. We would begin by remarking that it is admitted that there is no deed of endowment in existence. The plaintiff in support of his case, therefore, has been obliged to rely principally on oral evidence which has been mainly directed to show that the income of the property which is now in suit was applied for the up-keep of the mosque. Even if we accept that evidence as entirely reliable, it is clear from what has just been said that it would be insufficient to establish the fact of endowment for, as their Lordships observe in the case cited above, the mere appropriation of the rents of a particular property to the up-keep of a religious founda-

(1) 2 C. 341.

tion is not sufficient proof that such property is endowed property. But we are not disposed to consider the evidence which the plaintiff produced as being reliable evidence even to show that the income of the disputed property was applied in the manner which the plaintiff alleges. There is a vast amount of contradiction in the statements of the witnesses and it is quite apparent that a great many of them made reckless statements which are not based upon any particular knowledge of their own. The most important witness on behalf of the plaintiff was Ahmad Ali Khan, a descendant of the founder of the mosque, and the person who sold certain property to the predecessor of the defendant on the 30th August 1878. The property sold was adjacent to the mosque and, as has already been explained in a previous part of our proceedings, certain items were exempted form transfer. It is these items which form the subject-matter of the present suit and which are said to constitute the endowed property which Syed Abdul Ghafur seeks to recover. Ahmad Ali Khan, as a descendant of the founder of the mosque, might naturally be expected to know more about the property in dispute than any one else. It cannot, however, be said that he has given any very satisfactory evidence upon the issue. He seems to be a man who lives principally in Lucknow and who only visits Ajudhia at rare intervals. However, his account of the property in dispute, that is to say, the *Kothris* and the graveyard, is that he looked after the mosque himself for some time and that in his absence, he committed the management of the mosque and its property to a person named Sheikh Inayat Husain. Pausing here, it may be remarked that this statement of Ahmad Ali would go to indicate that no scheme of management for the mosque had ever been formulated nor apparently had any regular *mutawalli* been appointed to look after any property dedicated to the support of the mosque. Ahmad Ali Khan goes on to say that the income from the *Kothris* and from the sale of the *keora* flowers was spent in the up-keep of the mosque. He does not give any very clear account as to what the income of the property was or as to the particular manner in which it was applied but he speaks in one portion of his evidence of accounts of the collections of the rent and of the expenditure having been explained at various times to him. This, again, is an important piece of evidence for it seems doubtful whether, if the property in suit was really endowed property, any accounts of the application of the income would have been rendered to Ahmad Ali Khan. As a matter of fact, there is a good deal of contradiction in the evidence as to whether such accounts were rendered or not. Some of the witnesses say they were, others say the contrary. Ahmad Ali further stated in his evidence that he had never been to the mosque since the year 1878 when he sold a portion of the property to Mahant Ram Sewak Das. Again, it is difficult to reconcile the various statements made by these witnesses as to the management of this property which he describes as *waqf* property. He first of all says that he entrusted the management of it to Sheikh Inayat Husain. At a later stage, his statement was to the effect that he had given over the management of the property to the plaintiff Abdul Ghafur some 18 years before the suit. This witness was examined again after the remand and in his evidence on that occasion he mentioned that the rents of the property used to be collected by one called Mahabbat who acted as *Muazzan*. He says it was after the death of Mahabbat that he entrusted the management of the property to Inayat Husain who was a *Rais* of Ajudhia. Subsequently, the witness says he handed over the management to Abdul Karim and the (*Anjuman*) Association of which Abdul Ghafur is the President. With respect to what is called the graveyard, the evidence of Ahmad Ali Khan is very clear and seems to us to dispose of the question as to whether or not this place of burial was dedicated to the public. Ahmad Ali Khan definitely states in his evidence that the only persons who have been buried there are the members of his family, his friends and his servants and any other person for whose interment permission was given by the *mutawalli*. We do not think that this statemant of Ahmad Ali Khan, if accepted, (and we do not see any reason why it should not be accepted as he is the person best qualified to testify in this respect), can be treated as proof of the facts alleged by the plaintiff that the graveyard is a public one. On the contrary, Ahmad Ali

Khan's story seems to us to show quite clearly that the cemetery is a private cemetery.

The second important witness of the plaintiff was the plaintiff himself, namely, Abdul Ghafur. He was one of the witnesses examined at the original trial and in his statement there he claimed that the property was *waqf* property merely because it was contiguous to the mosque. Another reason he gave for saying that the property was *waqf* was that Ahmad Ali had told him that it had been exempted from the sale which was made in favour of Ram Sewak Das in 1878. With regard to the graveyard, his evidence was to the effect that he claimed it as *waqf* property because it was a public graveyard. As to burials in this particular graveyard, the only instance he could cite of an outsider being buried there was that of the daughter of one Munna. Abdul Ghafur stated that he realised the income of these *Kothris* and the proceeds of the sale of the *keora* flowers from one Makhdum Ahmad. He produced a register in Court which purported to set forth particulars of the income of these various properties. This register, it is said, is now kept up under the authority of the Association of which Abdul Ghafur is the President, but it is admitted that the entries in the register relate back to a date anterior to the formation of the Association. The learned Additional Judge, who tried the appeals in the Court below, was of opinion that this register was a highly suspicious document and after examination of it we agree entirely with that opinion. We do not go so far as to say that the register has been prepared for the purposes of this case, but it seems perfectly clear that a great many of the entries which go to show that accounts were checked by various persons are fictitious entries not made at the time they purport to have been made but made simultaneously at a recent date. We place no reliance whatever upon any entry in this register. With respect to Abdul Ghafur's evidence, we may also note that the learned Additional Judge held that there was no proof that Ahmad Ali Khan had ever entrusted the property in dispute to the *Anjuman* of which Abdul Ghafur is the principal officer.

We come now to the evidence of the witness, Makhdum Ahmad, the man who is referred to in Abdul Ghafur's statement. He claims to have been appointed the *mutawalli* of all the mosques and graveyards in Fyzabad and Ajudhia 21 or 22 years ago. When he was asked to explain how his appointment had been made, his answer was that he had been appointed at a large meeting of the Muhammadan community held at the *Idgah*. The time which Makhdum Ahmad refers to was clearly before the formation of the *Anjuman Islamia* and we must take it, therefore, that Makhdum Ahmad's claim to the position of *mutawalli* rests upon his statement that he was so appointed by members of the Muhammadan community. It is not clear how in this capacity Makhdum Ahmad was in any way entitled to interfere with the property now in dispute. The argument; perhaps, is that the Muhammadan community appointed Makhdum Ahmad to look after this property because they understood it to be *waqf* property. But there is no evidence whatever that the property had been made *waqf* at the time he refers to and it is to be noted too that Ahmad Ali Khan, who presumably ought to know more about this property than any one else, never refers to Makhdum Ahmad having been appointed as *mutawalli* by him. On the contrary, as already stated, he speaks of having entrusted the management to Sheikh Inayat Husain and after Inayat Husain's death, his story is that he entrusted the property to the management of the *Anjuman*. This is altogether inconsistent with the story of Makhdum Ahmad. Indeed, Makhdum Ahmad in his evidence frankly admits that the owner of the mosque and the *Kothris* did not entrust the management to him but entrusted it to the *Anjuman*. This witness also stated in his evidence that he knew nothing about the management carried on by Sheikh Inayat Husain. He stated that the income of the property in suit was some Rs. 17 or 18 a year and with respect to the graveyard, his story was that he had never seen any burials being made there. We may also note here that Abdul Ghafur was re-called after this witness, Makhdum Ahmad, contradicted his statement as to the management of the property. Abdul Ghafur definitely stated that after Inayat Husain ceased to manage the property, it was handed over for management to the *Anjuman*. Various other witnesses who

were examined at the original trial deposed principally to the fact that the rents of the *Kothris* in dispute were paid to Inayat Husain, who appropriated them for the maintenance of the mosque. A *Mali*, one Bandhu, also stated that he had been in the habit of buying the *keora* flowers from Inayat Husain in order to produce an income for the mosque. We do not think that any reliance can be placed on the statements of these persons. It does not appear that they could have any means of knowing how the income of the property was applied. Some notice may now be taken of the evidence of other witnesses who were examined after the remand. One of these was Hakim-ud-din, a nephew of Inayat Husain. His story is that Inayat Husain began to manage the property 40 years ago and the money used to be spent on the up-keep of the mosque. According to this witness's statement, his uncle himself never made the collections. Hakim-ud-din said he made the collections on behalf of his uncle and used to send accounts of the income to Ahmad Ali at Lucknow. Sometimes, he says, he used to show Ahmad Ali the accounts at Fyzabad when he came there. With regard to the graveyard, the witness mentions the name of one person who was buried there some 30 or 35 years ago. Otherwise, in this respect there is nothing in his evidence which would go to show that the graveyard is a public cemetery. Sarfaraz Ali is another witness who refers to Inayat Husain having collected rents of the property in dispute. With regard to the graveyard, the witness describes it as being known as Hyder Ali Khan's graveyard. He stated that he saw a new grave there some 24 years ago but that no one had actually been buried there in his presence. Muzaffar Husain is another witness who speaks about the graveyard. He says his brother was interred there 40 years ago with the permission of the *Takiadar*. Akbar Ali gives evidence which does not appear to fit in with the other evidence in the case. He describes the property in dispute as having been leased out along with other property adjacent to one Mahngu. He stated that Mahngu used to pay his rent to one Muhammad Jafar who was the uncle of the witness and that what Muhammad Jafar used to receive was the balance of the *theka* money after Mahngu had applied the rest in providing for the up-keep of the mosque. This seems to be a new story entirely. This arrangement, according to the witness, was the one which was in existence before Inayat Husain was appointed manager of the property by Ahmad Ali. In cross-examination, the witness stated that he had never seen Mahngu spending any money on the mosque nor could he, indeed, very well have seen any such expenditure for he was deposing to events which happened more than 40 years ago, while his present age on his own showing is only 56. As for the graveyard, the witness asserted that the general public had been buried in it; but he admitted that no one had been buried there in his presence. All he could say was that he had seen graves both new and old on occasions when he passed that way.

Then, we have the evidence of Idu, a man who now follows the calling of a pedlar. His age is 35 and his story was intended to show that the graveyard in dispute was a public one. He describes himself as having been a *Takiadar* of the cemetery in succession to certain of his ancestors and he speaks of various people having been buried in the cemetery. He says that he was appointed *Takiadar* by Abdul Ghafur and Makhdum Ahmad. Ahmed Ali Khan in his evidence never says anything about the appointment of this person and it is difficult to understand how this witness came to be appointed custodian of the cemetery by Abdul Ghafur and Makhdum Ahmad. For, as already said, Ahmad Ali has described this burying ground as being a private one. Two other witnesses, Kale Khan and Farzand Ali, also depose to certain people having been buried in this graveyard. Their evidence, too, was intended to prove that the cemetery was public.

This is a brief statement of the evidence which was tendered by the plaintiff to show that the property in dispute was *waqf*. It is sufficient to demonstrate that the evidence is contradictory and altogether unreliable. We do not propose to discuss the oral evidence led on behalf of the defendants for we do not think that it could command any more confidence than that which was produced by the plaintiff. In cases like this where the dispute is between Hindus and Muhammadans, there is no difficulty in procuring any amount of oral evidence on either side; but one important piece of documentary evidence has been filed on

behalf of the defendant which we think is strong proof against the case set up by the plaintiff. A copy of the *Khasra* prepared at the first Regular Settlement was put in for the defence. This is Exhibit A 20. This *Khsara* must have been prepared somewhere in the early seventies. The mosque is entered in the *Khasra* as being *waqf* property, that is, dedicated to God, but there is no entry whatever in this document which goes to show that any of the items of property in dispute was recorded there as endowed property. There is no reason why such an entry should not have been made if in fact these *Kothris* and the graveyard were property appertaining to the mosque and dedicated to the use of the public. With regard to the cemetery all that appears is that it is described as being the cemetery of the ancestors of Khairat Ali, that is to say, it is clearly put down as being a private and not a public cemetery. Two of the plots which are now in dispute admittedly contain the tombs of members of the family in the *Khasra* just referred to. But, as already said, it is a remarkable fact that if any property was really dedicated to the mosque, no mention of this was made at the time when the *Abadi Khasra* of Ajudhia was being prepared with great detail at the time of the first Regular Settlement. There is one entry in this *Khasra* which at first sight appears to support the story told on behalf of the plaintiff as to the property being entrusted to the management of Inayat Husain. The entry regarding plot No. 1132 in suit shows that it was the property of Khairat Ali Khan, the son of Hyder Beg, that it was in the possession of one Ram Din who paid Rs. 5 a year rent to Sheikh Inayat Husain "*ba hakuk zemindari*," that is to say, as *zemindari* dues. We were at first inclined to suppose that this entry meant that Ram Din was paying some annual sum as rent to Sheikh Inayat Husain in his capacity of manager of the property. But the entry is made clear by the statement of Inayat Husain's nephew, the witness Hakim-ud-din. He says that Inayat Husain was the *zemindar* of the entire *mohalla* and used to get *zemindari* dues from the persons who resided there. It seems more probable, therefore, that the entry in the *Khasra* refers to a payment made to Inayat Husain in his capacity of *zemindar* of the *mohalla*.

To sum up, therefore, we have it that there is no deed of endowment which can be relied on in proof of the claim made by the plaintiff that this property is *waqf* property. We have also the Settlement Record which appears to be against the case set up by the plaintiff. We have the statements of a large number of the witnesses—statements which cannot be reconciled and which are loose and unsatisfactory. At the very most, all they could prove if they were accepted is that the income of the property was applied to the up-keep of the mosque But, as has been pointed by their Lordships of the Privy Council, this fact, even if established, would not be adequate proof that the property was endowed property. We hold, therefore, that the plaintiff has failed to prove that the property in suit is *waqf* property and on this finding, the result must be that the plaintiff's suit with regard to it must be dismissed. He has no *locus standi* to sue for recovery of possession of any property unless it is proved to be *waqf* property. We dismiss Appeals Nos. 36 and 37, the appeals of Syed Abdul Ghafur, and allow the cross objections filed by the respondents in Appeal No. 37. Syed Abdul Ghafur's suit is dismissed with costs and he will pay the costs of the respondents both in the lower Appellate Court and in this Court.

Appeal dismissed.

MADRAS HIGH COURT.
FULL BENCH.
SECOND CIVIL APPEAL No. 1703 OF 1909.
August 19, 1912.

Present:—Mr. Justice Wallis, Mr. Justice Sundara Aiyar and Mr. Justice Sadasiva Aiyar.

GOPALAKRISHNAMARAJU, BY HIS MOTHER BANGARAYA—PLAINTIFF—APPELLANT

versus

VENKATANARASA RAJU AND OTHERS—DEFENDANTS—RESPONDENTS.

Hindu Law—Joint family—Debts—Marriage expenses of twice-born Hindu male.

Marriage is obligatory on Hindus who do not desire to adopt the life of a perpetual Brahmchari or of a *sanyasi*. Therefore, debts reasonably incurred for the marriage of a twice-born Hindu male are binding on the joint family properties.

GHAZAFFAR HUSSAIN v. MAHABIR PRASAD.

Devulapalli Kameswara Sastry v. *Palavasapu Veeracharlu*, 34 M. 422; 8 Ind. Cas. 195; 20 M. L. J. 855; 9 M. L. T. 26, followed.

Govindarajulu Narasimham v. *Venkatanarasayya*, 27 M. 206, overruled.

Second appeal from the decree of the Sub-Court at Ellore, in A. S. No. 145 of 1908, presented against that of the District Munsif of Narasapur, in O. S. No. 581 of 1906.

The case came on for hearing, in the first instance, on 22nd May 1911, before Abdur Rahim and Ayling, JJ., who made the following

ORDER OF REFERENCE TO A FULL BENCH.

By this appeal the question has been raised whether the 3rd defendant in the suit and his property are liable for a debt incurred to meet the expenses of the 2nd defendant's marriage. The defendants belong to a Kshatriya family.

In *Govindarajulu Narasimham* v. *Venkatanarasayya* (1), it was held that a sale of a land belonging to a joint family of Brahmins to defray the expenses of the marriage of one of its male members cannot be said to have been made for family necessity and is, therefore, not binding on the other members of the family. This decision has been dissented from in *Sundara Bai* v. *Shiv Narayin* (2) and its correctness has been doubted in the judgment of this Court in *Devulapalli Kameswara Sastry* v. *Palavasapu Veeracharlu* (3). In both of these cases the matter is fully discussed. There is, however, a suggestion in the last mentioned ruling and in a later judgment in Appeal No. 95 of 1903 that a distinction might, perhaps, be drawn between the case of Sudras and that of the three twice born castes. But, though the judgment of Chandravarkar, J., in *Sundara Bai* v. *Shiv Narayin* (2) and of Krishnaswami Aiyar, J., in *Devulapalli Kameswara Sastry* v. *Palavasapu Veeracharlu* (3), show that, regarding the question from the point of view of religious ceremonial, it may be said that there is a greater necessity for marriage among the Sudras than among the higher castes, the Bombay ruling clearly holds that there is no difference in the law in the two cases and that is also the inclination of opinion as expressed in *Devulapalli Kameswara Sastry* v. *Palavasapu Veeracharlu* (3).

(1) 27 M. 206.

(2) 32 B. 81; 9 Bom. L. R. 1366; 3 M. L. T. 46.

(3) 34 M. 422; 8 Ind. Cas. 195; 20 M. L. J. 855; 9 M. L. T. 26.

The question whether the marriage of a male member of a joint Hindu family belonging to one of the twice born castes is a family necessity and whether a debt incurred for the purpose of such marriage is binding on the other members of the family is one of importance and ought to be settled. We, therefore, refer the above question for the opinion of a Full Bench. Pending the receipt of the opinion of the Full Bench, the second appeal will stand over.

Mr. *T. Prakasam*, for the Appellant.

Mr. *P. Narayanamurti*, for the Respondent.

OPINION.—It is sufficient to say that we agree with the judgment of Krishnaswami Aiyar, J., in *Devulapalli Kameswara Sastri* v. *Palavarapu Veeracharlu* (3) that marriage is obligatory on Hindus who do not desire to adopt the life of a perpetual Brahmachari or of a *Sanyasi* and, this being so, that debts reasonably incurred for the marriage of a twice born Hindu male are binding on the joint family properties.

OUDH JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL NO. 32 OF 1912.

August 25, 1912.

Present:—Mr. Kanhaiya Lal, A. J. C

Syed GHAZAFFAR HUSSAIN—DEFENDANT—APPELLANT

versus

Lala MAHABIR PRASAD—PLAINTIFF—RESPONDENT.

Promissory-note, suit on—Execution admitted—Undue influence of plaintiff and immorality of defendant pleaded—Burden of proof—Consideration—Contract Act (IX of 1872), s. 16—Interest up to date fixed for payment—Negotiable Instruments Act (XXVI of 1881), s. 79.

In a suit on a promissory-note, the defendant—a young man of 25 or 26—admitted the execution of the pro-note but contended that (1) the plaintiff had obtained the note by the exercise of undue influence, (2) a major portion of the consideration had not been paid by plaintiff, and (3) whatever consideration was paid by plaintiff was paid for an immoral purpose:

Held, that as there was nothing on the face of the pro-note or in the evidence to indicate that the bargain was an unconscionable one or to show that the plaintiff was in a position to dominate the will of the defendant, the *onus* lay upon the defendant to prove the pleas of undue influence and immorality.

Under section 79 of the Negotiable Instruments Act, a plaintiff is entitled to interest at the stipulated rate

GHAZAFFAR HUSSAIN *v.* MAHABIR PRASAD.

from the date of the institution of the suit till the date fixed for payment.

Appeal against an order of the Subordinate Judge, Fyzabad, dated 6th December 1911.

Pandit *Brij Narain Chakbast*, for the Appellant.

Babu *Basudeo Lal*, for the Respondent.

JUDGMENT.—This was a suit for the recovery of money due on two promissory-notes, one of which was executed by the defendant in lieu of Rs. 1,415 on the 26th January 1910, and the other in lieu of Rs. 4,825 on the 12th February 1910, in favour of the plaintiff. The former promissory-note provided for the payment of compound interest at the rate of Rs. 1-12 per cent. per mensem and the latter at the rate of Rs. 1-10 per cent per mensem.

The defence was that the defendant had got Rs 100 on account of the first promissory-note and Rs. 225 on account of the second, that the defendant was a young man of immoral habits, of which the plaintiff took advantage, and that the terms extorted were hard and unconscionable.

The Court below decreed the claim. In appeal, it is contended on behalf of the defendant that the promissory-notes in question were obtained by the exercise of undue influence on the part of the plaintiff-respondent; that a major portion of the consideration was not paid to the defendant-appellant; that, whatever consideration was paid by the plaintiff-respondent, was paid for an immoral purpose, and that the plaintiff-respondent was not entitled to a decree for any thing more than what he had actually paid to the defendant-appellant.

The plaintiff-respondent has filed cross-objections, claiming future interest from the date of the institution of the suit till the date of realization.

I have gone through the evidence adduced by the plaintiff. The execution of the promissory-notes in question was admitted by the defendant. It is probable from the evidence that he is an extravagant man of dissipated habits but the consideration, in the present case, was paid, in case of each promissory-note, through the Fyzabad branch of the People's Industrial Bank, by means of cheques, which were summoned from the Bank and proved.

The defendant alleged that, after the cheques were cashed, the plaintiff took the defendant to his house and took back the money with the exception of the amounts admitted by the defendant. But the defendant did not come into the witness-box to swear to those facts and the evidence adduced by him in support of his statement is not reliable. On the other hand, Shambhu Dayal, the Manager of the Bank, stated that, when the defendant came to cash the cheques, the plaintiff was not present.

The plaintiff has not proved the purposes for which the loans were taken. The circumstance that the said loans were taken within a period of 16 days is, undoubtedly, suspicious. But the *onus* lay upon the defendant to prove that the plaintiff deliberately advanced loans for an immoral purpose or that the promissory-notes were obtained from the defendant by the exercise of undue influence on the part of the plaintiff. There is nothing on the face of the promissory-notes or in the evidence, to indicate that the bargains were unconscionable or to show that the plaintiff was in a position to dominate the will of the defendant. The defendant is a young man about 25 or 26 years old. He was in a position to judge for himself what suited best his interests. His own witnesses admit that he built a house at a cost of Rs. 8,000, or Rs 10,000 about three years ago. He may have had other necessities for borrowing the money. He entered into the bargain with open eyes and his story that, after coming back from the Bank, he returned the greater portion of the money received from the plaintiff, cannot be trusted.

The plaintiff was entitled to future interest at the stipulated rate from the date of the institution of the suit under section 79 of the Negotiable Instruments Act till the date fixed for payment.

I, therefore, dismiss the defendant's appeal with costs and allow the plaintiff's cross-objections in so far as to direct that the plaintiff shall be entitled to recover future interest on the amount claimed at the stipulated rate compoundable half-yearly from the date of the institution of the suit till three months from this date; after that further interest shall cease, as the plaintiff will have the option of taking steps for recovering his money and the rate of interest secured by the promissory-notes in suit is

already high. The defendant is allowed three months' time for payment. The costs of the cross-objections will be charged against the defendant-appellant, who shall bear his own costs.

Appeal dismissed.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No 1154 OF 1910.

November 2, 1912.

Present:—Sir Arthur Reid, KT., Chief Judge, and Mr. Justice Rattigan.

Rai Seth CHAND MAL—DEFENDANT—APPELLANT

versus

Rai Bahadur SANSAR CHAND—PLAINTIFF—RESPONDENT.

Limitation Act (IX of 1908), Sch. I, Arts. 62, 120—Limitation—Suit to recover interest from holder of Government Promissory-Notes—Pendency of previous litigation—Money had and received to plaintiff's use.

On 1st December 1898, *A.*, the proprietor of a firm, assigned all his rights in certain Government Promissory-Notes to *B.* Shortly after, certain creditors of the firm attached these Notes; *B.* objected to the attachment, but his objection was disallowed, whereupon in May 1900, he sued the decree-holders to establish his right to the Notes and impleaded *C.*, in whose name the Notes stood, as a defendant. The suit was decreed by the Divisional Court on 10th November 1904 and this decree was affirmed by the Chief Court on 18th May 1908. Neither *A.* nor *C.* contested *B.*'s right in this suit. In execution of the decree of the Divisional Court, *B.* recovered the Notes in October 1905.

During the pendency of this litigation, *C.* realised the interest due on these Notes for the period, 1st November 1898 to 30th June 1905; the interest was first realized on 13th August 1903. On the 22nd January 1909, *B.* sued *C.* for recovery of the interest so realised:

Held, (1) that Article 62 of the Limitation Act, 1908, provided the limitation for the suit;

(2) that the suit was barred by time having been brought three years after the date of realization of interest;

(3) that the fact that the right of *B.* to the Notes was finally settled on 18th May 1908 in the previous litigation did not give *B* any extension of time, as

(*a*) the litigation was not really between *B.* and *A.* or *C.*, and

(*b*) *B.* had recovered the Notes in execution of the Divisional Court decree in 1905 and the payment of interest was endorsed on the Notes at the time,

Gurudas Pyne v. *Ram Narain Sahu*, 10 C. 860; 12 I. A. 59, distinguished.

Article 62 applies whenever a person actually or constructively receives money for another person's use; in other words, when the receipt by the defendant is in law a receipt to the use of such other person to whom the money at the time of the receipt lawfully belongs.

Second appeal from the order of the Divisional Judge, Hoshiarpur Division, dated the 9th August 1910, affirming that of the District Judge, Hoshiarpur, dated the 2nd February 1910, decreeing plaintiff's claim.

The Hon'ble Mr. *Muhammad Shafi* and Mr. *Fazal-i-Husain*, for the Appellant.

Rai Sahib Pandit *Sheo Narain*, for the Respondent.

JUDGMENT.—The facts of this case are as follows:—

In the autumn of 1898, the firm of Raghnath Das-Hamir Mal, of which one Dhanrup Mal was (as found by subsequent litigation) the proprietor, became bankrupt, and on the 1st December 1898, the said Dhanrup Mal assigned all his rights in certain Government Promissory Notes to the value of Rs. 10,000 to the present plaintiff, Rai Bahadur Sansar Chand, and two other persons. The latter persons in turn transferred all their rights in the said Notes to the plaintiff. Shortly afterwards, certain creditors of the firm of Raghnath Das-Hamir Mal attached these Notes in execution of decrees which they had obtained against the said firm, whereupon plaintiff objected to the attachment on the ground that the Notes had been duly assigned to him. This objection was disallowed, whereupon plaintiff instituted a regular suit in May 1900 to establish his right to the Notes, and impleaded the aforesaid decree-holders and also (*inter alia*) the present defendant, Seth Chand Mal, in whose name the Notes then stood. The latter pleaded that though the Notes stood in his name, their real owner was Dhanrup Mal; that he had no interest whatever in the suit; that he had nothing to say either against or in favour of the alleged assignment of the Notes by Dhanrup Mal to plaintiff, and that he had been unnecessarily impleaded as a defendant. The decree-holder defendants, however, contested the validity of the assignment, but it was eventually found by the Divisional Judge, in his judgment, dated 10th November 1904, that the assignment was valid. The decree

of the Divisional Judge was confirmed on appeal by this Court on the 18th May 1908, and on the 13th October 1903, the plaintiff, in execution of his decree, obtained possession of the Notes.

He now sues Rai Bahadur Seth Chand Mal, defendant, for Rs. 2,016 interest on the said Notes from the 1st November 1898 (the date of the assignment to him) to the 30th June 1905, and for an additional sum of Rs. 584 as interest on the said sum at the rate of annas 8 per cent. per mensem, and in his plaint he alleges that the defendant, in spite of his knowledge of the assignment of the Notes by Dhanrup Mal, realised interest on the Notes and fraudulently concealed the fact of such realizations from him.

Defendant, Rai Bahadur Seth Chand Mal, admitted that he had realised the sum of Rs. 2,189-15-2 as interest on the Notes from the 1st December 1898 to the 30th April 1905; that he had paid all these amounts from time to time to Dhanrup Mal; that he had not been guilty of any fraudulent conduct and that the present suit, which was instituted on the 22nd January 1909, was barred by reason of the provisions of Article 62 of the Indian Limitation Act. The defendant further stated that it was not until August 1903 that he received interest on these Notes, after the date of the alleged assignment to plaintiff. The only question that has been really in issue between the parties is whether the claim is or is not barred under the provisions of the Limitation Act. The District Judge held that Article 62 of the Act was inapplicable and that as no other Article could possibly apply, recourse must be had to Article 120, and that the suit which had been instituted within six years of the date on which plaintiff obtained possession of the Notes and also within six years of the date (13th August 1903) on which defendant first realised interest on the Notes, the claim was within time. He accordingly granted plaintiff a decree for the full amount claimed.

Defendant appealed to the Divisional Judge and again contended that Article 62 of the Act barred the claim. The learned Judge dismissed the appeal, holding that the said Article was not applicable inasmuch as at the time when the defendant received the greater part of the money now claimed, the question of the ownership of the Notes was still in dispute in the Courts, and that, consequently, defendant could not be regarded as having received these sums for the use of any determinate person. To give the learned Judge's own words:—"It seems to me that the utmost that can be said is that Chand Mal received the interest for the use of the owner of the Notes, but as the question of ownership was still in dispute, he cannot be said to have received it for the use of any determinate person. When the greater part of the money was received, it was the decree-holders who had the better title and not the plaintiff who had failed in his objection and had not yet succeeded in his suit. The balance of title altered with the pronouncement of this Court, but while this title was still being fought, defendant could not be said to be receiving interest for the use of either party individually, though he was receiving it for the use of whichever of them might ultimately be declared the owner. I, therefore, hold that Article 62 does not apply, and that Article 120 does, and the suit is, therefore, within time."

From the decree of the Divisional Judge, the defendant has preferred a further appeal to this Court, and we have heard lengthy arguments on behalf, respectively, of the appellant and the respondent. We have taken time to consider the large number of authorities cited before us and the important question of law involved. Before we proceed to deal with these authorities, we may clear the ground by stating that we see no proof whatever on the record of any fraudulent conduct on the part of the defendant. He may have been right or wrong in paying the interest realised by him on the Notes to Dhanrup Mal, but we are certainly not prepared to say, upon the materials before us, that in so doing, he acted *mala fide* or that he concealed the fact of such payments from plaintiff. On the other hand, it may, perhaps, be conceded that plaintiff's present suit was not so inexcusably belated as at first sight it would seem. When he instituted his suit in 1900, he claimed to be the owner of the Notes, and he also prayed that he might be awarded such sums by way of interest therein as had been realised by the present defendant. The latter, in answer to interrogatories put to him, swore that up to

that date (November 1900), he had realised no interest on the Notes since the date of the assignment of the Notes to the plaintiff, a statement which was absolutely true. The Divisional Judge, when delivering judgment in November 1904, found, in reliance upon the evidence of the Treasury Clerk, one Hafiz, given in April 1904, that no interest had been realised by defendant on the Notes up to the date of decree and accordingly dismissed plaintiff's claim so far as it related to recovery of such interest. This finding was, in point of fact, incorrect, as it is now admitted that defendant had actually realised interest in 1903, but for this mistake, we cannot see that defendant was in any wise to blame.

It is urged on behalf of plaintiff that he was justified in assuming, upon the facts above stated, that no interest had been realised by defendant, and we think there is force in this argument so far as it relates to events prior to October 1905, when the Notes, with endorsements thereon of payment of various sums due as interest, were handed over to plaintiff. But it is difficult to account for his inaction after that date. Once he had received the Notes, he must have seen that interest thereon had been paid from time to time, from 1903 onwards, and it is surely no answer to urge (as his learned Advocate did) that the endorsements did not show to whom such interest was paid. The Notes were admittedly in the name of the defendant, and the only person to whom Government would have been likely to pay interest upon them was the person who, on the face of the documents, appeared to be their owner, or, at all events, Dhanrup Mal, on whose behalf the Notes had been deposited as security. But all that plaintiff seems to have done was to inquire in 1908, (three years after the Notes had come into his possession) from the Treasury Officer as to the person to whom the interest was paid. In reply he was told, in August 1908 that this information could not be given to him. Very shortly after this, plaintiff had no difficulty in ascertaining from defendant that the interest had been paid to the latter and had been handed over to Dhanrup Mal, (see Exhibit P 6, dated 16th December 1908).

It is urged on plaintiff's behalf that until his right to the Notes was finally established by the decree of this Court dated the 18th May 1903, he could not well claim interest on the Notes. But the futility of this argument is apparent when we remember that plaintiff did not await the decision of this Court to execute the decree of the Divisional Judge and recovered the Notes themselves in October 1905, some two-and-a half years before the decree of this Court. Once the plaintiff had the Notes in his possession, he must have become aware (as the Courts below find) that interest had in fact been paid thereon since 1903 and it is absurd to say that he could not discover for over three years to whom that interest had been paid. As we have remarked, it could only have been paid to defendant or to Dhanrup Mal, and it is clear that as soon as plaintiff made inquiries of defendant upon the subject, the latter forthwith admitted that he had received the money.

Obviously, therefore, there are no special equities in this case in plaintiff's favour, and the only question before us is whether his claim for interest is within time. Defendant admits that he received interest amounting in all to a sum of Rs. 2,189-15-2 from the 13th August 1903 up to the 30th April 1905, and he pleads that he received this interest merely as the agent of Dhanrup Mal or whoever was at the time the legal owner of the Notes, and certainly not on his own behalf. He contends, therefore, that as the plaintiff was the legal owner of the Notes from the date of their assignment to him, he must be taken to have received interest, constructively and in law, to the use of the plaintiff within the meaning of Article 62 of the Limitation Act, and that, consequently, the present suit which was instituted more than three years after the date of the last receipt of any such interest is barred by limitation.

The question before us is whether Article 62 or Article 120 of the said Act applies to a suit of the present kind.

It has been authoritatively laid down by their Lordships of the Privy Council, in the the case of *Mahomed Riasat Ali* v. *Hasin Banu* (1), that Article 120 of the Limitation Act must be applied, unless it is clear that the particular suit is within some other Article. In the present case, the only other

(1) 21 C. 157 at p. 163; 21 I. A. 155.

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Article suggested is Article 62. This Article runs as follows :—" For money payable by the defendant to the plaintiff for money received by the defendant for the plaintiff's use," and the period of limitation specified is three years from the date when " the money is received. " It has been held in various cases that this Article applies whenever one person actually or constructively, receives money for another person's use, see, *inter alia*, *Rama Sawamy* v. *Neli Hari Krishna* (2) or, in other words, whenever the receipt by the defendant is in law a receipt to the use of such other person to whom the money at the time of receipt lawfully belongs, [see *Kundun Lal* v. *Bansi Dhar* (3), and *Thakur Prasad* v. *Partab* (4) and also the decision of the Judicial Committee in *Syad Lutf Ali Khan* v. *Afzul-un-Nisa Begum* (5)].

In the case before us, there can be no doubt that as between Dhanrup Mal, the assignor, and plaintiff, the assignee, there had been a complete and valid transfer of the Notes in December 1898. It is also not denied that defendant, Rai Seth Chand Mal, was holding the Notes merely as agent for the owner of the Notes whom he believed (for some time at all events) to be Dhanrup Mal. Thus, so far as these three persons were concerned, the lawful owner of the Notes was the plaintiff and no question of his right to the Notes could have arisen, nor did it in fact arise, between any of the said persons. At the time, therefore, when the defendant began to realise interest on the Notes, he admittedly realised it for the owner at the time being, and at such time the owner was, as we have stated, the plaintiff. It is contended, however, and this is the basis of the Divisional Judge's judgment, that shortly after the transfer of the Notes to plaintiff, a dispute arose between the latter and certain creditors of Dhanrup Mal. These creditors succeeded in attaching the Notes and plaintiff's objection to the attachment was unsuccessful. Upon these facts, the Divisional Judge states that at the time when Chand Mal, defendant, received the interest, the question of the ownership of the Notes was in dispute and he cannot, therefore, be said to have received it for the use of the plaintiff, though he was receiving it for the use of such of the contending parties as might ultimately be declared the owner. This argument would have carried weight and would have had authority in support of it [see *Kondi Rama Sawamy* v. *Neli Hari Krishna* (2) above cited and *Narayana* v. *Narayana*, (6)], had the dispute as to, ownership been either between Dhanrup Mal and plaintiff or between Rai Seth Chand Mal, defendant, and plaintiff. In point of fact, however, in the litigation referred to, neither Dhanrup Mal nor defendant in any wise contested the right of plaintiff to the Notes, and, consequently, the defendant, when he received the interest, must be taken to have received it for the use of his principal, Dhanrup Mal, or of any assignee from him. It would seem clear, therefore, other questions apart, that Article 62 must be held applicable to the facts of this case.

Reliance, however, is placed by Mr. Shiv Narain on the well known case of *Gurudas Pyne* v. *Ram Narain Sahu* (7) and also upon the ruling of the Allahabad High Court in *Chand Mal* v. *Angan Lal* (8).

In the former case, the husband of one *Musammat* Moti Dasi had misappropriated certain timber belonging to the plaintiff. After the death of her husband, *Musammat* Moti Dasi instructed the defendant, her agent, to sell the timber and to hold the proceeds on her behalf. Thereafter, plaintiffs sued the defendant and claimed to recover the money obtained by the sale of the timber. Their Lordships held that, under these circumstances, Article 118 of the old Limitation Act (which corresponds with the present Article 120) applied and not Article 60 (corresponding to present Article 62), the *ratio decidendi* being that when the defendant sold the timber, he was selling it as the agent of Moti Dasi and received the money for her, and the nature of suit was explained as being one to enforce an equitable claim on the part of the plaintiffs to follow the proceeds of their timber, and finding them in the hands of the defendant, to make him responsible for the amount.

(2) 10 Ind. Cas. 658; (1911) 2 M. W. N. 220; 9 M. L. T. 465; 21 M. L. T. 705.
(3) 3 A. 170.
(4) 6 A. 442.
(5) 9 B. L. R. 348; 16 W. R. (P. C.) 20.
(6) 13 M. 437.
(7) 10 C. 860; 11 I. A. 59.
(8) 13 A. 368.

MUHAHMAD SARFARAZ BEGAM v. MUNNA.

In *Chand Mal* v. *Angan Lal* (8), one Angan Lal received certain monies as agent for and on behalf of one Ajudhia Prasad. Thereafter, a creditor of Ajudhia Prasad attached the monies in execution of a decree against Ajudhia Prasad and subsequently transferred his right to the attached monies to the plaintiff who sued to recover them from Angan Lal. Edge, C. J., and Tyrrell, J., were of opinion that Article 62 applied to the case but, in deference to the authority of *Gurudas Pyne* v. *Ram Narain Sahu* (7), held that the suit was governed by Article 20.

In our opinion, the decision of the Judicial Committee in the case cited has been rightly explained both by Subrahmania Ayyar, J., in *Shanmuga Pillai* v. *Govindasami* (9) and by Harrington and Mookerjee, JJ., in *Mahomed Wahib* v. *Mahomed Ameer* (10). This explanation is that in the case before their Lordships, the plaintiff's claim was for recovery of money, not on the ground that it had been received by the defendant for the use of plaintiff but on the ground that the plaintiff, as the person rightfully entitled thereto, was pursuing it in the hands of the defendant as the actual person in possession thereof at the time. Obviously, the facts of that case are entirely different from the facts of the case before us, for *Musammat* Moti Dasi was under no contractual relationship with the plaintiff. Her husband had misappropriated plaintiff's property and plaintiff was unquestionably entitled to recover the value of the property either from *Musammat* Moti Dasi herself or from her agent, if the money happened to be in the possession of the latter. Here, however, the person who received the money (Rai Seth Chand Mal) was admittedly the agent of Dhanrup Mal and received it as such for Dhanrup Mal's use. Dhanrup Mal, however, had, prior to the date of the receipt, transferred his rights to the plaintiff who thereupon stood in his shoes and was in law the person on whose behalf the defendant received the money.

After full consideration of all the authorities cited before us, we are of opinion that Article 62 and not Article 120 is applicable to the present case and we must, consequently, hold that the suit by plaintiff is barred by limitation. We accept the appeal and dismiss plaintiff's suit with costs throughout.

Appeal allowed.

(9) 30 M. 459; 17 M. L. J. 452.
(10) 32 C. 527; 1 C. L. J. 167.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 321 OF 1911.

August 6, 1912.

Present:—Mr. Piggott, J. C.

Rani MUHAHMAD SARFARAZ BEGAM —DEFENDANT—APPELLANT

versus

MUNNA AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Declaratory relief granted different from that asked for in plaint—Court of second appeal, power of, to interfere with discretion of lower Courts.

Where the two Courts below exercised their discretion in granting the plaintiff a declaration somewhat different from that asked for in the plaint, without any formal amendment of the plaint, the Court of second appeal refused to interfere in the absence of good reasons justifying interference.

Appeal against an order of the District Judge, Sitapur, dated 25th May 1911, modifying that of the Munsif of Kheri, dated 3rd March 1911.

Mr. *Wuseem*, for the Appellant.

Pandit *Gokaran Nath Misra*, for the Respondents.

JUDGMENT.—It seems to me that the only points really essential to the determination of this appeal admit of being briefly stated.

The plaintiffs sued for a certain declaration; the Court of first instance held that the claim as regards the particular form of declaration sought was barred by limitation, but that, on the merits, the plaintiffs were entitled to a somewhat different declaration, which was calculated to give the plaintiffs substantial relief they sought. The lower Appellate Court took practically the same view; it only modified the decree of the Court of first instance by correcting what appears to have been a palpable oversight. In argument before me, the entire question of the limitation law applicable to declaratory suits was raised and discussed but it seems to me sufficient to observe that, if the plaintiffs had confined themselves in the plaint as drafted to asking for the declara-

tion which they have actually obtained, on no possible view of the law of limitation could their suit have been held to be time-barred. The appellant's case is that the suit should be regarded as one governed by Article 120 of the first Schedule to the Indian Limitation Act, and that the provisions of section 23 of the said Act have no application. These are matters which I might have to consider if I had before me a cross objection by the plaintiffs-respondents; but so far as concerns the decree actually passed, these contentions might be allowed without in any way affecting the result of the defendant's appeal. The declaration granted in favour of the plaintiffs is one in respect of which a cause of action, undoubtedly, did arise within six years of the date of the suit. As regards the discretion of the Courts below to give the plaintiffs a declaration somewhat different from that asked for in the plaint, and to do this without any formal amendment of the plaint itself, I think the matter was one clearly within the discretion of the Courts below, and I see no good reason for interfering with their exercise of that discretion. There is nothing else in the memorandum of appeal except a plea which amounts in substance to this:—that the findings of the lower Appellate Court are inconsistent with one another and that, upon the view taken by him of the evidence, the learned District Judge ought not to have held that the plaintiffs were entitled to any declaration whatsoever. It was also contended that the declaration as granted is vague in its terms and should not have been passed without a further specific finding as to the precise sums of money in respect of which the declaration is made. I have considered both these points; but it seems to me that the decree as passed is definite enough for practical purposes, that on the evidence before it, the lower Appellate Court was entitled to come to the conclusion that the plaintiffs had established the right allowed them by this declaration and that there is nothing in the other findings recorded by that Court to make its decision on this point open to question in second appeal.

I, accordingly, dismiss this appeal with costs.

Appeal dismissed.

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL No. 30 OF 1911.

October 24, 1912.

Present:—Sir Henry Richards, Kt., Chief Justice, and Mr. Justice Banerji.

KESHO PARSHAD—PLAINTIFF—APPELLANT

versus

RAM KISHEN DAS—DEFENDANT—RESPONDENT.

Malicious prosecution—Reasonable and probable cause—Damages.

A., who dealt in sugar at Lakhiserai, in compliance with a written order from *B.*, sent a consignment of sugar to him at Agra. *B.*, however, did not pay for it. *A.* went to Agra and found the sugar in the shop of *C.* he accordingly lodged a complaint of cheating against *B.* and *C.* *B.* and *C.* were acquitted, whereupon *C.* sued *A.* for damages for malicious prosecution:

Held, that there was no reasonable and probable cause which justified *A.*'s complaint and, consequently, he was liable for damages for malicious prosecution.

First appeal from a decree of the Subordinate Judge of Agra, dated the 8th December 1910.

The Hon'ble Dr. *Sundar Lal* (with him Mr. *Durga Charan Banerji*), for the Appellant.

Mr. *Hamilton* (with him Mr. *Gokul Prashad*), for the Respondent.

JUDGMENT.—This appeal arises out of a suit in which the plaintiff claimed damages for malicious prosecution. It appears that some time in November 1908, the defendant, who deals in sugar at a place called Lakhiserai, sent a consignment of sugar to one Madho Ram at Agra. Madho Ram did not pay him for the sugar, and the defendant came to Agra, and finding the sugar in the shop belonging to the plaintiff's firm, he lodged a complaint against the plaintiff and Madho Ram alleging that he had been cheated by them. Madho Ram and the plaintiff were subsequently arrested on the charge made by the defendant and tried. After a somewhat protracted trial, they were both acquitted, the Court holding that, so far as the plaintiff was concerned, there was no case against him at all and that he had acted perfectly *bona fide*, and that, so far as Madho Ram was concerned, the matter was of a civil nature.

The account given by the plaintiff of the transaction, stated as shortly as possible, is as follows. He says that he had nothing whatever to do with the purchase of the sugar but that the sugar having been purchased by

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Madho Ram, the plaintiff, in the ordinary course of his business, took over consignment note, advanced money on the sugar and sold it in the ordinary course of his business in the shop. He admits that the defendant came to Agra to inquire about the sugar and the payment of its price; that he gave the defendant all the information that he could and that he showed him his books, told him the amount he had advanced to Madho Ram, and offered, if the defendant would give him a written order, not to pay any more money in respect of the sugar to Madho Ram.

The story told by the defendant differs very substantially. He alleges that the sugar was purchased verbally not by Madho Ram alone but by the plaintiff also who came to Lakhiserai with Madho Ram and ordered the sugar; that he understood that he was selling the sugar to these two persons; that when he came to Agra and searched in vain for the shop of Madho Ram, he discovered from the Railway authorities that delivery had been made to the firm of which the plaintiff Kesho Parshad is proprietor; that he went to the shop, saw Kesho Parshad and Madho Ram, who at once made themselves scarce; that one Murlidhar, father of the plaintiff, pretended to know nothing about the sugar and ordered him out of the shop; that thereupon he returned to Lakhiserai and, after about a week's interval, lodged a complaint. He contends that, under these circumstances, he had reasonable and probable cause to institute the criminal complaint against Kesho Parshad and Madho Ram.

The learned Subordinate Judge seems to have been of opinion that the defendant had a reasonable and probable cause for lodging the complaint or, at any rate, that the plaintiff has not proved the absence of such reasonable and probable cause. He has apparently accepted the statement made by the defendant and believed that Kesho Parshad really did accompany Madho Ram to Lakhiserai and that he, in fact, ordered the sugar.

We are quite unable to agree with the learned Subordinate Judge. Certain letters were produced both in the criminal case and also in the present suit which, to our mind, demonstrate that the order for the sugar was not a verbal order at all but an order given in writing by Madho Ram. The defendant admitted a letter which was obviously written before the sugar was ordered. This was a letter in which the defendant points out that he has ascertained that Madho Ram was in the habit of purchasing sugar at Lakhiserai and he asks that if more sugar is wanted, it may be purchased from him. Another letter, which the plaintiff does not admit to be in his hand-writing but which he has not the hardihood to suggest did not issue from his firm, admits the receipt of a letter ordering the very consignment out of which the criminal charge which he made arose. This letter clearly shows that the order for the sugar was a written order contained in the letter which he admits having received. It, therefore, appears that the defendant made a deliberate mis-statement when he stated that Kesho Parshad came and gave a verbal order for the sugar. This is a matter of very great importance. In the first place, if Kesho Parshad never ordered the sugar from the defendant, it takes away in a very great measure the reasonable and probable cause that the defendant alleges he had for making the complaint. The matter is also important when we come to consider whom we ought to believe in the conflict in the evidence between the plaintiff and the defendant. If we find that the defendant has told a deliberate falsehood in one matter, it is a just ground for doubting his evidence in other respects where it conflicts with the evidence of the plaintiff. We have already mentioned the account that Kesho Prashad gave of the visit of the defendant to Agra when he was inquiring about his sugar. He admits that the defendant came to his shop and he has told us what he said to the defendant and what the defendant said to him. The defendant never contradicted this part of his evidence. It is alleged that there was an implied contradiction in the allegation of the defendant that Kesho Parshad made himself scarce as soon as he arrived in Agra. We cannot look upon this as by any means a satisfactory answer to the detailed statement of the plaintiff. The inferences to be drawn from certain admitted facts are also strongly in favour of the truth of the plaintiff's story. For example, the demand for the price of the sugar was made to Madho Ram and not to Kesho Parshad. Furthermore, we think that had the defendant come to Agra and been convinced, as he alleges, that he had been swindled by Kesho Pershad and Madho Ram, he would in all probability have gone to the Police in

Agra and not waited a whole week before making a complaint in the Court at Monghyr. He admits in his deposition that he made no complaint to the Police at Agra. In our opinion, the plaintiff's evidence is entitled to far more credit than the evidence of the defendant. In addition to this, as already stated, the facts themselves render the story of the plaintiff much more probable.

The result is that we accept the plaintiff's story, namely, that the charge was made by the defendant without any ground whatever except the mere fact that the property when discovered by the defendent was in his (plaintiff's) charge. In our opinion, this fact would, in no way, constitute reasonable and probable cause so as to justify the defendant in making the serious charge that he did against an apparently respectable merchant. We think, therefore, that the plaintiff ought to have had a decree; and it only remains to consider what damage should be awarded to him. Here, again, his statements go almost uncontradicted. He swears that he paid Rs. 1,135 to Pleaders to defend the suit. He gives his Railway fare to the place of trial (Monghyr) and back for self and witnesses as amounting to Rs. 475. It appears that he had to go to Monghyr on many occasions. He gives his expenses at Monghyr and on the way at Rs. 500. He further claims Rs. 2,000 for bodily and mental pain and Rs. 1,000 for loss of business. These last two items are somewhat vague but it is clear that there must have been some loss in respect of business and the plaintiff must also have suffered a considerable amount of worry and trouble. Taking all circumstances into consideration, we have decided to award him a lump sum of Rs. 3,500 (three thousand and five hundred rupees) to cover all claims in respect of the present suit. We accordingly set aside the decree of the Court below and make a decree in plaintiff's favour for the sum of Rs. 3,500 with full costs in both Courts including in this Court fees on the higher scale.

Appeal allowed.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 332 OF 1911.

August 8, 1912.

Present:—Mr. Piggott, J. C.

Babu SHEO SAHAI AND OTHERS—PLAINTIFFS—APPELLANTS

versus

SHIB SINGH AND OTHERS—DEFENDANTS—RESPONDENTS.

Property subject to mortgages—Covenant by vendor to discharge previous mortgages—Pre-emption suit—Civil Procedure Code (Act V of 1908), s. 11—Res judicata.

The first defendant owned a share of 1 *biswa*, 8 *biswansis* in a certain village and out of it he sold an unspecified 12 *biswansis* share to the plaintiffs. The sale-deed contained a recital that as the aforesaid share of 12 *biswansis* was being sold to the plaintiffs free of any charge, the vendor will pay off the debts due under the mortgages existing on the said share and if the plaintiffs were compelled to pay anything, they would be entitled to recover that sum from him. The other defendants pre-empted the share in suit and obtained the possession of it in payment of the purchase-money. Meanwhile, the plaintiffs purchased the previous mortgages existing on the property in dispute and put them into suit. It was contested by the defendants, who had pre-empted the property, that because the plaintiffs had not put forward the aforesaid mortgages in the pre-emption case, their present suit was barred:

Held, that the suit on the aforesaid mortgages was maintainable, inasmuch as a plea regarding the aforesaid mortgages could not be the subject of an issue in the pre-emption suit nor could it affect the result of that suit.

Appeal against an order of the District Judge of Hardoi, dated June 28th, 1911, modifying that of the Subordinate Judge, Hardoi, dated 18th March 1911.

Pandit *Gokaran Nath Misra*, for the Appellants.

Babu *Lachman Das*, for the Respondents.

JUDGMENT.—This was a suit on a mortgage-deed of September the 9th, 1895, brought by the plaintiffs as transferees of the said deed. It was decreed in full by the Court of first instance and has also been decreed by the District Judge on appeal subject to a modification to be noticed presently.

The plaintiffs appeal against the modification which the District Judge has made in the decree of the Court of first instance. Certain respondents have filed a petition of objection raising a question of costs. As I am satisfied that the plaintiffs' appeal must prevail, this petition of objection naturally fails and is hereby dismissed.

In order to understand the point on which the two Courts below have differed, it is better

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to take the facts somewhat out of their chronological order. The first defendant, Sardar Singh, owned a share of 1 *biswa*, 8 *biswansis* in village Kakwa and on the 16th of August 1902, he sold an unspecified 12 *biswansis* share out of the above to Sheo Sahai and Ganga Sahai, who are the plaintiffs in this suit. That sale-deed contained a recital by the vendor to the effect that his share in village Kakwa was subject to two mortgages, one in favour of Juggi Lal and another in favour of Mohan Lal.

As he wished to convey these 12 *biswansis* to the plaintiffs free from any charge, he covenanted with them that he would himself pay off these two mortgages, that if the plaintiffs were compelled to pay anything towards them, they might hold him liable and recover any sum which they might thus be compelled to pay from his person or his remaining property. Subsequently to this transaction, that is to say, on September the 23rd, 1902, the plaintiffs acquired from the heirs of Juggi Lal, one of the mortgagees above mentioned, their mortgagee rights which are those under the deed of September 9th, 1895, now in suit. After this, certain co-sharers, who are now, represented by defendants Nos. 2, 3 and 4, hereafter called the contesting defendants in this case, brought against the present plaintiffs, a suit for pre-emption in respect of the sale-deed of August the 16th, 1902. They won that suit, paid to the plaintiffs the consideration which the plaintiffs had already paid to the vendor Sardar Singh and so became owners of this unspecified 12 *biswansis* share out of 1 *biswa*, 8 *biswansis*. Now the mortgage-deed of September the 9th, 1895, is for an unspecified share of one *biswa* out of 1 *biswa* 8 *biswansis* and the plaintiffs are simply suing for sale of an unspecified share. They have impleaded the contesting defendants because the share purchased by the latter, added to the share which is the subject of the mortgage in suit, would give a total exceeding the 1 *biswa*, 8 *biswansis*, which represented Sardar Singh's interest in village Kakwa. These contesting defendants resisted the suit on various grounds, but I am concerned now only with the pleas embodied in the 8th and 9th paragraphs of their written statement, which were made the subject of issue No. 4 in the Court of first instance. The contention is that the plaintiffs are in some way bound by the terms of the sale-deed of August the 16th, 1902, so that they cannot hold the share of 12 *biswansis* purchased by the contesting defendants liable for any portion of the mortgage-debt. The first Court seems to have found it difficult, as I am bound to say I do myself even, to understand precisely what the defendants meant by this contention but it overruled it and gave the plaintiffs a decree for the sale of an unspecified share of 1 *biswa* out of 1 *biswa*, 8 *biswansis* as claimed. The learned District Judge on appeal seems to have accepted a plea, which I find in a somewhat vague and confused form in the third paragraph of the memorandum of appeal to his Court, that the plaintiffs are bound to exempt this share of 12 *biswas* not by reason of any stipulations contained in the sale-deed of August the 16th, 1902, but by reason of the conduct of the present plaintiffs in the pre-emption suit. I am quite unable to accept the reasoning of the learned District Judge. When the plaintiffs were purchasing this 12 *biswansis* share in August 1902, they entered into an agreement with Sardar Singh that he would idemnify them against the existing mortgage charges affecting unspecified portions of his share of 1 *biswa*, 8 *biswansis*. They quite understood that no covenant entered into between Sardar Singh and themselves could in any way affect the rights of the holders of existing mortgages. They knew, therefore, that if these mortgagees enforced their rights, they would be able to bring to sale such unspecified shares out of Sardar Singh's entire proprietary rights as might be mentioned in their mortgage-deeds.

Amongst other things they knew that Juggi Lal or his heirs would have a right to enforce this mortgage of September 1895 against an unspecified share of 1 *biswa* out of 1 *biswa*, 8 *biswansis*. They obviously realized that, in the event of Sardar Singh failing to keep his promise to pay off existing mortgages out of his own funds, they might be obliged to pay the whole or some portion of this mortgage-debt in order to safeguard their newly purchased share of 12 *biswansis*. They, therefore, covenanted with Sardar Singh that he would idemnify them against any payment which they might be compelled to make in respect of these previously existing mortgage charges. It was a covenant between Sardar Singh and his vendees and in itself was not binding on the mortgagees. Now, the con-

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testing respondents have used their right of pre-emption in order to thrust themselves into the place of the plaintiffs as vendees under the sale-deed of August the 16th, 1902.

I find it difficult to understand what was in the mind of the learned District Judge when he wrote of the plaintiffs "receiving full price for the property." What the plaintiffs received from the pre-emptors was what they had paid to Sardar Singh; the person who received the full price was Sardar Singh and as he sold this share of 12 *biswansis* under a covenant of indemnity to keep it free from liability in respect of previously existing mortgages, he is bound by that covenant and will have to idemnify his vendees if they are put to any loss in respect of these mortgage charges. By their success in the pre-emption suit, the contesting defendants have simply stepped into the shoes of the plaintiffs as the vendees under the sale-deed of August the 16th, 1902. The plaintiffs have now neither rights nor liabilities left under this document. How the plaintiffs could have pleaded in the pre-emption suit the fact that they had, in the meantime, acquired the mortgagee rights of the heirs of Juggi Lal or how such a plea could have been made the subject of an issue in the pre-emption suit or could have affected the result of that suit, it passes me to conceive.

I am uuable, therefore, to maintian the decision of the lower Appellate Court. It was suggested to me in the course of argument that inasmuch as a number of pleas were taken by the contesting defendants in their memorandum of appeal to the District Judge and as most of these are not referred to in the judgment of that Court, I should, before disposing of this appeal remit issues calling for findings in respect of some of the other pleas thus raised. It seems to me that these pleas cannot have been pressed in the lower Appellate Court. They are practically overruled by the District Judge when he affirms the decree of the Court of first instance, subject only to the modification introduced by him regarding the 12 *biswansis* share of the contesting defendants. Moreover, I have myself examined them in connection with the judgment of the Court of first instance and they seem to me of no force whatever. I can see no reason for disallowing *post diem* interest and the suit certainly could not be dismissed on the ground that one Likha Sah had not been joined as a defendant. The plaintiffs have taken their chance of any difficulties to which they may be exposed in the execution department in consequence of their not having impleaded this man. As for the pleas taken on the merits regarding the execution of the mortgage deed of September the 9th, 1895, and as to the validity of the transfer of the mortgagee rights in favour of the plaintiffs, while I do not say that these contesting defendants were not entitled to put the plaintiffs to proof on these points, it is obvoius, in the face of the admissions contained in Sardar Singh's written statement and of the evidence set forth in the judgment of the first Court, that there was no real force in these pleas. I, therefore, accept this appeal, set aside the decree of the lower Appellate Court and restore that of the Court of first instance with the direction that the contesting defendants, Hitam Singh, Sib Singh and Chedda Singh, will pay the plaintiffs' costs in this and in the lower Appellate Court. I extend the period fixed for payment to six months from the date of this present decree.

Appeal accepted.

OUDH JUDICIAL COMMISSIONER'S COURT.

CIVIL APPLICATION No. 88 OF 1912.

July 26, 1912.

Present:—Mr. Kanhaya Lal, A. J. C.

LALA—PLAINTIFF—APPLICANT

versus

Chaudhari ABDUS SAMED—DEFENDANT—RESPONDENT.

Arbitration—Award made within time fixed but reaching Court late—Arbitration superseded before receipt of award—On receipt of award supersession order set aside—Sarpanch, *meaning of—Award invalid if not made by all arbitrators—Illegal and void award—Judicial notice by Court of illegal award—Civil Procedure Code (Act V of* 1908), *Sch. II, cl.* 8—*Limitation Act (IX of* 1908), *Sch. I, Art.* 158.

An order of supersession, under paragraph 8 of Schedule II to the Civil Procedure Code, cannot be passed where an award has already been made and completed or, in other words, signed and delivered by arbitrators within the time fixed by the Court, though it may reach the Court afterwards, inasmuch as it is not necessary to the validity of such award that it should actually reach the hands of the Court within such period.

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Therefore, where an order of supersession was passed on the date fixed but the award reached the Court the same day after the passing of the order:

Held, that the Court would be justified in setting aside *suo motu* its order of supersession as erroneous.

On a reference to several arbitrators together, where there is no clause providing for an award made by less than all being valid, each of them must act personally in performance of the duties of his office, as if he were the sole arbitrator; for as the office is joint, if one refuse or omit to act, the others can make no valid award.

The word '*Surpanch*' might indicate either an umpire or referee in case of difference of opinion among the arbitrators, or might imply a chief or head arbitrator like the senior Judge of any other tribunal.

Where a matter was referred to the arbitration of three persons, two of whom were described as *panches* and the third as *Surpanch*:

Held, that this did not mean that the two *panches* alone were to decide the matter and that the third person was to be approached only in case of difference of opinion.

Where an award is illegal and void *ab initio* and the illegality is apparent on the very face of it, the Court should take judicial notice of it; it is not necessary that parties should file objections to the award within the time prescribed under Article 158 of the 2nd Schedule of the Limitation Act.

Raja Har Narain Singh v. *Chaudhrain Bhagwant Kuar* 13 A. 300; 18 I. A. 355; *Ram Narain Roy* v. *Baij Nath Malal*, 29 C. 36, referred to.

Application against an order of the Additional Munsif, Lucknow, dated 14th June 1912.

Pandit *Gokaran Nath Misra*, for the Applicant.

Pandit *Manmohan Nath Chak*, for the Opposite Party.

ORDER.—This was a suit for the recovery of the price of sheep alleged to have been sold to the defendant. The suit was referred to arbitration and the 29th April 1912 was fixed for the filing of the award. The time was afterwards extended on an application of one of the arbitrators to the 14th May 1912. On the last mentioned date, the case was taken up for hearing but, as the award was not received, the Court passed an order superseding the reference and granted an adjournment for two days to enable the parties to produce their evidence. On the same date, subsequent to the passing of the above order, the Court, however, received the award by post in a registered cover. Notices for filing objections to the award were, thereupon, issued to the parties. The plaintiff was served with that notice on the 20th May 1912, and filed his objections to the award on the 7th June 1912, more than ten days after the service of the notice. The Court below disallowed those objections and passed a decree in accordance with the award.

In revision, it is contended on behalf of the plaintiff that the learned Munsif acted illegally and without jurisdiction in accepting the award after he had superseded the arbitration by his previous order; that the award was void *ab initio* because it was not signed by all the arbitrators including the umpire, and that the objections to the award were filed by him within time.

The order, superseding the arbitration, was apparently passed under paragraph 8 of the second Schedule to the Code of Civil Procedure, which provides, that where the arbitrators or the umpire cannot complete the award within the period specified in the order, the Court may, if it thinks fit, either allow further time or may make an order superseding the award, and in such case shall proceed with the suit. The order of supersession cannot, however, be passed where an award has already been made and completed or, in other words, delivered within the time fixed, though it may reach the Court afterwards, for, as observed in *Sita Ram* v. *Bhawani Din Ram* (1) and *Asadullah* v. *Muhammad Nur* (2), it is sufficient if the award be made, that is, completed and signed, by the arbitrators within the period fixed by the Court and it is not necessary to the validity of such award that it should actually reach the hands of the Court within such period. The fact of registration and the intervention of a Sunday probably delayed its delivery to the Court before the time fixed. But neither the arbitrators nor the parties were responsible for that delay and the learned Munsif was, therefore, justified in accepting the award and setting aside his previous order superseding the reference.

The award is, however, on the face of it, invalid because it is signed by only two of the arbitrators. The agreement of reference to arbitration gave the names of three persons, two of whom were described as *panches* and the third as a *surpanch*, and provided that, whatever decision was arrived at by the *panches* and *surpanch*,

(1) 26 A. 105; A. W. N. (1904) 205.
(2) 27 A. 459; 2 A. L. J. 201; A. W. N. (1905) 47.

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named therein would be binding on the parties. It did not specify that the *surpanch* was only to act in case the other arbitrators differed. The word *surpanch* might indicate either an umpire or referee in case of a difference of opinion among the arbitrators or might imply a chief or head arbitrator, one of whose functions would be to organize and convene the sittings, inform the parties, send reports to the Court and do other administrative business connected with the arbitration in like manner as is done by a senior Judge of any other tribunal.

Fallon defines the word *surpanch* as meaning either a chief umpire or referee or a president, chairman, or foreman of a Jury. Wilson describes it as meaning the president of a *panchayat*.

The mere use of the word *surpanch* in an agreement to refer to arbitration, therefore, does not necessarily imply that the *surpanch* is only to act in case of a difference of opinion among the other arbitrators and in the face of the clear reference in the agreement, filed by the parties, that they shall be bound by the award made by the *panches* and the *surpanch*, there can be no justification for thinking that the award made by two arbitrators alone, without the co-operation of the *surpanch* or chief arbitrator, was valid and binding.

The plaintiff objected in the Court below that the parties never intended to refer the case to the decision of only two arbitrators. On a reference to several arbitrators together, when there is no clause providing for an award made by less than all being valid, each of them must act personally in performance of the duties of his office, as if he were the sole arbitrator: for as the office is joint, if one refuse or omit to act, the others can make no valid award. Where the reference is to three arbitrators, all three must, therefore, concur in the award and an award made by only two of them would not be enforceable. "Sometimes," says Russell, "the framing of the submission is so ambiguous that it is difficult for the Court to decide on the respective duties of each arbitrator. Thus, where a cause was referred to two arbitrators and such third person as they should nominate as their umpire, and the parties agreed to perform the award to be made by the two and their umpire, the Court refused to enforce by attachment performance of an award made by the two arbitrators alone, considering it a doubtful point whether the award was not intended to be the joint act of the three." (Russell on Arbitration and Award, ninth Edition, page 168).

Article 158 of the Limitation Act does not apply where the award is, on the face of it, void for, as held in *Raja Har Narain Singh* v. *Chaudhrain Bhagwant Kuar* (3), the Court ought to take judicial notice of its patent invalidity, notwithstanding the fact that neither party has taken any objection thereto. In *Ram Narain Roy* v. *Baij Nath Malal* (4), an application to set aside an award on the ground that three out of five arbitrators, were not present at the time the award was made and did not sign the award, although it purported to have been signed by all of them, was held to be governed by Article 158 of the Limitation Act. But, in the present case, the award is no award as it does not purport to have been signed by all the arbitrators, including the *surpanch* or chief arbitrator, appointed by the parties. The notice issued to the plaintiff informing him of the filing of the award, did not specify that the order of supersession previously passed was or would be set aside, a fact which might have delayed the plaintiff's objection. If the award was no award, the order of the Court below, passing a decree in accordance with it, was *ultra vires* and illegal.

The application is, therefore, allowed and the case remanded to the Court below for a trial on the merits. The costs of the application will abide the event.

Application allowed.

(3) 13 A. 300; 18 I. A. 355.
(4) 29 C. 36.

ARMUGHA MUDELIAR *v.* YAGAMBA BAI AMMANI.

MADRAS HIGH COURT.

APPEAL AGAINST ORDER No. 20 OF 1911.

September 24, 1912.

Present:—Mr. Justice Sundara Aiyar and Mr. Justice Sadasiva Aiyar.

ARMUGHA MUDELIAR—APPELLANT

versus

YAGAMBA BAI AMMANI AND OTHERS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), *s.* 42, *O. XXI, rr.* 16, 53—*Attachment of decree for mesne profits—Assignment of decree after attachment—Part consideration intended to benefit assignor and defeat creditors—Fraudulent assignment—Right of assignee to execute decree—Determination of equities between assignee and attachers in execution—Assignee entitled to charge for consideration paid by him—Rights of attachers where attachment not made by Court passing decree — Attachment of decree by judgment-debtor—Right to execute.*

An assignee of a decree, which has been attached, has, under Order XXI, rule 53, clause 2, the right to execute the decree notwithstanding the attachment.

Thiruvengadam Pillai v. *Doredla Subbiah*, 13 Ind. Cas. 659; (1912) 1 M. W. N. 176; 11 M. L. T. 144, dissented from.

Yakoob Ali Chowdhry v. *Ram Doolal*, 13 C. L. R. 272, *Thuchakovil Unni Koya* v. *Arapayil Pathuthi Umma*, (1911) 1 M. W. N. 187; 9 M. L. T. 312; 9 Ind. Cas. 786; 21 M. L. J. 577; *Adhar Chandra Das* v. *Lal Mohan Das*, 24 C. 778; 1 C. W. N. 676, referred to.

But the right of the assignee to execute the decree is subject to the rights of the attachers just as the assignor's right itself would be. The assignment will not prevent the assignor's creditors from proceeding against the decree as if it still remained the property of the assignor. The assignment, though valid as between the parties to it, is subject to the rights of the creditors, including both those who may have already attached the decree and other creditors who might proceed against the decree notwithstanding the assignment.

Where the difference between the real value of the decree and the consideration for its assignment is, by a secret agreement between the assignor and the assignee, intended to benefit the assignor and to defeat his creditors, the assignment is fraudulent and invalid against the creditors and will not affect their rights to proceed against the decree as being still the property of the assignor. Neither the assignor, nor the judgment-debtor, can object to it on that ground.

Chidambaram Chettiar v. *Samy Iyer*, 30 M. 6; 16 M. L. J. 427; 1 M. L. T. 351 and *Ishan Chunder Das Sarkar v. Bishu Sardar*, 24 C. 825; 1 C. W. N. 665, referred to.

The assignee in such a case is entitled to execute the decree notwithstanding the partial fraud and is entitled to a charge for the consideration actually paid by him, and if the prior attachments are valid, his charge would be subject to the rights of the attachers.

An application for execution by the assignee decree-holder may be resisted by the attaching creditors and all questions of rights of priority, etc., should be determined in the execution proceedings.

Per *Sundara Aiyar, J.*—An order of attachment of a decree by the Court actually executing the decree after its transfer to it from the Court which passed it is not altogether void. The defect in the attachment, if any, consequent on its being made by a Court other than that which passed the decree is not such a jurisdictional defect as to make the order void. The defect may be waived by the judgment-debtor, as where the latter does not take objection to the attachment.

Thamboo Pillay v. *Sriramulu Naidu*, 17 M. L. J. 300, referred to.

Per *Sadasiva Aiyar, J.*—Orders of attachment in execution of a decree, though these orders are effected by sending notice to other Courts, *are made in exercise of the powers in executing a decree* and, therefore, under section 42 of the Civil Procedure Code, 1908, the Court to which the decree is sent for execution can also itself exercise the power mentioned in Order XXI, rule 53, clause 1 (*b*) as exercisable by the Court which passed the decree.

Per *Sundara Aiyar, J.*—Order XXI, rule 16 of the Civil Procedure Code, 1908, does not make an assignment of a decree in favour of one of several judgment-debtors invalid in law. The provision for disabling such transferee judgment-debtor from executing the money-decree does not in terms apply to transferees of decrees other than those for money. But, whether the judgment-debtor taking an assignment of a decree against himself for immoveable property can execute it or not, the attachment of the said decree by him is not invalid.

Per *Sadasiva Aiyar, J.*—A judgment-debtor who obtains the decree by assignment cannot execute it, but he has the right to apply for a set-off of the amount due to him as decree-holder in a suit against his assignor as against what is due by him and his co-judgment-debtors in the suit wherein he got the decree assigned to himself. His rights and priorities should be determined as if the decree for the larger amount was attached at his instance as soon as either of the decree-holders applies for execution.

Appeal against the order of the Subordinate Judge of Tanjore, in E. P. No. 101 of 1909, in O. S. No. 13 of 1903.

Mr. *S. Subramanya Aiyar*, for the Appellant.

The Hon'ble Mr. *T. V. Seshagiri Aiyar*, Messrs. *R. Ruppusawmy Aiyar* and *A. Vaidyanatha Aiyar*, for the Respondents.

JUDGMENT.

SUNDARA AIYAR, J.—This appeal arises out of an application for execution of the Subordinate Judge's Court of Tanjore in Original Suit No. 13 of 1903. The application was dismissed by the Subordinate Judge. The appellant is the assignee of the decree under a document dated 5th July 1909. The decree was for possession of certain lands, *mesne profits* and costs. The appellant obtained an assignment only so far as the award of *mesne profits* and costs was con-

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cerned. Prior to the assignment, the decree had been attached by several persons who had obtained decrees against the assignor, Yogamba Boyi Ammani. Of these, the 16th respondent made the attachment in execution of his decree in Small Cause Suit No. 905 of 1903, on the file of the Subordinate Judge's Court of Tanjore; his attachment was in October 1904. The 17th respondent was the decree-holder in Original Suit No. 56 of 1905, on the file of the District Munsif's Court of Tiruvadi; his decree was transferred for execution to the Tanjore District Munsif's Court, and the attachment was made by the latter Court on the 5th August 1905. The 18th respondent was the decree-holder in Original Suit No. 313 of 1905, in the Tiruvadi District Munsif's Court, who got his decree transferred to the District Munsif's Court of Tiruvalur which attached this decree on 13th March 1909. The assignor of the decree is the 1st respondent. She did not appear to contest the appellant's application. The judgment-debtors resisted the petition on the ground that the assignment was fraudulent and unsupported by consideration. The attaching decree-holders also contested the appellant's right to execute the decree and supported the contentions of the judgment-debtors. The amount due to the assignor under the decree at the time of the assignment was about Rs. 3,500. The consideration for the assignment was Rs. 2,500 of which Rs. 2,000 was due to the assignee from the assignor on account of the decree obtained by the appellant against her in Original Suit No. 60 of 1905 on the file of the Tiruvadi District Munsif's Court and a sum of Rs. 230 was paid by the assignee to one Ismalsa Rowther on the assignor's account. The remaining amount of Rs. 270 has been found by the Subordinate Judge not to have been paid to the appellant. He apparently was not willing to pay it until his assignment was recognised by the Court executing the decree. The Subordinate Judge held that Yogamba Boyi Ammani, the assignor, was heavily indebted to various persons at the time of the assignment and that, besides the decree in question, her property consisted of only 10 *velis* of land, her life-interest in which was of precarious value. He was of opinion that there must have been some secret arrangement between Yogamba Boyi Ammani, and the appellant and that the consideration set forth in the assignment deed was not, to use his own words, "the real consideration or the whole consideration for it," and that the assignment was made with a view to defeat the rights of all those who had already attached the decree under the impression that the attachments already made were legally defective and might be successfully impeached. He held that the assignment deed did not evidence a *bona fide* transaction, and that it was not supported by real or proper consideration.

I am unable to understand what the Subordinate Judge means by the observation that the consideration was not real, in the face of his finding that the assignee had a decree for Rs. 2,000 against the assignor and that he paid a further sum of Rs. 230 for the assignment. The non-payment of the remaining sum of Rs. 270 would not invalidate the assignment as between the appellant and Yogamba Boyi Ammani and the latter's right would only be to recover it from the appellant. If there was any secret understanding that she should be entitled to receive from the appellant any further amount subsequently, it may possibly be that she would be entitled to recover that also. But all this would not entitle her to dispute the validity of the assignment. What the Subordinate Judge apparently means is, that the difference between the real value of the decree and the consideration for the assignment was intended to go to Yogamba Boyi Ammani, and that she and the appellant combined to defeat the rights of her creditors. It is clear that the consideration was inadequate and that the object was to benefit Yogamba Boyi Ammani to the extent of Rs. 1,000 or thereabouts, at the expense of her creditors by converting the decree which would be easily available to the creditors for execution into cash which she could easily conceal from them. Such a transaction must be held to be fraudulent and invalid as against the creditors and would not affect their rights to proceed against the decree as being still the property of Yogamba Boyi Ammani. See *Chidambaram Chettiar* v. *Samy Iyer* (1) and *Ishan Chunder Das Sarkar* v. *Bishu Sardar* (2). But the appellant is en-

(1) 30 M. 6; 16 M. L. J. 427; 1 M. L. T. 351.
(2) 24 C. 825; 1 C. W. N. 665.

titled against the creditors to a charge for the amount actually paid by him. If the attachments in question, which were all prior in date to the assignment, are valid, his charge would be subject to the rights of the attachers. Mr. Seshagiri Aiyar, who appears for some of the attaching creditors, contends that the assignee is not entitled to take out execution and relies on the judgment of this Court in *Thiruvengadam Pillai* v. *Doredla Subbiah* (3). That case, no doubt, seems to support his contention. There, the assignment was prior to the date of the attachment of the decree. Benson and Abdur Rahim, JJ., held that, according to Order XXI, rule 53, clause (2) of the Civil Procedure Code, only an attaching creditor or his judgment-debtor, *i.e.*, the original holder of the decree attached, was entitled to execute the attached decree. With all deference, I am unable to agree with this ruling. Rule 16 of the Order entitles an assignee in writing of a decree to apply for execution and proceeds to state: "The decree may be executed in the same manner and subject to the same conditions as if the application were made by such decree-holder." That recognises the indubitable principle that the assignee has the same rights as the assignor. There is no reason to suppose that the attachment of a decree in any way curtails the rights of the assignee of it. In the case before the learned Judges, the assignment was prior to the attachment so that the attacher had nothing which he could validly attach in law. Assuming that an assignee of a decree has not, in all cases, an absolute right to enforce his right by execution and that there may be complicated equities arising out of the assignment which could not properly be made the subject matter of execution proceedings, [see *Yakoob Ali Chowdry* v. *Ramdoolal* (4)], that does not in any way affect the rights as between the assignee and the attaching creditor. When the assignment is after an attachment, it will, of course, be subject to the rights of the attacher just as the assignor's right itself would be; but it is difficult to see why this should interfere with the assignee's right to stand in the shoes of the assignor and as, according to rule 53, clause 2 of Order XXI of the Code of Civil Procedure, a person, whose decree has been attachad, may apply for execution notwithstanding the attachment, his assignee must be held entitled to have the same right. According to section 273 of the repealed Code, the attacher alone apparently could apply for execution of the attached decree. See *Thuchakovil Unni Koya* v. *Arapayil Pathuthi Umma* (5), although Maclean, C. J., even there held that the holder of an attached decree could apply for execution. See *Adhar Chandra Das* v. *Lal Mohan Dass* (6). But, Order XXI, rule 53, of the present Code, clearly recognises the right of the attacher's judgment-debtor also to execute his decree. Whichever of the two may take out execution, he must, of course, hold the proceeds realised in execution in trust for the satisfaction of the rights of the attacher in the first instance and the balance for the benefit of the holder of the attached decree. I must, therefore, overrule the contention that, in consequence of the attachment, the assignor became incompetent to execute the decree. I have already found that the assignment in this case was in fraud of the assignor's creditors. Does this disentitle him to take out execution? As already observed, his assignment is perfectly good against the assignor. It must also be valid against the judgment-debtors of the assignor; they have no right to say that only the assignor and not the assignee should have execution against them. The assignment, no doubt, will not prevent the creditors from proceeding against the decree as if it still remained the property of the assignor. What is the legal result of such a state of affairs? I think, it must be taken to be that the assignment, though valid as between the parties to it, is subject to the rights of creditors, including both those who may have already attached the decree and other creditors who might proceed against the decree notwithstanding the assignment. But the assignee may, like the assignor, himself take out execution against the judgment-debtors; the proceeds of execution will, however, be subject in his hands to a trust for the creditors whose rights were sought to be defeated by the assignment. The assignor himself

(3) (1912) 1 M. W. N. 176; 11 M. L. T. 144; 13 Ind. Cas. 659.

(4) 13 C. L. R. 272.

(5) (1911) 1 M. W. N. 187; 9 M. L. T. 312; 9 Ind. Cas. 786; 21 M. L. T. 577.

(6) 24 C. 778; 1 C. W. N. 676.

having parted with all his rights is no longer entitled to the benefit of the decree. There is no principle on which he can be held to be the legal owner and a trustee for his assignee whose rights are perfect as against himself. There is, therefore, no reason for holding that the assignee is altogether disentitled to execute.

The appellant contends that he is entitled to an order for execution without any determination of the rights of the attaching creditors-respondents and that they have no right to intervene at all in these proceedings. I do not think that this contention should prevail. It does not appear that any of the attaching creditors has yet applied for execution of the attached decree. But if their attachments are valid, they have obtained substantial rights in the decree and they are interested in resisting the appellant's right to execution and in getting their own rights to payment out of the proceeds of execution recognised in priority to appellant's rights. If the property in question were not a decree but, say, immoveable property, they would, according to the recognised procedure, be entitled to attach it notwithstanding a fraudulent alienation by their judgment-debtor and the alienee would have to assert his right to the property by a claim petition and any order passed on such a petition would be subject to the right of the unsuccessful party, whether the assignee or the attaching creditor, to establish his right by a regular suit. As the property in question is a decree, both the assignee and the attaching creditor are, according to the Civil Procedure Code, persons entitled to apply for the execution of the decree. They must, therefore, both be entitled to get an adjudication as to whether either has a right to execute and what their rights of priority are. An assignor, as well as an attaching creditor, is a representative of the original decree-holder; and when the attaching creditor impeaches the right of the assignee to execute, he is entitled to urge his objection in execution proceedings to the assignee's right to take out execution. I cannot, therefore, hold that the attachers had no right to intervene in these proceedings.

The appellant next contends that all the attachments in question made by the several respondents are invalid. I shall deal with them separately. The objection taken to the attachment of the 17th and 18th respondents, the holders of decrees in Original Suit No. 56 of 1905 and Original Suit No. 313 of 1905 on the file of the Court of the District Munsif of Tiruvady, respectively, is, that they were not made by the Courts which passed those decrees but by the Courts to which they were transferred. It is, no doubt, true that, according to rule 53 of Order XXI, the issue of a notice to the Court which passed the decrees sought to be attached to stay the execution of the decree until the cancellation of the notice or an application for execution of the decree to be attached by the attacher or his judgment-debtor, should be made by the Court, which passed the decree in execution of which the attachment is sought. But, is an order of attachment by the Court actually executing the decree after its transfer to it from the Court which passed it, altogether void? According to section 42 of the Code of Civil Procedure, 1908, the Court executing a decree has the same powers of executing it as if it had been passed by itself. There are, no doubt, special provisions which direct that applications of particular kinds relating to execution should be made to the Court which passed the decree. But, assuming that section 42 does not show that the executing Court may also attach a decree of another Court, the defect in the attachment in consequence of the order being passed by the executing Court instead of by the Court which passed the decree is not such a jurisdictional defect as to make the order void. In *Thamboo Pillay* v. *Sriramulu Naidu* (7), Benson and Miller, JJ., held that the objection to the jurisdiction of a Court, to which a decree was transferred for execution, to issue notice to the legal representatives of a deceased judgment-debtor with a view to execution issuing against them, was one which could be waived. I am of opinion that an objection to the issue of the notices required under Order XXI, rule 53, clause (2) is similarly one that the parties could waive. The attachment of the 17th respondent in execution of his decree was made in August 1905. Although,

(7) 17 M. L. J. 300.

according to section 273 of the repealed Procedure Code which was then in force, it was not incumbent on the attaching Court to issue notice of the order to the holder of the attached decree, it is impossible to hold that Yogamba Boyi Ammani was unaware of the attachment for a period of nearly four years after it was made. The assignment was in reality made, as already stated, to defeat the rights of the attachers by taking advantage, if possible, of supposed defects in the attachment.

The 18th respondent's attachment in execution of his decree in Original Suit No. 313 of 1905 was on the 13th March 1909, nearly four months before the assignment. Yogamba Boyi Ammani must have received notice of the order of the attaching Court as rule 53 of Order XXI of the present Code makes provision for the issue of such notice. She raised no objection to the attachment but tried to defeat it by means of an alienation to the appellant. I must hold that she waived any objection to the attachments of the 17th and 18th respondents by her acquiescence and the appellant, her assignee, cannot be permitted to raise any objections that she herself did not.

The objection to the 16th respondent's attachment is different. He was himself one of the judgment-debtors in Original Suit No. 13 of 1903, on the file of the Court of the Subordinate Judge of Tanjore, the decree attached by him. It is contended that he could not, as an attaching creditor, obtain a right to execute the decree passed against himself and other judgment-debtors. It is really unnecessary to decide at the present stage whether there could be any valid objections to his taking out execution. It does not appear that he has applied for execution of the decree in Original Suit No. 13 of 1903. It does not appear further that the other judgment-debtors in Original Suit No. 13 of 1903 would raise any objection to his claim to execute the decree. The appellant's objection is rested on the proviso to rule 16 of Order XXI that "Where a decree for the payment of money against two or more persons has been transferred to one of them, it shall not be executed against the others." This rule does not make the assignment of a decree in favour of one of several judgment-debtors invalid in law. It only provides that the transferee is not entitled to enforce his rights by execution of the decree. It will be noticed that the rule refers only to the rights of the transferee of a money-decree. An attaching creditor is not a transferee for the purposes of execution: he is declared to be the representative-in-interest of the decree-holder whose right he attaches. It is doubtful whether rule 16 which lays down merely a rule of procedure can be applied to cases to which its language does not in terms extend. The attacher in seeking to execute the decree stands in the shoes of the holder of the decree and holds the proceeds of the execution in trust for himself and the original decree-holder. No doubt, if he is permitted to take out execution, he may be enabled to realize the amount of the decree from his co-judgment-debtors alone leaving them to assert their right to contribution. It is, at any rate, clear that no one except the judgment-debtor in the decree attached can object to the attacher's right to execute. The attachment itself cannot be held to be invalid even if there would be any valid defence by his co-judgment-debtors to an application by him to execute the decree. I cannot, at the present stage, decide the question of his right to take out execution. The Civil Procedure Code does not expressly lay down the rules as to the course to be pursued by the Court if several persons who have rights in a decree all seek to execute it. Rule 15 of Order XXI provides for cases where a decree has been passed jointly in favour of more persons than one. But there is no rule laid down where there are several attaching creditors all entitled to execute according to rule 53 or where an attaching creditor and his judgment-debtor both seek to execute the decree. If execution is allowed in favour of any one of them and if more than one person having interest in a decree are entitled to execute it, provision must, of course, be made for the protection of the interests of other persons having rights in the decree. There does not appear to be any objection to execution being granted jointly in favour of more persons than one. The rights of all parties interested in the proceeds of execution should, of course, not be affected

by any one of them being allowed to execute. The Court would also have power to appoint a Receiver to execute the decree and to pay over the proceeds to the various parties interested. If the attaching creditors in this case or any of them apply for execution, regard must be had to these observations in deciding the proper course to be adopted.

The order of the lower Court dismissing the appellant's application is set aside and the petition for execution is remanded to the lower Court for fresh disposal according to law. It will be the duty of the lower Court, before passing final orders, to take steps to protect the rights of all parties to the petition. If the attaching decree-holders also apply for execution, it will decide, on a consideration of all the circumstances of the case, which one or more of the parties should be allowed to take out execution. The costs of this appeal will abide the result so far as the appellant and the judgment-debtors are concerned. The appellant must pay the 18th respondent's costs of this appeal.

SADASIVA AIYAR, J.—I have had the advantage of perusing the judgment of my learned brother in this case. So far as the 1st respondent, *viz.*, the assignor of the petitioner is concerned and so far also as the respondents Nos. 2 to 15, who are the judgment-debtors, are concerned, I entirely agree with my learned brother, for the reasons stated by him, that their objections to the petitioner being allowed to execute the decree as the assignee of the decree-holder cannot be legally sustained. The 16th respondent is the 15th judgment-debtor and is also the decree-holder in Small Cause Suit No. 905 of 1903 of the same Subordinate Judge's Court in which the petitioner wants to execute his decree. He has attached the decree passed against him and others in favour of his own decree-holder. I have grave doubts, having regard to clause (4) of Order XXI, rule 18 of the Code of Civil Procedure, 1908, and illustration (*d*) to that rule and to the wording of the rule itself, whether the 16th respondent could be allowed to take any other steps in connection with the execution of his Small Cause decree except applying to the Court to set-off the amount due to him as decree-holder in Small Cause Suit No. 905 of 1903 against what is due by him and others as judgment-debtors in Original Suit No. 13 of 1903. In *Sinnu Pandaram* v. *Santhoji Row* (8), Boddam and Bashyam Iyengar, JJ., held that the decree for the smaller amount becomes incapable of execution and the decree for the larger amount less the decree for the smaller amount is alone capable of execution where there are such cross-decrees. There was a doubt under section 246 of the old Code whether the holder of a decree passed against several persons jointly and severally may treat it as a cross-decree in relation to a decree passed against him singly in favour of one or more of such persons, but that doubt has been set at rest in favour of an affirmative answer by the new clause (4) and the new illustration (*d*) introduced in Order XXI, rule 18. Though, in my opinion, the holder of the decree for the smaller amount cannot apply for execution, his rights and priorities should be decided as if the decree for the larger amount was attached at his instance as soon as either of the decree-holders applies for execution.

As regards the 17th and 18th respondents, who hold decrees against the 1st respondent passed by the Tiruvadi District Munsif's Court, they had the present decree of the Tanjore Subordinate Judge's Court attached through other District Munsif's Court than the Tiruvadi District Munsif's Court. Under Order XXI, rule 53, the attachment is to be made by the issue to the Subordinate Judge's Court of a notice by the Court which passed the decree requesting the Subordinate Judge's Court to stay the execution of its decree till the 17th and 18th respondents or the 1st respondent applies for the execution of the Subordinate Judge's Court's decree. This power of attachment then by Order XXI, rule 53, was vested in the Tiruvadi District Munsif's Court so far as the execution of the decrees of that Court passed in favour of the 17th and 18th respondents is concerned. This power is, by section 42 (section 228 of the old Code), also vested in the Courts to which those decrees of the Tiruvadi District Munsif were sent for execution. The Full Bench case of *Swaminatha Ayyar* v. *Vaidyanatha Sastri* (9) was decided on the ground that the

(8) 12 M. L. J. 398; 26 M. 428.
(9) 28 M. 466; 15 M. L. J. 116.

bringing of the legal representative of the judgment-debtor on the record under section 234 (present section 50, rule 1) is not a proceeding connected with the exercise of the powers in executing a decree, but is a preliminary step towards those powers being exercised by the Court to which the decree has been transferred, and hence the latter Court had no power to pass orders under section 234. But orders of attachment in execution of a decree, though those orders are effected by sending notice to other Courts, *are made in exercise of the powers in executing* a decree and, hence, it seems to me that, under section 42, the Court to which the decree is sent for execution can also itself exercise the powers mentioned in Order XXI, rule 53, clause 1 (*b*), as exercisable by the Court which passed the decree. I am, therefore, of opinion that, without bringing into service the doctrine of waiver relied upon in *Thamboo Pillay* v. *Sriramulu Naidu* (7), it is possible to hold that the attachment made by the 17th and 18th respondents through the Tanjore and Tiruvalur District Munsif's Courts are perfectly valid. I may remark, in passing, that I feel serious doubts whether the doctrine of waiver can validate the attachment made by a Court which had no jurisdiction to do so and whether substantive rights given by the attachment could be placed on the same footing as the issue of a notice to the legal representatives of a deceased judgment-debtor and though the waiver of an objection to the jurisdiction of a Court to issue notice to the legal representative might be valid, I am, as at present advised, not at all clear that an objection to the jurisdiction of a Court to attach properties can be waived by mere omission to take objection to such attachment. However, on the view I take of the powers of the Court executing a decree sent to it for execution, it is not necessary to give a final opinion on this point.

In the result, I agree that the order of the lower Court dismissing the appellant's application should be set aside and the petition for execution should be remanded to the lower Court for fresh disposal according to law and that the costs of the appeal should be awarded to the 18th respondent alone, the other's costs abiding the result.

Appeal allowed.

OUDH JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 52 OF 1912.

August 21, 1912.

Present:—Mr. Stuart, A. J. C.

Thakur BISHESHAR BAKHSH SINGH AND OTHERS—PLAINTIFFS—APPELLANTS

versus

DEBI BAKHSH SINGH AND OTHERS—DEFENDANTS—RESPONDENTS.

Usufructuary mortgage, meaning of—Mortgage in which possession is postponed to be delivered on a date subsequent to the mortgage, interpretation of.

The word "*deliver*" in section 58 does not necessarily mean "*deliver immediately*" and where the mortgagor is not in a position to give immediate delivery of possession it is sufficient if he gives the right to possession though he cannot give delivery of possession.

Therefore, where under the terms of a mortgage-deed, the possession is to be delivered to the mortgagee subsequent to the date of the mortgage, the transaction is an usufructuary mortgage as defined in section 58 of the Transfer of Property Act.

Pratab Bahadur Singh v. *Gajadhar Bakhsh Singh*, 21 A. 521; 28 I. A. 148, followed.

If there is a condition in the mortgage-deed by which the mortgaged property cannot be redeemed until a certain period elapses after the date of execution of the deed, the deed is nevertheless a usufructuary mortgage.

Hikmat-ul-lah Khan v. *Imam Ali*, 12 A. 203; *Visvalinga Pillay* v. *Palaniappa Chetti*, 21 M. 1; *Tukaram* v. *Ramchand Malukchand*, 26 B. 252; 3 Bom. L. R. 778; and *Khuda Bakhsh* v. *Alim-un-nissa*, 27 A. 313; A. W. N. (1904) 273; 1 A. L. J. 715, referred to.

Appeal against an order of the Subordinate Judge, Bahraich, dated 11th March 1912.

Pandit *Gokaran Nath Misra*, for the Appellants.

Messrs. *A. P. Sen*, *N. Sadiq Ali* and *Munni Lal*, for Respondents Nos. 1 to 4.

Babu *Har Narayan Das*, for Respondent No. 5.

JUDGMENT.—On the 22nd August 1872, Jang Bahadur Singh, father of the plaintiffs, mortgaged with possession to Niaz Beg six villages for a consideration of Rs. 14,000 and he subsequently included two more villages in the mortgage. The terms were, that the mortgagee should remain in possession of the villages for 25 years, from the commencement of the *kharif* of 1280 *Fasli* to the end of the *rabi* of 1304 *Fasli*; that the profits of the eight villages for the first five years should be enjoyed absolutely by the mortgagee, and that during the remaining twenty years, Rs. 600 a year were to be devoted towards the payment of the principal amount, the remainder of the income

being enjoyed in lieu of interest. Under the provisions of this deed, it would thus appear that at the end of the term, the mortgagor could redeem the mortgage, and re-gain possession of the villages on payment of Rs. 2,000. On the 24th December 1890, Jang Bahadur Singh mortgaged his existing rights in the village Jiganiauwas, one of the eight villages in question, (with other villages), to Hukam Singh and Sahipat Singh by a deed of simple mortgage without possession. Jang Bahadur Singh sold his rights in another of these villages called Anantpur to Har Prasad. On the 12th October 1895, the plaintiffs, who are the successors-in-interest of Jang Bahadur Singh, mortgaged with possession their interests in the village Jiganiau (with the exception of an area of 1 *bigha* 6 *biswas*) to Manna Ratan Singh who is now represented by defendants Nos. 1 to 4. The deed was for a consideration of Rs. 14,000, of which Rs. 7,036-4-0 were paid in cash, and Rs. 6,963-12-0 were left with the mortgagee for the satisfaction of the simple mortgage of the 24th December 1890 in favour of Hukam Singh and Sahipat Singh. According to the terms of the deed of the 12th October 1895, the mortgagors were not to be at liberty to redeem until the end of the *Fasli* year 1314. On the same date, the 12th October 1895, the plaintiffs executed a deed of further charge, by which it was agreed that Rs. 1,706-4-0 were to be paid in addition to the sum of Rs. 14,000 already mentioned before the property could be redeemed. This deed was not for cash, but the consideration was stated to represent the profits that would be due from the 12th October 1895 to the beginning of 1305 *Fasli*, that is to say, to September 1897. The reason for the execution of this deed of further charge was that, under the terms of the deed of 22nd August 1872, it was not possible for the mortgagors to place Manna Ratan Singh in possession of Jigniau until the beginning of 1305 *Fasli*. It is to be noted that in the sale to Har Prasad a sufficient amount had been left with the vendee to redeem the deed of mortgage of 22nd August 1872. On the 20th May 1897, Rs. 2,000 were deposited in Court for the redemption of the deed of 22nd August 1872. This sum was refused by the successors-in-interest of Niaz Beg, and a suit for redemption of the deed of 22nd August 1872 was brought on the 27th August 1897. To this suit, Manna Ratan Singh, as mortgagee under the deeds of 12th October 1895, Har Prasad and Jwala Prasad, as vendees of the village Anantpur, and Pirthi Raj, brother of Jang Bahadur Singh, who had obtained rights in a portion of the property mortgaged by the deed of 22nd August 1872 under a family partition, were joined as plaintiffs, and the parties represented every one interested in the eight villages which had passed into the possession of Niaz Beg under the deed of 22nd August 1872. A decree for possession by redemption was passed in favour of the plaintiffs on the 3rd March 1898, and joint possession was obtained through the Court over all the eight villages on the 29th March 1898. The mortgagees appealed to the District Judge, and on the 5th November 1898, the District Judge set aside the decision of the lower Court, and remanded the case for re-trial. In consequence of the order of the District Judge, the descendants of Niaz Beg received possession of these eight villages through the Court on the 7th December 1898. The lower Court re-tried the case, and dismissed the suit on the 4th August 1899. An appeal was again filed, and, it being then discovered that the appeal lay to the Court of the Judicial Commissioner and had previously been improperly filed in the Court of the District Judge, the appeal was taken to the Court of the Judicial Commissioner, which decided on the 5th June 1900 in favour of the plaintiffs and directed redemption for the sum of Rs. 2,000. On the 15th July 1900, possession of the eight villages was restored to all the plaintiffs jointly under the order of the Judicial Commissioner. On the 5th June 1911, the plaintiffs deposited under the provisions of section 83 of Act IV of 1882 Rs. 15,706-4-0 to redeem the property affected by the two deeds of the 12th October 1895. The defendants-respondents Nos. 1 to 4 who are successors-in-interest of Manna Ratan Singh, refused to accept the tender, and on the 4th November 1911, the suit was instituted against the decree, in which the present appeal has been preferred. Defendant No. 5 was impleaded as a sub-mortgagee, who had obtained a decree on the 12th of May 1911 against the defendants Nos. 1 to 4. The case taken by the defendants Nos. 1 to 4 was, that they did not obtain possession of the property mortgaged till July 1900, and they, therefore, demand-

ed that, before redemption should take place, they should receive the profits for 1305, 1306 and 1307 *Faslis*. They estimated those profits at Rs. 892 a year, that is to say, Rs. 2,676, and further claimed interest to the extent of Rs. 4,488 making a total of Rs. 7,164. Their case was thus that the village could be redeemed upon payment of Rs.[22,870-4. The learned Subordinate Judge decreed redemption on the payment of Rs. 18,376-14-5. The plaintiffs appeal.

The learned Subordinate Judge decided that this was an anomalous mortgage and the first point that I shall decide is whether it was an anomalous or an usufructuary mortgage. The two deeds of 12th October 1895 really represent one transaction. The mortgagors agreed in these two deeds that, in consideration of the mortgagee paying Rs. 6,963-12 in satisfaction of the deed of 24th December 1890, and paying Rs. 7,036-4 in cash to the mortgagors, and agreeing to abstain from taking possession until the beginning of 1305 *Fasli* over the property mortgaged (the compensation for such abstention being valued at Rs. 1,706-4), that is to say, in consideration of Rs. 15,706-4, the mortgagee was to be placed in possession of the whole of the village Jiganiau with the exception of an area of 1 *bigha*, 6 *biswas* and that he was to hold this village for ten years at least from the beginning of 1305 *Fasli* and that after that period, the mortgagors should be at liberty to redeem the property. The deeds provided that the interest on the said Rs. 15,706-4 should be considered as satisfied from the usufruct of the property, and the amount payable on redemption was fixed at Rs. 15,706-4. The definition of an usufructuary mortgage in section 58 of Act IV of 1882 is:—"Where the mortgagor delivers possession of the mortgaged property to the mortgagee and authorises him to retain such possession until payment of the mortgage-money, and to receive the rents and profits accruing from the property, and to appropriate them in lieu of interest, or in payment of the mortgage-money, or partly in lieu of interest and partly in payment of the mortgage-money, the transaction is called an usufructuary mortgage and the mortgagee an usufructuary mortgagee." Here the possession was to be delivered, but it was to be delivered on a subsequent date. The mortgage-money was Rs. 15,706-4 and possession was to be retained until the payment of the mortgage-money. The rent and profits accruing from the property were to be appropriated in lieu of interest, but redemption was postponed for a period, and was not to be allowed until the end of the year 1314 *Fasli*. If there is nothing inconsistent with the nature of an usufructuary mortgage, as defined in the Act, in the facts that the delivery of possession was to be postponed, and that redemption was not to take place until a certain period had elapsed from the date of the execution, this transaction is clearly an usufructuary mortgage as defined in section 58. For the appellants it is argued that the word "delivers" in section 58 does not necessarily mean "delivers immediately" and where, as was the case here, the mortgagor is not in a position to give immediate delivery of possession, it is sufficient if he gives the right to possession though he cannot give delivery of possession. Against this, it is argued for the respondents that the immediate delivery of possession is a component part of this species of mortgage; and that, therefore, until there is possession, an usufructuary mortgage does not come into existence. Dr. Gour states, in his well known Treatise on the Transfer of Property Act, that the immediate delivery of possession to the mortgagee is a *sine qua non* in this form of security, which cannot be displaced by the registration of the mortgage-deed, or by delivery of possession on a subsequent date. It is not, however, possible to suggest that the existence of a clause permitting postponement of delivery of possession shows that a deed containing it is, therefore, not an usufructuary mortgage, in view of the decision of their Lordships of the Privy Council in *Partab Bahadur Singh* v. *Gajadhar Bakhsh Singh* (1). In that case, the mortgagor covenanted to put the mortgagee in possession of certain villages at a subsequent date and to pay interest at 24 per cent. until possession was delivered:—Their Lordships said at pages 530 to 531: "It appears to thier Lordships that this decision is right. The only provision in the mortgage-bond as to interest is in these words: 'Until delivery of possession of the aforesaid villages to the Raja Saheb ..... I shall pay interest at the rate of 2 per cent. on the above mentioned mortgage-money', and the subsequent words

1) 24 A. 521; 29 I. A. 148.

'Until I pay up the sum of Rs. 5,600 on account of principal with interest to the very last pie' must be read to refer to interest as previously stipulated, namely, until possession was given of the mortgaged property. The mortgage was of the class known as usufructuary mortgages, which are not uncommon in India, and in which possession of the mortgaged property is delivered to the mortgagee who takes the rents and profits in lieu of interest or in payment of the mortgage-money or partly in lieu of interest and partly in payment of the mortgage-money (Act IV of 1882 section 58) (*d*)." This is a very clear pronouncement that a mortgage in which possession was to be delivered but in which the delivery of possession was deferred was an usufructuary mortgage, and on the authority of this decision, I find that the existence of the clause in the deed in question, by which delivery of possession was postponed until the beginning of 1305 *Fasli*, does not preclude the determination of this mortgage as an usufructuary mortgage.

I now come to the second point, whether the existence of a condition in the deed by which the property could not be redeemed until a certain period had elapsed after the date of the execution, is sufficient to show that the deed in question cannot be considered as an usufructuary mortgage. The following decisions are quoted to support the proposition that such amortgage is anomalous:—*Hikmatulla Khan* v. *Imam Ali* (2); *Visvalinga Pillai* v. *Palaniappa Chetti* (3) and *Tukaram* v. *Ram Chand Malukchand* (4). The Allahabad decision referred to a case where a person had mortgaged certain land with possession in favour of a mortgagee who was to receive the profits, credit Rs. 36 from the same to himself as interest, and credit the remainder towards the payment of the principal, was to remain in possession for four years and at the end of the time, the mortgage was to stand redeemed if principal and interest had been paid out of profits, but otherwise the mortgagor was to be responsible for any deficiency. A Bench of two Judges decided that this instrument was an anomalous mortgage, but also decided that for the first four years, it was an usufructuary mortgage, and it was to be regarded as an usufructuary mortgage not only during the four years but after their expiration. In the Madras case, it was decided (with hesitation) that an *Arakattu otti* deed was an anomalous mortgage. I do not find that the circumstances in the Madras case are parallel with the circumstances in the present appeal. The Bombay case referred to a deed headed "Mortgage-deed with possession regarding land" by which the beneficiary was to take possession of certain land for ten years, and appropriate the income thereof in liquidation of a debt, with condition that after the expiry of the said period, the right to the land was to cease. On the one side, it was argued that this documnt was a lease and on the other side it was argued that it was a mortgage. A Full Bench decided that the deed was a mortgage and came to the following conclusion:—"It was contended by Mr. Setlur" (This Counsel had argued that the document was a lease) "that in the definition of an usufructuary mortgage, as set forth in section 58 clause (*d*) of the Transfer of Property Act, there is no mention of any fixed term. That, no doubt, is so, but the law contemplates the property remaining in the possession of the mortgagee, who is authorised to retain it until payment of the mortgage-money, and to appropriate the rents and profits in lieu of interest, or in payment of principal or both, and the nature of the contract is not altered by the fact that the calculation is made beforehand of the period for which the rents and profits will be sufficient to pay off both principal and interest." From this, it would appear that the Full Bench decided that the deed in question was an usufructuary mortgage. It is true they subsequently added that there was no apparent reason why it should not come within the category of an anomalous mortgage, but the effect of the decision is rather that the deed was an usufructuary mortgage. The Full Bench had only to decide, whether it was a mortgage or a lease, and not whether it was or was not an usufructuary or an anomalous mortgage. I consider that this decision is rather in favour of the appellants than of the respondents. There is a later ruling of a Bench of the Allahabad High Court in which the Bench decided that a mortgage which could not be redeemed until five years after the date of execution was a deed of usufructuary mortgage. This

(2) 12 A. 203.
(3) 21 M. 1.
(4) 26 B. 252; 3 Bom. L. R. 778.

is the decision in *Khuda Bakhsh* v. *Alim-un-nissa* (5). At page 315, Sir John Stanley, C. J., says:—"The mortgage in fact is a simple usufructuary mortgage." I am unable to find any reason, why the existence of a condition postponing redemption should be considered to convert what would otherwise be an usufructuary mortgage into an anomalous mortgage, and I am supported in this view by the decision of the Allahabad High Court in the case which I have just mentioned. Taking all the facts and circumstances together, I interpret the two deeds of 12th October 1895, which I consider to embody the same transaction, as one deed of usufructuary mortgage.

Having disposed of this point, it is now necessary to consider the main question of loss of profits by the respondents. As has already been shown, Manna Ratan Singh was in possession of the property in question from the 29th of March 1898 to the 6th December 1898. It is true that the possession of this village Jiganiau was held by him jointly with many other persons, the whole of the possession affecting eight villages of which Jigniau was one, but in virtue of the decree there could have been no possible difficulty in the way of his obtaining separate possession over Jiganiau for that period, and between the dates of the 29th March 1898 and the 6th December 1898, he was in a position to make full collections for the agricultural year. As the year 1305 commenced in Setpember 1897 and the prior mortgagee was entitled to remain in possession up to that date, he was thus deprived only of an opportunity to make collections for the *kharif* of 1306. He was in a position to make the *rabi* collections of 1305 and the *kharif* collections of 1306. He was dispossessed on the 7th December 1898 and did not re-gain possession till the 14th July 1900. He was thus deprived of an opportunity to make the *rabi* collections of 1306, the *kharif* collections of 1307, and the *rabi* collections of 1307. It is, however, to be noted that the mortgagors had done all that they possibly could do to put the mortgagee in possession. Rupees 2,000 had been deposited in Court on the 20th May 1897 but the sons of Niaz Beg had refused to accept it. The mortgagors had without delay filed a suit for redemption. The fact that Manna Ratan Singh was out of possession from the 7th December 1898 to the 14th July 1900 was owing to an erroneous decision of the two Courts, which was subsequently corrected by the Court of the Judicial Commissioner. But, further, the record shows that in 1903 Pirthi Raj Singh applied in execution of the decree directing redemption, for the profits of the period during which he had been out of possession of the property which had fallen in his share in Application No. 97. Manna Ratan Singh applied for the profits of Jiganiau for a similar period by an application No. 134. The Subordinate Judge dismissed both applications. Manna Ratan Singh did not appeal against his decision. Pirthi Raj Singh appealed against the decision and obtained from the Judicial Commissioner's Court on the 28th June 1904 an order to the effect that the profits for that period were payable to him in execution. It is true that the Judicial Commissioner's Court qualified this decision by an addition that it was to be decided, as a matter of fact, whether he had or had not made surplus collections, since he had come into possession sufficient to satisfy the profits in question, and that on the decision of fact, it was found that he had made surplus collections which were sufficient to cover these profits, but the point was decided in his favour that such profits could be recovered in execution; and had Manna Ratan Singh carried the matter further, the decision would, no doubt, also have been in his favour. The decisions in *Bhawani Prasad* v. *Saheb Din* (6) and *Mahadaji* v. *Joti* (7) are not exactly in point, though the principle laid down in those decisions has a distinct bearing on the decision in this appeal. I prefer to decide the point upon a general principle. Here I find that the appellants have been asked to re-coup the respondents for damages which they have incurred owing to the action of the prior mortgagees and of Courts which came to an erroneous decision. The persons responsible are the prior mortgagees in the first instance. The damage caused by their action must be suffered either by the appellants or by respondents Nos. 1 to 4. On general principles, there would not appear to be strong reason for saddling the appellants who had kept their portion of the

(5) 27 A. 313; A. W. N. (1904) 273; 1 A. L. J. 715.

(6) 9 O. C. 44.

(7) 17 B. 425.

bargain and did their best to put the predecessor of respondents Nos. 1 to 4 in possession with responsibility for damage incurred by the action of a third party and when, as in this case, it appears that the predecessor of respondents Nos. 1 to 4 had a legal remedy to recover these damages from the offending party and that he lost this remedy by omitting to pursue it, they have, in my opinion, no case against the appellants for the recovery of these damages. The learned Subordinate Judge has laid stress upon a clause in the deed of 12th October 1895, which I interpret to mean that if the mortgagee's interests are threatened, the mortgagor will defend those interests. I do not consider that this clause can be construed as a contract to indemnify, and, in any circumstances, I do not find that the existence of this clause would justify respondents Nos. 1 to 4 obtaining possession for mesne profits which they had been unable to realise through no fault of the appellants. For the above reasons, I consider that the deeds of the 12th October 1895 did not provide for redemption of the property in question for a sum in excess of Rs. 15,706 4, the amount tendered by the plaintiffs under the provisions of section 83 of Act IV of 1882 on the 5th June 1911. I, therefore, modify the decree of the learned Subordinate Judge by directing redemption for Rs. 15,706-4 and as that sum was tendered under the provisions of the law on the 5th July 1911 and respondents Nos. 1 to 4 refused to accept it, without proper justification, I direct that the respondents Nos. 1 to 4 should pay the costs of the appellants in the original suit and in this appeal. It was owing to the action of the respondents Nos. 1 to 4 that the appellants were forced to sue. The latter had taken the remedy which the law allowed them of tendering the correct amount in Court, and in the circumstances, they are, in my opinion, entitled to costs of both Courts. The appellants have further pressed for mesne profits from the 5th June 1911 to date; but I do not find that they sued for this relief in the original suit; and even in the present appeal, they have not claimd this relief explicitly. I decide that they are not entitled to this latter relief. The learned Counsel for respondent No. 5 has asked that whatever may be realised, that is, the sum of Rs. 15,706-4 should be payable to his client in satisfaction of his decree of the 12th May 1911. This must, of course, be done. I do not modify the decree of the learned Subordinate Judge in any other respect except by substitution of a sum of Rs. 15,706-4 in place of the sum of Rs. 18,376-14-5, and on the point of costs. Respondent No. 5 was awarded no costs in the lower Court and I see no reason to award him costs in this Court.

Decree modified.

OUDH JUDICIAL COMMISSIONER'S COURT.

EXECUTION DECREE APPEAL NO. 31 OF 1911.

July 26, 1912.

Present:—Mr. Stuart, J. C., and Mr. Kanhaiya Lal, A. J. C.

Babu SURAJ BIKRAM SINGH—JUDGMENT-DEBTOR—APPELLANT

versus

Babu CHANDRABHAN SINGH—DECREE-HOLDER—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 11—Res judicata—"Ought"—Under-proprietary rights in Oudh, meaning of—Oudh Rent Act (XXII of 1886), s. 3, cl. 6—Proprietary rights, claim as to, does not affect under-proprietary rights—Pleas in defence which ought to be raised—Inconsistent pleas when barred.

A sued *B.* for the recovery of the estate of a deceased *Talukdar C.* and obtained a decree for possession of the estate. In execution of his decree, *A.* obtained possession of the said property. *B.* objected that the under-proprietary rights in the property were held by *A.* and *B.* under previous Settlement Court decrees and that these rights were not affected by the decree for the proprietary rights obtained by *A.* On this ground, *B.* claimed restitution of the property. In the decree obtained by *A.* against *B.*, no reservation was made in respect of the under-proprietary rights in favour of *B.*; no question was in issue as to under-proprietary rights in the suit:

Held, (1) that the decree related to the proprietary rights of *C.*'s estate and did not affect the under-proprietary rights held by *A.* and *B.* jointly and independently of *C.*;

(2) that the under-proprietary rights were no part of the property of *C.*;

(3) that as *A.* and *B.* litigated as rival claimants to the estate of *C.*, under a title different from the one claimed as under-proprietors, section 11 of the Civil Procedure Code could have no application.

Srimut Raja Moottoo Vijava Raganadha Bodha Gooroo Samy Periya Odaya Taver v. *Katama Nachiar*, 11 M. I.A. 50, 10 W.R. 1(P.C.), explained and distinguished.

A party may join two or more alternative claims for relief based on inconsistent allegations but is not bound to join them in a claim unless such joinder is possible without confusion or embarassment and without impleading others as additional parties. The word "ought" in explanation IV, section 11, Civil Procedure Code, should be interpreted with refer-

SURAJ BIKRAM SINGH v. CHANDRABHAN SINGH.

ence to the array of parties to the previous litigation and the nature of the estate or claim then claimed or set up.

Daya Shankar v. *Ganga Sahai*, 12 O. C. 347; 4 Ind. Cas. 763, followed.

Under-proprietary rights are independent and distinct from proprietary rights. They do not form a part and parcel of *talukdari* rights. An under-proprietor has as complete an ownership over his land as that possessed by a superior proprietor, subject only to the payment, in certain cases, of rent or *malikana* to the superior proprietor. An under-proprietor can deal with his property as freely as a superior proprietor can deal with his, and an under-proprietor's interests are heritable and transferable. The main distinction between a proprietor and an under-proprietor, is that the former is not only the owner or part-owner of the *mahal*, but is also entitled to engage directly with Government for land revenue, while the latter, though owner of the land within the *mahal* is not entitled to engage directly with Government but pays his assessment to the proprietor of the *mahal*.

Appeal against an order of the Sub-Judge, Tahsil Biswan, dated 29th April 1911.

Mr. *Mohammad Waseem*, for the Appellant.

Babu *Rampat Ram*, for the Respondent.

ORDER.—This appeal arises out of an application for execution of a decree obtained by Babu Chandrabhan Singh against Babu Debi Bakhsh Signh, the father of the judgment-debtor-appellant, for the recovery of possession over certain villages, forming the estate of the late Rana Raghuraj Singh, known and described as the Rajpur estate, and some other property, on the 5th July 1907. The decree was confirmed by their Lordships of the Privy Council on the 15th July 1910.*

The decree-holder obtained possession over the said property in execution of his decree. The judgment-debtor then filed an objection, stating that the decree-holder had taken actual possession of *Mauzas* Ladlapur and Chak Randa, on the allegation that they formed part of the Rajpur estate, whereas the decree aforesaid awarded possession to the decree-holder of the proprietary rights of the late Rana Raghuraj Singh in the said villages but did not affect the under-proprietary rights, and that the under-proprietary rights in the said *mauzas* were held by the decree-holder and the judgment-debtor under decrees of the Settlement Courts, dated the 16th December 1870 and the 28th February 1871. He claimed restitution and mesne profits from the date of his dispossession to the date on which restitution may be effected.

The learned Subordinate Judge disallowed the objection on the ground that no reservation in respect of under-proprietary rights in favour of the judgment-debtor was given in the decree and that the claim to under-proprietary rights was, therefore, barred by Explanation IV of section 11 of the Code of Civil Procedure.

In appeal, it is contended, on behalf of the judgment-debtor-appellant, that there was no question in issue as to under-proprietary rights in the previous litigation, and that the judgment-debtor was, therefore, entitled to remain in possession of his under-proprietary rights irrespective of the provisions of that decree.

In order to ascertain the nature of the estate which formed the subject-matter of the litigation, which resulted in the above decree, it is necessary to refer to the plaint in the original case. Paragraphs 4 and 10 of it stated that Rana Raghuraj Singh had originally obtained the Rajpur estate, comprising the villages entered therein, including *Mauzas* Ladlapur and Chak Panda, as a special grant from the British Government and that, after the death of his widow, the plaintiff, as the eldest descendant and reversionary heir of the late Rana Raghuraj Singh, became entitled to his estate. The plaint further stated that, under orders passed by the Revenue Courts on the 19th October 1904 and the 18th February 1905, the defendant had, without any legal justification, taken possession of the entire property in suit. No reference was made in the plaint to the decrees of the Settlement Courts, dated the 16th December 1870 and the 28th February 1871, and it is obvious from the plaint that the suit was confined to the estate of the late Rana Raghuraj Singh and the right, title and interest he held therein and did not cover subordinate rights claimed to have been held by the parties to that litigation independently of the late Rana Raghuraj Singh.

According to the law in force in Oudh, under-proprietary rights are independent of

* See *Debi Bakshh Singh* v. *Chandrabhan Singh*, 7 Ind. Cas. 724; 14 C. W. N. 1010; 12 C. L. J. 303; 8 M. L. T. 273; 7 A. L. J. 1122; 12 Bom. L. R. 1015; 13 O. C. 316; 20 M. L. J. 917; 32 A. 599—*Ed.*

proprietary rights and an under-proprietor has as complete an ownership over his land as that possessed by a superior proprietor, subject only to the payment, in certain cases, of rent or *malikana* to the superior proprietor. An under-proprietor can deal with his property as freely as a superior proprietor can deal with his, and an under-proprietor's interests are heritable and transferable. The main distinction between a proprietor and an under-proprietor is that the former is not only the owner or part owner of the *mahal*, but is also entitled to engage directly with Government for the land revenue, while the latter is owner of the land within the *mahal*, and is not entitled to engage directly with Government but pays his assessment to the proprietor of the *mahal*. Section 3, clause (6), of the Oudh Rent Act, accordingly lays down that "proprietor" does not include an under-proprietor: and where there are two private rights of property, one superior and the other subordinate, in the same land, "proprietor" means the holder of the superior right only. Clauses 7 and 8 of the said section further lay down that "proprietary right" means a proprietor's right in land, and an "under-proprietor" means any person possessing a heritable and transferable right of property in land for which he is liable to pay rent.

At the time of the passing of the Oudh Estates Act (I of 1869), to which a reference was made in paragraph 4 of the plaint, it was distinctly declared that, while the *sanads* granted to the *talukdars* conferred on them and their heirs for ever the full proprietary rights in their respective estates, those *sanads* did not affect the rights of inferior proprietors, who held an interest in land intermediate between the *talukdars* and the *ryots*. Some of those under-proprietary rights related to the *sir* and *nankar* lands, granted in lieu of maintenance, while others were ascertained and declared at the time of the Sub-Settlement under Act XXVI of 1866. These under-proprietary rights, to all intent and purposes, were independent and distinct from the proprietary rights and if the decree related to the proprietary rights of the late Rana Raghuraj Singh in the Rajpur estate as is shown by the plaint, it would be unfair to hold that it affected the under-proprietary rights held by the parties to that case jointly and independently of the late Rana Raghuraj Singh.

The litigation which ended in the decree related to the property of the late Rana Raghuraj Singh, but the present dispute relates to under-proprietary rights, which form no part of the property of the late Rana Raghuraj Singh. A decree affecting the property of the late Rana Raghuraj Singh cannot, therefore, affect the under-proprietary rights, if any, held by the parties jointly and from before in a different capacity. As under-proprietary rights do not form a part and parcel of *talukdari* rights, but are independent of them and, as the parties then litigated as rival claimants to the late Rana Raghuraj Singh's estate under a title different from the one now claimed, section 11 of the Code of Civil Procedure can have no application. The decree for possession obtained by Babu Chandrabhan Singh related, in our opinion, only to the proprietary rights of the late Rana Raghuraj Singh, whose estate the decree-holder was then claiming and, if the parties to the present decree held under-proprietary rights in the two villages in question, independently of the rights possessed by the late Rana Raghuraj Singh, those rights will not be affected by this decree.

The learned Subordinate Judge relies on a *dictum* of their Lordships of the Privy Council in *Srimut Raja Moottoo Vijava Rajanadha Bodha Gooroo Sawmy Periya Odaya Taver* v. *Katama Natachiar*(1), in support of his contention that, if the judgment-debtor wanted to save the under-proprietary rights common to him and the plaintiff from the operation of that decree, it was necessary for him to set up those rights in his defence. That was, however, a case in which the defendant could have resisted the suit brought against him on the ground that the property claimed was undivided as also on the ground that he was entitled to it under a Will and if he did not set up either of those alternative titles, it was evidently improper that he should have been allowed to set up one of those

(1) 11 M. I. A. 50; 10 W. R. 1 (P. C.).

alternative title afterwards to disturb the decree.

In the present case, the parties are not litigating under the same title but claim a title independently of the late Rana Raghuraj Singh and, as observed in *Daya Shankar* v. *Ganga Sahai* (2), a party may join two or more alternative claims for relief based on inconsistent allegations but he is not bound to so join them in a claim unless such joinder is possible without confusion or embarassment and without impleading others as co-plaintiffs or adding as additional defendants. The word "ought" in Explanation IV of section 11 of the Code of Civil Procedure should be interpreted with reference to the array of the parties to the previous litigation and the nature of the estate or title then claimed or set up.

The learned Counsel for the decree-holder-respondent has cited certain authorities in support of the proposition that a Court executing a decree cannot go behind its terms, but the under-proprietary rights, forming the subject-matter of the present objection, did not form a part and parcel of the estate of the late Rana Raghuraj Singh, in respect of which the decree was obtained; and an enjoyment by the parties of the under-proprietary rights, if any, in the villages in question would not, therefore, be inconsistent with the enforcement of the decree for possession in regard to the Rajpur estate.

We, therefore, allow the appeal and, setting aside the decree and order of the Court below, remand the case for a trial on the merits. The costs of the appeal will abide the result.

Appeal allowed.

(2) 12 C. C. 347 at p. 379; 4 Ind. Cas. 763.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 356 OF 1911.

October 13, 1912.

Present:—Mr. Justice Abdur Rahim and Mr. Justice Sundara Aiyar.

P. MAMABI AND OTHERS—APPELLANTS

versus

ACHARATH PARAKAT MALIGA PURAZIL CHERIYE KUNHIFAPPI HAJI AND OTHERS—RESPONDENTS.

Pre-emption—Right of othidar *in possession to claim pre-emption—Limitation—Knowledge of sale to third party—Limitation Act (XV of 1877), Sch. II, Art. 120.*

The right of an *othidar* in possession of property to claim pre-emption consists in a right to elect, when there has been an attempt on the part of the owner of the property to sell it to a third person, whether he will buy it for the same price as that offered by the third person or not.

Article 120 of the Limitation Act provides the period of limitation for a suit by an *othidar* for pre-emption, and time commences to run against the *othidar* from the date he has knowledge of the sale and of its terms and not from the date of the sale.

Second appeal against the decree of the Subordinate Judge of North Malabar, in A. S. No. 346 of 1901, preferred against that of the District Munsif of Tellicherry, in O. S. No. 545 of 1908.

The Hon'ble Mr. *J. L. Rosario*, (Advocate-General), for the Appellants.

The Hon'ble Mr. *T. V. Seshagiri Aiyar*, for the Respondents.

JUDGMENT.—This appeal arises in a suit instituted by an *othidar* to enforce his right of pre-emption, and the question argued before us is, whether the lower Courts are right in dismissing the suit on the ground that it is barred by limitation without finding that six years had elapsed since the date the plaintiff came to know of the sale by auction. There is no finding when the plaintiff had knowledge of the auction sale. We are asked to consider whether it is enough for an *othidar*, who seeks to enforce his right of pre-emption, to show that he has come to Court before the expiry of six years from the date he came to know of the sale to a third person.

It is contended on behalf of the respondents that Article 120 of the Limitation Act does not imply that time runs from the date when the *othidar* came to know of the sale; in other words, the right to sue arises from the date of the sale or the contract to sell, independently of when he had knowledge of such sale or contract. We may mention that there is no dispute before us that Article 120

applies to this case, for it is clear that Article 10 does not apply because the *othidar* himself is in possession and there has been no registered instrument of sale within the meaning of that Article. Article 120 is in general terms. The third column of that Article lays down that the six years run from the date "when the right to sue accrues." It is argued by Mr. Seshagiri Iyer on behalf of the respondent that we should be adding words which are not in the Article if we were to hold that the right to sue arises on the plaintiff coming to know of the sale of which he complains. No doubt, generally speaking, Article 120 does not make it a condition that the plaintiff should have knowledge of the facts which give rise to the cause of action before time begins to run. But there can be no doubt, and this Mr. Seshagiri Iyer very fairly concedes, that, if the nature of the right imports, as a necessary condition, knowledge of certain facts, then the right to sue cannot be said to arise in such a case unless the plaintiff has the necessary knowledge. The right of pre-emption which an *othidar* has, depends entirely on the custom which prevails in the West Coast. The materials from which the usage is to be gathered, and the nature and extent of the right of pre-emption are to be found in certain decisions of this Court. The cases to which we have been referred are *Cheria Krishnan* v. *Vishnu Nambudri* (1), *Vasudevan* v. *Keshavan* (2), *Kanharankutti* v. *Uthotti* (3), *Ammotti Haji* v. *Kunhayen Kutti* (4), *Krishna Menon* v. *Kesavan* (5), *Ramasami Patter* v. *Chinnan Asari* (6), *Kurri Veerareddi* v. *Kurri Bapireddi* (7) and *Kadakamvalli Kammili Sankaran Moosad* v. *Mokkath Hussain Haji* (8). None of these authorities directly decide the present question. The case in *Ramasami Patter* v. *Chinnan Asari* (6) is hardly to the point, because there the right to purchase the property in preference to third persons was conferred by an express contract, and the Full Bench decision in *Kurri Veerareddi* v. *Kurri Bipareddi* (7) is cited only to show that a mere contract in favour of the defendant to sell the property to him is no answer to a suit in ejectment. Here the suit is by the *othidar* himself to establish his right. The other cases deal with different questions relating to the right of pre-emption possessed by an *othidar*. Apart from any particular form of language that has been used in some of these cases, we think it can be fairly inferred from the course of decisions in this Court that the right of the *othidar* consists in a right to elect, when there has been an attempt on the part of the owner of the property to sell it to a third person, whether he will buy it for the same price as that offered by the third person or not. It is obvious that such a right can only be exercised when the *othidar* knows, first of all, that the property is sold or attempted to be sold to another person and what the terms are on which it is so proposed to be sold. If he has no knowledge of either fact, he is not in a position to make any election. As it is put in some of the cases, an *othidar* is entitled to have an opportunity given to him to make the election to which his right of pre-emption entitles him. If this be the corret apprehension of the *othidar's* right, we think it follows that the right to sue does not arise until the *othidar* knows of the sale of the property and the terms of the sale. Both the lower Courts have dismissed the suit finding the question of limitation against the appellant, reckoning the period of limitation from the date of sale, and, as we have stated, it is not found when the *othidar* came to know of the execution-sale. That is a point which must be decided for, in our opinion, time would only run from the date of the *othidar's* knowledge of the sale. We, therefore, resolve to set aside the decrees of both the Courts and remand the case to the District Munsif for disposal according to law, having regard to the above remarks.

We may mention that, in some of the cases, *viz.*, *Cheria Krishnan* v. *Vishnu Numbudri* (1) *Vasudevan* v. *Keshevan* (2) and *Ammotti Haji* v. *Kunhayen Kutti* (4), language is used which might imply that the right of pre-emption consists in a right to have an offer made by the owner of the property to sell the property to the *othidar* for the same price for which he has contracted to sell to a third person. We might have some hesitation in saying that this is an accurate definition of

(1) 5 M. 198.
(2) 7 M. 309.
(3) 13 M. 490.
(4) 15 M. 480; 2 M. L. J. 231.
(5) 20 M. 305.
(6) 24 M. 449; 11 M. L. J. 132.
(7) 29 M. 336; 1 M. L. T. 153; 16 M. L. J. 395.
(8) 30 M. 388; 2 M. L. T. 354; 17 M. L. J. 329.

the nature of the right, because such a definition, if strictly pursued to its logical conclusion, might lead to difficulties and complications. We, however, refrain from pronouncing any definite opinion on that point as the learned Advocate-General says that, if it be found that his client had knowledge of the sale more than six years before the institution of the suit, he would not be prepared to contend on the facts of this case that the suit would still be within time because no offer was made to him by the owner of the property before the auction sale.

The costs of this appeal will abide the result.

Appeal allowed.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1162 OF 1911.

October 11, 1912.

Present:—Mr. Justice Sundara Aiyar and Mr. Justice Sadasiva Aiyar.

THUKKU GOUNDAN—APPELLANT

versus

KUPPAUDA GOUNDAN AND ANOTHER—RESPONDENTS.

Oaths Act (X of 1873), ss. 11, 12—Agreement to abide by oath of opponent—Imposition of fresh conditions at time of taking oath—Right of party agreeing to take oath to enforce original agreement.

Where one of the parties to a suit agrees to abide by the statement made on oath by his opponent, but at the time of taking the oath, the former imposes fresh conditions as to the form of taking the oath, the party agreeing to take the oath has a right to enforce the agreement originally entered into by the party offering to abide by the oath. If he takes the oath according to the original agreement, the evidence so given will be conclusive aganist the other party.

Umayammai v. *Muthiah Nadar*, 17 M. L. J. 99, explained.

Moyan v. *Pathu Kutti*, 31 M. 1; 3 M. L. T. 98; 17 M. L. J. 545, referred to.

Second appeal against the decree of the District Court of Comibatore, in A. S. No. 326 of 1910, presented against that of the District Munsif of Udamalpet, in O. S. No. 802 of 1909.

Mr. T. M. Krishnaswami Aiyar, for the Appellant.

Mr. *V. C. Seshachariar*, for the Respondent.

JUDGMENT.—The suit in this case was one in ejectment. The plaintiff obtained a decree in the District Munsif's Court. On appeal, that judgment was reversed. When the appeal came on for hearing on the 30th March 1911, the plaintiff offered to be bound by an oath to be taken by the defendant at a temple in a certain form. The defendant agreed to make the oath. The lower Appellate Court has found that the plaintiff attached further conditions as to the way in which the oath should be made when both the parties were at the temple for the purpose of the oath. The defendant refused to make the oath observing the further conditions imposed by the plaintiff. The oath was in consequence not made. The judgment of the Appellate Court dismissing the plaintiff's suit is not based on the ground that plaintiff resiled from his agreement to be bound by the defendant's oath or that he prevented him from making the oath, but is based on the merits of the suit. The plaintiff has appealed against that judgment.

The appellant and the Pleader who appeared for him before the Judge, have both put in affidavits stating that the appeal was never heard on the merits. This statement has not been denied on the defendant's side. We accept the statements contained in those affidavits and must, consequently, hold that the Judge was wrong in dismissing the suit on the ground on which he did without hearing arguments.

It is argued by Mr. Seshachari for the respondent that the plaintiff having varied the agreement with regard to the oath and thereby made it impossible for the defendant to take it, he must be taken to be bound by his offer in the same manner as if the defendant had made the oath in accordance with the original agreement. He is not able to cite any provision in the Oaths Act which would support such a contention. The Act provides (section 11) that "If an oath is taken . . . . the evidence so given shall, as against the person who offered to be bound as aforesaid, be conclusive proof of the matter stated" We find it difficult to see how an oath which is not given can furnish any evidence Section 12 provides that: "Where one of the parties offers to give evidence on oath but afterwards refuses to do so, he shall not be compelled to make it." But the Court is to make a record of the fact of his refusal. But there is no provision for a case where a party who offers to be bound by the oath made by another person afterwards refuses to be so bound. There is no reason why the

contract which he entered into should not be held to be binding on him. In such a case, if the oath be taken by the other party in accordance with the agreement originally entered into, it must furnish conclusive proof of the facts to which the evidence given on oath relates. The respondent's Vakil goes further and argues that a party who agrees to be bound by an oath of the opposite party but afterwards resiles from the agreement should be bound by his agreement as if his opponent had performed his part, although his opponent has not, as a matter of fact, performed his part of the contract by taking the oath. We cannot agree with this contention. Mr. Seshachari relies on a case reported in *Umayammai* v. *Muthiah Nadar* (1). The facts of that case do not appear in the report. The learned Judges observed: "If the party who has agreed to be bound prevents the oath being taken, the other party is, in our opinion, entitled to a decree, at any rate, in a case like the present where it is the plaintiff who agrees to be bound and the result of his refusal to allow the oath to be taken in the form agreed upon is that there is no evidence in support of his case." Possibly, the judgment was founded on the special circumstances of the case. If that be so, there is nothing more to be said about it. It does not appear from the judgment whether the plaintiff failed to give any evidence after he had repudiated his agreement to be bound by his opponent's oath. If so, he would, of course, have only himself to blame. The learned Judges do not say that the plaintiff was prevented by the Court from adducing any other evidence he had in support of his claim. We do not think it could have been intended to lay down that the Court would have any right to pervent him from giving evidence on the mere ground that he refused to be bound by the opponent's oath. If the learned Judges intended to lay down any such rule, then we are, with all respect, unable to follow it. In *Moyan* v. *Pathu Kutti* (2), the learned Chief Justice, who was a party to the judgment in *Umayammai* v. *Muthiah Nadar* (1), explains that case. He observes (see page 3): "In that case, the plaintiff's guardian agreed to be bound by the defendant's oath to be made in a certain form which required something to be done by the plaintiff's guardian. The defendants attended for the purpose of making the oath in the form agreed to, but the plaintiff's guardian declined to perform his part of the ceremony and the oath as agreed upon was not made for this reason." In *Moyan* v. *Pattu Kutti* (2), the plaintiff who had agreed to take the oath refused to do so afterwards. It was held that that did not deprive him of the right to give other evidence in support of his claim. We are of opinion that the defendant is entitled to enforce the plaintiff's agreement that he would abide by his oath to be taken according to the agreement originally entered into. We are unable to accept the argument that the defendant rescinded the contract by his refusal to take the oath in accordance with the fresh conditions insisted on by the plaintiffs. We reverse the decree of the lower Appellate Court. As Mr. Seshachari, the Vakil for the defendant, says that his client is still willing to take the oath, he must be given an opportunity to give evidence on oath in the manner originally agreed upon between the parties. If he does so, the evidence so given will be conclusive evidence of the facts to which the evidence relates. If he refuses to do so, then the District Court must proceed to hear the appeal on the merits. The decree of the Appellate Court is set aside. The appeal is remanded to the District Court for fresh disposal according to law. The costs of this second appeal will abide the result.

Appeal allowed.

(1) 17 M. L. J. 99.
(2) 31 M. 1; 3 M. L. T. 98; 17 M. L. J. 545.

ALLAHABAD HIGH COURT.

LETTERS PATENT APPEAL No. 128 OF 1911.
June 21, 1912.

Present:—Sir Henry Richards, KT., Chief Justice, and Mr. Justice Banerji.

CHHATKU RAI AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

BALDEO SHUKUL AND OTHERS—DEFENDANTS—RESPONDENTS.

Mortgage—Redemption—Mortgage for term of years—

CHHAKTU RAI v. BALDEO SHUKUL.

Failure of mortgagee to perform essential part of contract—Right of mortgagor to redeem before expiry of period.

Where property subject to prior encumbrances is mortgaged with possession for a term of years, and the mortgagee covenants to pay the prior encumbrancers out of the mortgage-money but does not do so, the mortgagor has, on equitable grounds, the right to redeem the mortgage before the expiration of the period for which the property has been mortgaged, as the essential part of the contract, so far as the mortgagors are concerned, has not been performed by the mortgagee.

Appeal under section 10 of the Letters Patent, against the following decision of Mr. Justice Piggott:—

"The point really in issue in this appeal admits of being stated without going into all the somewhat complicated, but not strictly relevant, details. The proprietor of a one anna share in certain *zemindari* property executed a mortgage by conditional sale, the terms of which were as follows:—

"The mortgagee paid Rs. 50-15-0 in cash to the mortgagor, and covenanted to pay Rs. 549 to certain other creditors of the latter. The mortgagor covenanted to give the mortgagee possession for ten years and to redeem at the end of that time; there was the usual stipulation that, failing redemption at the time specified, the instrument should operate as a deed of sale. The plaintiffs have acquired the equity of redemption in this one-anna share. They say the holder of the mortgage above referred to has not paid off the creditors in accordance with the stipulations in the deed; they accordingly deposit in Court Rs. 50-15-0 for payment to the mortgagee and sue for possession. The Courts below have held that the suit is premature, the period of ten years stipulated in the mortgage-deed not having expired. The plaintiffs do not contest the general principle that on a deed like the one in question, the mortgagee is entitled to claim the benefit of the stipulation ensuring him ten years' possession; they plead that it is inequitable that the mortgagee should enforce this stipulation when he has not performed his part of the bargain. The principles governing the question in issue are to be found in sections 39, 55 and 73 of the Indian Contract Act (IX of 1872); a consideration of these sections shows that the Courts below were right that the mortgagor (or the plaintiffs as representatives of the mortgagor) cannot claim relief against the contract allowing ten years' possession to the mortgagee, and that the mortgagor's remedy for the loss he is alleged to have suffered is by way of a suit for damages. The contract embodied in the instrument of mortgage cannot be set aside unless the plaintiffs can bring the case within the scope of section 39 or of section 55 of Act IX of 1872. The latter section cannot apply because no time was fixed within which the mortgagee was to pay off the creditors named in the deed. Nor can it be said that he has either "refused to perform or disabled himself from performing his promise in its entirety" within the meaning of section 39. The plaintiff's case is at most that he has neglected to perform it. So far from refusing to do so, his plea on the facts (a plea which the decision of the Courts below on the issue of law has prevented them from investigating) was that he had performed it. It cannot be said that the mortgagee has disabled himself from performing his part of the contract, or that it has become impossible of performance within the meaning of section 55 of Act IX of 1872. The case is simply one for a suit for damages. This appeal, therefore, fails and is hereby dismissed with costs."

The plaintiffs appealed under section 10 of the Letters Patent. On the appeal coming up for hearing before Richards, C. J., and Banerji, J., a finding on the issues as to whether the defendant, second party, had or had not paid the amount which he had undertaken to pay, was called for. The finding on this issue was in the negative. The appeal was then re-argued.

Mr. *Peary Lal Banerji*, for the Appellants.

Mr. *Jogendra Nath Mukerji*, for the Respondents

JUDGMENT.—The vendors of the plaintiffs in this appeal made a usufructuary mortgage in favour of the defendants of the second party. The consideration for the mortgage was Rs. 599-15-0. All save Rs. 50-15-0 were left with the mortgagees for payment of creditors of the mortgagors. It has been found, as the result of certain issues which we referred to the Court below, that the creditors were prior incumbrancers of the mortgaged

property, and that the mortgagee never discharged the incumbrances. The usufructuary mortgage was by way of conditional sale and provided that the property should not be redeemed for ten years. The present suit is in form a suit to redeem the property upon payment of Rs. 50-15-0, which was the full amount of the consideration given by the mortgagees. The defendants, second party, contend that the plaintiffs cannot redeem the property or get possession of it until the expiration of the term of ten years, and this notwithstanding that the prior incumbrances, to meet which the greater part of the consideration was left with them, have never been discharged by them. Both the lower Courts dismissed the plaintiff's suit. On second appeal to this Court, the decision of the Courts below was affirmed.

The plaintiffs come here in appeal under the Letters Patent and contend that inasmuch as the defendants, second party, never kept their part of the bargain by discharging the incumbrances which they agreed to discharge, they ought not to be delayed in redeeming or getting back possession of the property until the end of ten years. It seems to us that if, under the circumstances of the present case, the defendants, second party, are allowed to remain in possession of the property over the full period of ten years, taking the profits and allowing the interest on the prior incumbrances to accumulate, the plaintiffs will be without any proper or effectual remedy. It is doubtful whether a suit for damages could possibly be brought at the present time, and at the expiration of the period of ten years, it will only be an effectual remedy if the defendants, second party, or their representatives are sufficiently good marks for damages. We think that on equitable grounds, the defendants having not performed what we deem to be a most essential part of the contract so far as they are concerned, the plaintiffs ought to be allowed to redeem the property before the expiration of the period of ten years.

We accordingly allow the appeal, set aside the decree of this Court, and also the decrees of the Courts below and decree the plaintiff's claim for redemption on payment of Rs. 50-15-0. The appellants will have their costs in all Courts. We allow one month for payment of the Rs. 50-15-0 mentioned above. The decree will be drawn up in the usual form.

Appeal decreed.

MADRAS HIGH COURT.

CIVIL SUIT No. 101 OF 1910.

July 23, 1912.

Present:—Mr. Justice Bakewell.

THE OFFICIAL ASSIGNEE OF MADRAS —PLAINTIFF

versus

T. C. RAMASAMY IYENGAR AND OTHERS —DEFENDANTS.

Letters Patent (Madras), cls. 11, 12—*Transfer of Property Act (IV of* 1882), *s.* 53—*Suit to declare a mortgage of property outside Madras fraudulent—Suit for land—Suit to avoid incumbrance—Jurisdiction—High Court—Original jurisdiction—Extent considered.*

A suit to avoid an incumbrance on land is a suit for land within the meaning of the Letters Patent.

Nalum Lakshmikantham v. *Krishnaswamy Mudeliar*, 27 M. 157 and *Sundarabai Sahiba* v. *Tirumal Rao Sahib*, 33 M. 131; 20 M. L. J. 103; 6 M. L. T. 263; 3 Ind. Cas. 930, relied upon.

Where the Official Assignee sues for a declaration that a mortgage of properties situate in the North Arcot District, executed by an insolvent in favour of another person, is fraudulent and not binding on him, the suit is not within the jurisdiction of the original side of the Madras High Court, as the landed property is situate outside its jurisdiction.

NulamLakshmikantham v. *Krishnaswamy Mudaliar*, 27 M. 157, followed.

The High Court, in the exercise of its original jurisdiction, is merely a Local Court, and the general principle of construction applicable to an enactment conferring jurisdiction is that it must clearly appear that a particular case falls within the provisions of the enactment and that the jurisdiction should not be extended by implication.

Read v. *Brown*, 22 Q. B. D. 128; 58 L. J. Q. B. 120; 60 L. T. 250; 37 W. R. 131; *Simpson* v. *Blues*, L. R. 7 C. P. 290; *Payne* v. *Hogg*, (1900) 2 Q. B. 43; 69 L. J. Q. B. 579; 82 L. T. 584; 48 W. R. 417; 16 T. L. R. 298, referred to.

Messrs. *V. Masilamani Pillay* and *P. Durasawmy Iyengar*, for the Plaintiff.

Messrs. *V. V. Srinivasa Iyengar* and *C. P. Ramasawmy Iyer*, for the 2nd Defendant.

JUDGMENT.—In November 1908, the 1st defendant presented his petition to the Insolvent Court, and in his schedule stated that certain immoveable properties situate in the North Arcot District had been mortgaged to the 2nd defendant by a deed of simple mortgage, dated 23rd August 1906. The Official Assignee, the plaintiff in this suit, alleges that this deed is fraudulent and that

he is entitled to avoid it, and, in his plaint, prays that the deed may be declared fraudulent and invalid and not binding on him and that the 2nd defendant may be decreed to deliver up the same duly cancelled.

The suit appears to be based upon section 53 of the Transfer of Property Act, 1882, which enables a creditor to avoid a transfer of immoveable property made with intent to defeat or delay the creditors of the transferor; such a transfer is not void but is voidable at the option of certain persons; that is to say, assuming that the plaintiff proves his case as regards all the world except the creditors of the 1st defendant and also as against them until they choose to exercise their option, the 2nd defendant possesses a mortgage interest in the land in question.

The plaintiff now seeks to exercise that option to avoid the 2nd defendant's mortgage and thus to clear the land which is now vested in the plaintiff of an existing incumbrance. The 6th issue raises the question of the jurisdiction of this Court to entertain this suit and by consent has been tried as a preliminary issue. Clause 11 of the Letters Patent of this Court declares that "it shall have and exercise ordinary original civil jurisdiction within such local limits as may.....be declared and prescribed" and clause 12 declares that "in the case of suits for land or other immoveable property, such land or property shall be situate within the local limits."

The question for determination is, therefore, whether a suit to avoid an incumbrance upon land is a suit for land within the meaning of the Letters Patent.

It appears from the clauses of the Letters Patent, which I have cited, that the High Court, in the exercise of its original civil jurisdiction, is merely a local Court and the general principle of construction applicable to an enactment, conferring such a jurisdiction, is that it must clearly appear that a particular case falls within the provisions of the enactment, and that the jurisdiction should not be extended by implication. [See *Read* v. *Brown* (1); *Simpson* v. *Blues* (2); *Payne* v. *Hogg* (3)]. The object of the Legislature is in fact to distribute the work of administering the law among certain tribunals which should not encroach the one upon the other. For this reason, it appears to me that the well known cases in the English Court which deal with the question to what extent a Court of Equity will, as against a person subject to its process, enforce rights relating to property situate outside the Kingdom, have little application to the present question.

The general intention of the Legislature, as declared in clause 12 of the Letters Patent and section 16 of the Code of Civil Procedure, 1908, is that suits to establish or enforce any right to or interest in land should be brought in the Court within whose local jurisdiction, the land is situate [see *Nulam Lakshmikantham* v. *Krishnaswamy Mudaliar*(4)] and I think the burden is upon the plaintiff to show that the present suit is not a suit for land within the meaning of the Letters Patent.

A suit to get rid of an incumbrance on land appears to me a suit for land equally with a suit to enforce or obtain a charge upon land; [see *Nulam Lakshmikantham* v. *Krishnaswamy Mudaliar* (4) and *Sundara Bai Sahiba* v. *Tirumal Rao Sahib* (5)]; since, in each case, the plaintiff claims an interest in the land and asks the Court to enforce his right; in the first case, he asks for the entire interest in the land and in other cases for a partial interest only, and the former is, therefore, more clearly a suit for the land.

For these reasons, I am of opinion that the 6th issue should be answered in the negative, and I dismiss the suit with costs of the 2nd defendant.

Suit dismissed.

(1) (1888) 22 Q. B. D. 128; 58 L. J. Q. B. 120; 60 L. T. 250; 37 W. R. 131.
(2) (1872) L. R. 7 C. P. 290.
(3) (1900) 2 Q.B. 43; 69 L. J. Q.B. 579; 82 L.T. 584; 48 W. R. 417; 16 T. L. R. 298.

(4) 27 M. 157.
(5) 33 M. 131; 20 M. L. J. 103; 6 M. L. T. 263; 3 Ind. Cas. 930.

CALCUTTA HIGH COURT.
CIVIL REFERENCE No. 5 OF 1912.
September 3, 1912.

Present:—Sir Ashutosh Mookerjee, Kt., Judge, and Mr. Justice Beachcroft.

Diwan BALMUKUND SAHAI—PLAINTIFF

versus

TARINI SINGH AND OTHERS—DEFENDANTS.

Limitation—Rent suit—Institution of suit after in-

BALMUKUND SAHAI v. TARINI SINGH.

terest of landlord had ceased—Relation when right to sue accrued—Bengal Tenancy Act (VIII of 1885), Sch. III, Art. 2 (b)—Limitation Act (IX of 1908), Sch. I, Art. 110.

The question whether a suit for the recovery of arrears of rent is a suit brought by a landlord within the meaning of Article 2 (*b*), Schedule III of the Bengal Tenancy Act, ought to be determined with reference to the relation in which the parties stood when the right to sue accrued, that is, when the arrears of rent claimed fell due.

Chhatarapat Singh v. *Gopichand Bothra*, 26 C. 750; 4 C. W. N. 446; *Srimanta Roy* v. *Mahadeo Mahata*, 8 C. W. N. 531; 31 C. 550 and *Maharaj Bahadur Singh* v. *Forbes*, 35 C. 737; 7 C. L. J. 652, referred to.

Therefore, the provisions of that Article apply to a suit for the recovery of rent of a holding by one whose interest as landlord has ceased to exist before the institution of the suit, provided that the arrears claimed accrued due to him when he was the landlord of the defendant.

Reference by the Munsif, Jamui, dated 26th March 1912 in Rent Suits Nos. 508 and 1083 of 1911.

ORDER OF REFERENCE.

Plaintiff, in these two analogous suits, was the the *thikadar* of 8-anna share of *Mauzah* Katowna up to the year 1316, when the period of his lease expired and the *Mauzah* came to the *sir* possession of the proprietor. Within this *mauzah*, defendant in Suit No. 503 holds a *jote* at Rs. 36-14-10 *dam* besides cesses, and defendant in Suit No. 1083 holds a *jote* at Rs. 22-7-6 *dam* besides cesses. Plaintiff, on the allegation of having had separate collection, sues in these two suits for recovery of his half share of the rents and cesses of the two aforesaid holdings for the years 1315 and 1316. The defendants in their written statements raised certain pleas but none of them was pressed. The only question that was urged on behalf of the defendants in both these suits is, that the plaintiff not having been the landlord of the defendants at the time the suits were instituted, the suits cannot be considered as suits brought by a landlord against his tenants, and, plaintiff cannot, therefore, claim the benefit of the longer period of limitation provided by Article 2 (*b*), Schedule III of the Bengal Tenancy Act, but the ordinary period of limitation provided by Article 110, Schedule I of the general law of limitation ought to govern these suits. Accordingly, it is contended that the claim for the rents of the first three quarters of 1315, which fell due more than three years before the institution of the suits, is time-barred.

There does not appear to be any authoritative decision directly bearing on this point and the question does not seem to me to be altogether free from doubt. The amount claimed in both these suits is below Rs. 50; under section 153 (*b*), Bengal Tenancy Act, there will, therefore, be no appeal against any decree that may be passed by me in either of these two suits. According to rule 1, Order XLVI of the Civil Procedure Code, I, therefore, consider it proper at the request of the plaintiff to refer the following question for the decision of the Hon'ble High Court:

Whether in a suit for recovery of rent of a *raiyati* holding by one whose interest as landlord of the *mauzah* has ceased to exist long before the institution of the suit, the period of limitation provided in Article 2 (*b*), Schedule III, Bengal Tenancy Act is applicable or the period of limitation provided by Article 110 of the general law of limitation should apply?

My own opinion is, that the special limitation provided by the Bengal Tenancy Act cannot apply to a suit by an ex-landlord, but his suit should be governed by the ordinary limitation of three years as provided in Article 110 of the Limitation Act.

Article 2 (*b*), Schedule III of the Bengal Tenancy Act, refers to a suit for the recovery of an arrear of rent in a suit brought by (*i*) a sole landlord, (*ii*) entire body of landlords or (*iii*) one or more co-sharer landlords. Evidently, the suit must be between parties, who, at the time of the institution of the suit, stand in the relation of landlord and tenant, and does not include a suit by one who is not the landlord at the time of the institution of the suit but might have been so at some previous time. The principle of the decision in *Mohendra Nath Kalamoree* v. *Koilash Chandra Dogra* (1), which was a suit for recovery of rent by an assignee, seems to me to be applicable with all force to a suit for recovery of rent by an ex-landlord. I was referred to the case of *Srimanta Roy* v. *Mahadeo Mahata* (2), in which it was held that a suit by a *ticadar*, after the expiration of his lease, against a tenant for the recovery of arrears of rent, which had fallen due during the pendency of his lease, can be brought

(1) 4 C. W. N. 605.
(2) 8 C. W. N. 531; 31 C. 550.

under the provisions of the Bengal Tenancy Act. I understand this decision to mean that such a suit is a suit for rent, in the same way as in the Full Bench case of *Srish Chunder Bose* v. *Nasim Kazi* (3), it was held that a suit brought by an assignee of a landlord against a tenant is a suit for rent. This Full Bench ruling was considered in the case of *Mohendra Nath Kalamoree* v. *Koilash Chandra Dogra* (1) and, in spite of it, it was held that Article 2 (*b*), Schedule III of the Bengal Tenancy Act, does not apply to a suit by an assignee. The ruling in *Sumanta Roy* v. *Mahadeo Mahata* (2) does not, in the same way, decide that the limitation provided in the Bengal Tenancy Act applies to a suit by an ex-landlord. In the case of *Hem Chunder Bhunjo* v. *Mon Mohini Dassi* (4), it was held that the word "landlord" in section 66 of the Bengal Tenancy Act cannot mean an ex-landlord. The same meaning ought to be attached to the same word throughout the Act and the Schedule attached to an Act is a part of the Act. The word "landlord" used in Schedule III of the Bengal Tenancy Act cannot, therefore, mean an ex-landlord. For these reasons, I am inclined to hold that an ex-landlord is not entitled to the period of limitation provided by Article 2 (*b*), Schedule III of the Bengal Tenancy Act, but his suit should be governed by Article 110 of the general Limitation Act. As the point, however, is not absolutely free from difficulty, I refer the question for decision of the Hon'ble High Court.

If the Hon'ble High Court decide the question in favour of the plaintiff, both these suits will be decreed in full with costs, but if it be decided against the plaintiff, he will get in each suit a partial decree for rent and cesses of one quarter of 1315 and whole of 1316 together with damages at 25 per cent., and proportionate cost. Interest at 6 per cent. per annum will run from the date of decree."

Babu *Kulwant Sahay*, for the Plaintiff.

JUDGMENT.—This is a Reference under rule 1 of Order XLVI of the Civil Procedure Code of 1908. The question upon which our opinion has been sought is formulated in these terms: "Whether in a suit for recovery of rent of a *raiyati* holding by one whose interest as landlord has ceased to exist before the institution of the suit, the period of limitation provided in Article 2 (*b*), Schedule III of the Bengal Tenancy Act, is applicable or the period of limitation provided by Article 110 of the Indian Limitation Act of 1908 should apply."

The plaintiff was an intermediate tenure-holder for a term, and the period of his lease expired on the 29th September 1909. On the 11th September 1911, he commenced this suit for recovery of arrears of rent which had accrued due to him before the expiry of his lease. The tenant contended that as the plaintiff ceased to be his landlord before the date when the suit was instituted, the provision of Article 2 of Schedule III of the Bengal Tenancy Act could not apply. That Article is in these terms: "A suit for recovery of arrears of rent brought by a sole landlord or the entire body of landlords or one or more co-sharer landlords, in all cases where the arrear fell due before a deposit was made under section 61, must be instituted within three years from the last day of the agricultural year in which the arrear fell due." The contention of the tenant is, that to determine whether this is a suit for the recovery of arrears of rent brought by a sole landlord, the Court ought to have regard to the relationship of the parties at the point of time when the suit is commenced. In our opinion, this is not a reasonable construction of Article 2. Whether a suit for the recovery of arrears of rent has been brought by a landlord within the meaning of that Article, ought to be determined with reference to the relation in which the parties stood when the right to sue accrued, that is, when the arrears of rent claimed fell due. If this view is adopted, there is no question that Article 2 is applicabla. The view we take is supported by the principle which underlies the decisions of this Court in the cases of *Chhataraput Singh* v. *Gopichand Bothra* (5), *Srimanta Roy* v. *Mahadeo Mahata* (2) and *Maharaj Bahadur Singh* v. *Forbes* (6). In the first of these cases, the principle was laid down that a decree for rent, obtained by the landlord after he has parted with his interest, is a rent decree and is enforceable as such. The same principle

(3) 4 C. W. N. 357; 27 C. 827.
(4) 3 C. W. N. 604.
(5) 26 C. 750; 4 C. W. N. 446.
(6) 35 C. 737; 7 C. L. J. 652.

was recognised in *Maharaj Bahadur Singh* v. *Forbes* (6), and it was further laid down in *Srimanta Roy* v. *Mahadeo Mahata* (2) that a suit framed for the recovery of such arrears is a suit under the Bengal Tenancy Act. It is worthy of note that an attempt made to support the contrary view was not successful in the case of *Khetra Pal Singh* v. *Kritartha Moyi Dasi* (7), which overruled the decision in *Hem Chander Bhunjo* v. *Mon Mohini Dassi* (4). In the case last mentioned, it had been ruled that a decree for arrears of rent obtained by a landlord at a time when he was the landlord of the defendant, lost its character as a rent-decree, if, before execution was taken out, the plaintiff had ceased to be the landlord. This view, however, can no longer be maintained in view of the decision of the Full Bench in *Khetra Pal Singh* v. *Kritartha Moyi Dasi* (7). The Full Bench affirmed the doctrine that the character of the decree as a rent-decree is not affected by subsequent events. Mr. Justice O'Kinealy appears to have held, in the case of *Hem Chander Bhunjo* v. *Mon Mohini Dassi* (4), that as a decree for ejectment obtained by the landlord cannot be executed against the tenant under section 66 of the Bengal Tenancy Act after he had ceased to be the landlord, a decree for rent cannot be enforced by a sale of the holding after the decree-holder has ceased to be the landlord. It is fairly clear, however, that there is no analogy between the two classes of cases. The landlord who has obtained a decree for ejectment is entitled to execute the decree and obtain possession of the holding, only so long as he is the landlord ; after the tenant has been ejected, he is entitled to take possession of the land, only because it is included within his property ; when he ceases to be the landlord, he is obviously not entitled to execute the decree for ejectment. The same considerations, however, do not apply to an application for execution of a decree for rent by the sale of the defaulting holding. Reference may in this connection be made to the case of *Sheikh Munsar* v. *Loknath Roy* (8), where it was ruled, upon the authority of the decision in *Shama Soonderee Dossi* v. *Brindabun Chunder* (9), that a suit by an assignee of rent is in essence a suit for rent; the same view was subsequently affirmed by a Full Bench of this Court in the case of *Sris Chunder Bose* v. *Nasim Kazi* (3). In *Mohendra Nath Kalamoree* v. *Koilash Chandra Dogra* (1), it appears, however, to have been held that although a suit by an assignee of rent is a suit for rent for the purposes of the determination of the jurisdiction of the Court in which the claim can be enforced, it cannot be treated as a suit for rent for the purposes of the determination of the question of limitation. The case mentioned is not on all fours with that now before us, and when the question arises again, it may require re-consideration. At any rate, we are not prepared to extend the doctrine, which underlies the decision in *Mohendra Nath Kalamoree* v. *Koliash Chandra Dogra* (1), to cases where, as here, the plaintiff, upon the expiry of the term of his own lease, seeks to recover arrears which had accrued due to him when he was the landlord of the defendant. It is further worthy of note that the decision in the case of *Mohendra Nath Kalamoree* v. *Koilash Chandra Dogra* (1) was not followed in the case of *Shashi Kumar Mirbahar* v. *Seeta Nath Banerjee* (10). We are, therefore, of opinion, upon a construction of Article 2 of Schedule III of the Bengal Tenancy Act, that the provisions of that Article apply to a suit for recovery of rent of a holding by one whose interest as landlord had ceased to exist before the institution of the suit, provided that the arrears claimed accrued due to him when he was the landlord of the defendant. There will be no order for costs, as the defendant has not entered appearance in this Court.

The same order will govern the second suit mentioned in the order of reference.

The records will be sent down as soon as possible with this expression of our opinion.

Reference answered for plaintiff.

(7) 33 C. 566; 10 C. W. N. 547 (F. B.); 3 C. L. J. 470.

(8) 4 C. W. N. 10.

(9) (1862) Marshall 199; 1 Hay 574.

(10) 35 C. 744; 7 C. L. J. 425.

MADHAVAIYA CHETTY v. DAMODARAM CHETTY.

MADRAS HIGH COURT.

CIVIL SUIT No. 208 OF 1910.

July 26, 1912.

Present:—Mr. Justice Backewell.

B. MADHAVAIYA CHETTY—PLAINTIFF

versus

B. DAMODARAM CHETTY AND OTHERS—DEFENDANTS.

Hindu Law—Joint family—Nucleus of family property—Acquisition by joint labour—Joint family property.

If the members of a Hindu family choose to live together, work jointly together, throw all their earnings into a common stock and have one food, in such a case the presumption is that they must have intended their property to be joint family property and the ordinary consequences attach to it and the right of all the members to partition necessarily follows. It is not necessary in such a case that there should be a nucleus of joint family property.

Sudarsanam Maistri v. *Narasimhulu Maistri*, 25 M. 149 at p. 155; 11 M. L. J. 335; *Gopalsami Chetti* v. *Arunachellam Chetti*, 27 M. 32 at p. 35; *Muniswami Chetty* v. *Maruthammal*, 34 M. 211; (1910) M. W. N. 233; 8 M. L. T. 124; 20 M. L. J. 687; 7 Ind. Cas. 176, *Karsandas Dharamsey* v. *Gangabai*, 32 B. 479, 10 Bom. L. R. 184, followed.

Where the plaintiff's father carried on business jointly with his uncles and cousins without the aid of any patrimony and they lived and acquired properties together and at a partition between them, the plaintiff's father got considerable properties for his share:

Held, **the properties were joint family properties in which the plaintiff, as the son of his father, acquired an interest and the plaintiff's father had no right to dispose of the same by Will.**

FACTS.—B. Lakshmiah and B. Munuswami were brothers who carried on business in piece goods as hawkers. B. Lakshmiah died leaving Madurai and Ramaswami his sons. B. Munuswami and B. Madurai entered into a partnership with C. Munuswami in a piece-goods business and sometimes later Ramaswami, who then arrived at an age that he could take part in the business, joined the firm. The business was carried on for about 12 years under the name of C. Munuswami Chetti & Co. and was a flourishing concern. In 1897, Ramaswami having died in the meantime, B. Munuswami and B. Madurai severed their connection with C. Munuswami Chetti and Co., receiving at the time of their leaving the firm a large sum for their share of profits. B. Munusawmi and B. Madurai and B. Narayanaswami, son of B. Munuswami started a business in piece-goods under the name of B. Munuswami Chetty and Co. and the capital for this business was the sum of money above referred to. The other members of this family were either too young to take part in the business or were still attending school. The new firm carried on business from 1897 to 1903 and earned large profits. During the whole of the period above referred to, B. Munuswami and other members of the family lived together and separate accounts were not maintained of their expenditure. Nor did they divide profits. In 1903, disputes having arisen among the members of the family, the properties of the total value of Rs. 1,60,259-15-8 were divided in three shares between B. Munuswami, B. Madurai, and B. Narayanaswami. B. Madurai, subsequent to this division, carried on a piece-goods business in partnership with certain others and at the date of his death was possessed of immoveable property worth about a lac of rupees. He made a Will disposing of this property.

The suit was by one of his sons for the setting aside of the Will on the ground that his father had no power to dispose of the properties as they were joint family properties.

Messrs. *Venkaitasubba Rao* and *Radhakrishnayya*, for the Plaintiff.

Mr. *C. P. Ramaswami Aiyar*, for the 1st Defendant.

Mr. *V. Masilamani Pillai* and *A. Suryanarayana*, for the 2nd and 3rd Defendants.

Mr. *Venkatasubba Rao*, for the Plaintiff:—The property, which the plaintiff's father obtained at the partition, is joint family property. The evidence shows that there was enough nucleus on which the members built their subsequent fortune. For the purposes of this case, the existence of a nucleus is immaterial. The members here have lived together and acquired properties in common. To constitute joint family property, a nucleus is not necessary. The nature of joint family property is well discussed by Beaman, J., in *Karsandas Dharamsey* v. *Gangabai* (1). He draws the distinction between ancestral property and joint family property and shows that the property available for division among members of a joint family need not necessarily be ancestral. If members of a joint family acquire property together jointly or by joint labour, in the absence of an indication to the contrary, the presumption is that it is joint family property. *Sudarsanam Maistri* v.

(1) 32 B. 479; 10 Bom. L. R. 184.

Narasimhulu Maistri (2), *Gopalsami Chetti* v. *Arunachellam Chetti* (3), *Haridas Lalji* v. *Narotam Raghanji* (4). The onus is heavily on those who say that it is not joint family property. They must plead and prove any special contract which impressed on the property the character of partnership property as distinguished from joint family property. *Rampershad Tewarry* v. *Sheo Churn Doss Tewarry* (5), *Muniswami Chetty* v. *Maruthammal* (6), per Wallis J.

The moment it becomes joint family property, sons acquire a right by birth and the right to interdict any disposition of the same. And there can be no joint family property in which the sons do not get an interest and in respect of which the principle of survivorship does not operate: *Karuppayi Nachiyar* v. *Sankarayanan Chetty* (7). If proof of intention to treat the property as joint is necessary in this case, Exhibit B, the partition deed, is conclusive and every phrase used therein indicates unmistakeably what the intention of the parties was. In *Chellayamal* v. *Muttialamal* (8), their Lordships inferred a similar intention from a consideration of the documents similar to Exhibit B. The fact that Narayanasami took an equal share does not show that Exhibit B. is not a deed of partition. Evidence shows that to avoid litigation and purchase peace, the other parties agreed to this arrangement The property in the hands of Madurai Chetty, the plaintiff's father, having become impressed with the character of joint family property and the necessary incidents attaching thereto, he had no right to make a Will of that property. *Lildas Narandas* v. *Motibai* (9). Mayne, who, in para. 477 of the old edition of his book, seemed to hold a contrary view, relying on *Chatturbhooj Meghji* v. *Dharamsi Naranji* (10), in the latest edition indicates that Bashyam Iyangar, J., has taken a different view in *Sudarsanam Maistri* v. *Narasimhulu Maistri* (2). Besides on the facts of this case, *Chatturbhooj Meghji* v. *Dharamsi Naranji* (10) is not against me.

Mr. *V. Masilamany Pillay*, for Defendents Nos. 2 and 3.—I rely on Mayne's Hindu Law, 7th Edition, para. 477, and *Chatturbhooj Meghji* v. *Dharamsi Meghji* (10). Even Bashyam Iyengar, J., says the question is only one of intention. The evidence shows that the parties intended to treat the property as partnership property. Exhibit B supports me. Narayanasami, under Exhibit B, takes a share equal to that of his father Munuswami and his cousin Madurai, whereas at a family partition property should have been divided equally between Munuswami as representing one branch and Madurai as representing the other. The conduct of Madurai also shows that he regarded the property to be self-acquired property. The fact that he made a Will is indicative of it.

JUDGMENT.—The question in this case is whether the property disposed of by the Will of one B. Madurai Chetty, is property over which he had a power of testamentary disposition or whether it was joint family property. The testator had been engaged in a business in piece-goods in which his immediate family ancestors had been engaged for some years. His father, Lakshmiah Chetty, and his uncle, B. Munuswami Chetty, carried on business together as hawkers of piece-goods for some time and after Lakshmiah's death in 1876 or in 1877, B. Munuswami Chetty and the testator carried on the same hawker business. In 1885, the testator, B. Munuswami Chetty, and the 1st witness for the plaintiff, C. Munuswami Chetty, opened a piece-goods business with one Ramaswami Chetty, the testator's brother, a child about 9 or 10 years old. The 1st witness for the plaintiff stated that the testator and his relations brought in a capital of about Rs. 2,000 for the business but no accounts have been produced. That business was carried on for 12 years and in 1897, the 1st witness for the plaintiff separated from the business and the testator, B. Munuswami Chetty and one Narayanaswami Chetty, the 1st witness for the defence, who was the son of B. Munuswami Chetty, carried on the peice-goods business up to the year 1903. In that year, these three persons executed a *Muchilika* appointing arbitrators for the

(2) 25 M. 149 at p. 155; 11 M. L. J. 335.
(3) 27 M. 32 at p. 35.
(4) 14 Ind. Cas. 769; 14 Bom. L. R. 237.
(5) 10 M. I. A. 490 at p. 506.
(6) 34 M. 211; (1910) M. W. N. 233; 8 M. L. T. 124; 20 M. L. J. 687; 7 Ind. Cas. 176.
(7) 27 M. 300 at p. 312; 13 M. L. J. 398.
(8) 15 W. R. 1 (P. C.).
(9) 10 Bom. L. R. 175.
(10) 9 B. 438.

partition of their properties which was carried out by means of a partition-deed, Exhibit D, dated 4th July 1903.

With regard to the allegation of the 1st witness for the plaintiff that a capital of Rs. 2,000 was brought into the business in 1885, no accounts have been produced and his evidence is highly partisan and I am not inclined to put much faith in that statement. Obviously, the previous business that had been carried on by Lakshmiah and his brother was a small hawker business and it is quite possible that it was carried on with borrowed capital. With regard to any capital that might have been required for the business which was started in 1885, no accounts have been produced and the statement of the first witness for the plaintiffs that the testator and B. Munuswami Chetty carried large capital of Rs. 60,000 into the new business must also be regarded with considerable doubt. I think it, therefore, safer to assume that when business was commenced in 1897, it was with little or no capital. There is no reliable evidence to prove what the new capital of the business consisted of. The accounts of the business from 1897 to 1903 have not been put in but Narayanaswami, the first witness for the defence, has given a general description of the accounts that were kept. He said: "There are not several accounts of drawings in the firm books. There is one account of household expenses. There is no capital account. There is nothing to show division of profits. We did not divide profits. What was taken was for household expenses and that was not divided. No individual accounts were kept for what was expended." He then says that immoveable properties were largely purchased out of the profits of the business in the names of Munuswami and Madurai, the testator. It is admitted that all but two out of 13 properties are in the names of Munuswami, representing one branch of the family, and Madurai the other.

Then, with regard to the family life of the parties, the same witness says: "I have lived there (*i.e.*, the house which stands in the name of Muthialammal, his grandmother) ever since I can remember. It is one of the family properties included in the division (in Exhibit B). We all lived there before any business was started as owners. There was a passage between two houses. After I came of age, the next house was bought. There was one cooking, one food."

Then, it appears that in 1903, some discussions arose in the family. After some shuffling, which was apparent throughout the whole course of the witness's evidence, Narayanaswami said that the important cause of dissension was that he took Rs. 1,75,000 and debited it in the accounts and refused to part with it." I determined to divide and did this for the purpose. I got my dues."

Under these circumstances, the parties entered into Exhibit B, dividing the property of which they were possessed. The whole frame of this document has exactly the features of a division of family property. Every phrase used in it deals with the family. It contains provisions which would be natural in a division of family properties but which would be unnatural in a division of partnership properties—such as provisions for charity and for maintenance of family members. The only thing which was pointed out by the learned Vakil for the defendant, is that the shares would not be natural in a division of family properties and that all the members of the family were not included. I think this is sufficiently explained by circumstances under which the division was arrived at. Narayanaswami Chetti had seized a considerable sum and was claiming an equal share with the other two, his father, B. Munuswami and his cousin, the testator, and the only alternative to giving him an equal share was to go to law and waste a considerable portion of the family property. It seems to me that the whole arrangement was one dictated by this man and that, under those circumstances, the division is perfectly natural. The revolting member of the family is kept out by giving him the one-third share which he asks, and the other two branches of the family each take half of the remaining assets. Thus, each branch of the family obtains a third.

The legal point has been raised whether, if it is not proved that there is any nucleus of family property, the property in the hands of the family may be considered to be joint family property with the ordinary rights of the members of the family to a share on partition. I think that in this Court the point is clearly dealt with by the dicta of Mr. Justice Bhashyam Iyengar in *Sudarsanam Maistri* v. *Narasimhulu Maistri* (2), *Gopalsami Chetti*

v. *Arunachellam Chetti* (3), which have been approved by Mr. Justice Wallis in *Muniswami Chetty* v. *Maruthammal* (6). And there is also an express decision on the point by Mr. Justice Beaman in *Karsandas Dhiramsey* v. *Gangabai* (1). I think that from these cases it is perfectly clear that if the members of a Hindu family choose to live together, work jointly together, throw all their earnings into a common stock and have one food, in such a case the presumption is that they must have intended their property to be joint family property. I think the evidence in this case shows conclusively that the property was intended to be held as joint family property. That being so, the ordinary consequences attach to it and the right of all the members to partition necessarily follows.

I give an oral judgment holding that the property is joint family property with the incidents of partition and did not pass under the Will of B. Madurai Chetty. The 2nd defendant is a minor and cannot give a discharge for the property and the person entitled to possession, as the eldest male member of the family, is the plaintiff. There will be a decree that the 1st defendant do deliver possession of the plaint property to the plaintiff. Taxed costs of all parties will be paid out of the estate by the 1st defendant, who will be allowed to retain his costs, charges and expenses incurred as executor of the Will.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 384 OF 1909.

November 14, 1912.

Present:—Mr. Justice Robertson and Mr. Justice Beadon.

SANT SINGH—DEFENDANT—APPELLANT

versus

MULA AND OTHERS—PLAINTIFFS—RESPONDENTS.

Custom—Adoption of collateral—Jats of the Gujranwala District—Repudiation of adoption—Age.

Among *Jats* of the Gujranwala District, a sonless proprietor may validly adopt any one of the descendants of a common ancestor, residing in the village, whom he prefers.

Duni Chand v. *Ram Chand*, 28 P. R. 1887, distinguished.

When an adoption has once been completed, it cannot be set aside or repudiated by the adoptiv father.

Among *Jats* and kindred tribes in the Punjab, a man may appoint an heir from the descendants of a common ancestor; he need not necessarily appoint the nearest collateral.

The age at which an adoption takes place is immaterial.

Second appeal from the order of the Additional Divisional Judge, Sialkot Division at Sialkot, dated the 12th February 1909, reversing that of the Munsif, 1st class, Gujranwala, dated the 15th August 1907, dismissing plaintiffs' claim.

Rai Bahadur Lala *Sukh Dial*, for the Appellant.

Khawaja *Zia-ul-din*, for the Respondents.

JUDGMENT.—The facts of this case are simple enough. One Arura, a *Jat* of the Gujranwala District, adopted one Sant Singh, and on the 10th February 1904, executed a deed reciting and confirming that adoption. A suit was instituted by some of the present plaintiffs on the 16th March 1904 to set aside the adoption, but it was dismissed under section 98 of the Civil Procedure Code, on the 22nd December 1904. Arura has since died and the plaintiffs have now brought a suit for possession of the land, alleging that the adoption of Sant Singh by Arura, the factum of which they fully admit, was not valid and, consequently, that they are entitled to succeed to the property left by Arura.

It appears that on Arura's death, the land was mutated in the name of Sant Singh, the adopted son, and that entry was maintained although appealed up to the Court of the Financial Commissioner.

The sole point, therefore, before us on the pleadings is, whether the adoption of Sant Singh by Arura was valid or not. In 1904, Arura was a defendant in a case and made a statement to the effect that he, undoubtedly, adopted Sant Singh, but that he made a mistake in doing so, and desired to repudiate the adoption owing to Sant Singh's alleged misconduct. The misconduct alleged is of a very flimsy character and it is not now contested that it was within the power of Arura to set aside the adoption which had once been completed. We need not, therefore, discuss that point further.

As regards the validity of the adoption,

we notice that the lower Appellate Court has stated that Sant Singh is not a collateral of Arura though he belongs to the same *got*. It is now admitted on both sides that Sant Singh was a collateral of Arura though in the 9th or 10th degree. He is a member of the same village and admittedly descended from a common ancestor.

The *onus* of proving that Sant Singh was validly adopted by Arura was thrown by the first Court upon Sant Singh and that Court considered that the *onus* had been discharged. The lower Appellate Court appears to have relied upon the fact that Sant Singh was not a collateral and upon the repudiation of the adoption by the adoptive father. As noted above, neither of these reasons can be maintained and we have to fall back upon the question whether the adoption was or was not a valid one. The general, though not the universal, principle of the *Jats* and kindred tribes in the Punjab is, undoubtedly, that a man may appoint an heir from amongst the descendants of a common ancestor, and that he need not necessarily appoint the nearest collateral. This point is fully discussed in *Nidhana* v. *Shaman* (1). It is also a general principle that the age at which the adoption takes place is immaterial. *Budh Singh* v. *Mula Singh* (2) is an authority on this point, as is also *Chandu* v. *Akbar* (3), *inter alia*. No point has been made in argument before us as to the age of Sant Singh when appointed. What is relied upon by the respondents-plaintiffs is the entry in the *riwaj-i-am* and the fact that no instances were quoted in support of the defendant's case, and the facts that Sant Singh is only distantly related to the deceased, and that there are nearer collaterals of the deceased in the village.

As regards the entry in the *riwaj-i-am*, it is almost identical with that quoted in *Nidhana* v. *Shaman* (1) and we do not think that the clause which points to the advisability of adopting from amongst near collaterals, is anything more than advisory; we think that it is not mandatory. It is true that in *Nidhana* v. *Shaman* (1), a number of precedents were given which are absent in the present case, but as regards the terms of the *riwaj-i-am*, they are almost identical, and we must hold that it has not been shown that Arura was debarred from appointing any one of the descendants of a common ancestor, residing in the village, whom he preferred. Much stress was laid by the learned Pleader for the respondents on a case reported as *Duni Chand* v. *Ram Chand* (4). In that case, a *Jat* of the Gujranwala District had adopted a member of the same *got* living in another village. It was not shown that he was a collateral of the adoptive father or that he was descended from a common ancestor, however remote. In that case, it was held after inquiry that the adoption was not proved to be valid by the custom of the tribe to which the parties belonged. The case here, however, is quite different. The adopted son was a member of the same village community, a collateral, though distant, and admittedly descended from a common ancestor. That being so, we think that the custom of appointing heirs being established to exist amongst the tribe to which the parties of this suit belong, the burden of proving that this particular adoption was invalid lay upon the plaintiffs and they have failed to discharge it.

The appeal, therefore, must succeed and the suit be dismissed with costs. Costs against plaintiffs throughout.

Appeal allowed.

(1) 10 P. R. 1908; 7 P. L. R. 1907; 43 P. W. R. 1907.
(2) 40 P. R. 1905; 18 P. L. R. 1905.
(3) 49 P. R. 1909; 70 P. W. R. 1909; 68 P. L. R. 1909; 2 Ind. Cas. 91.

(4) 28 P. R. 1887.

CALCUTTA HIGH COURT.
SECOND CIVIL APPEAL No. 1294 OF 1909.
August 7, 1912.
Present:—Mr. Justice Chatterjee and Mr. Justice Richardson.
LACHMI NARAIN AND ANOTHER—PLAINTIFFS—APPELLANTS
versus
DHANUKDHARI PROSAD SINGH—DEFENDANT—RESPONDENT.

Limitation Act (XV of 1877), Sch. II, Arts. 62, 120, 132, 142—Purchase of property by mortgagee—Subse-

LACHMI NARAIN *v.* DHANUKDHARI PROSAD SINGH.

uent sale of property for Government revenue—Suit by mortgagee to recover surplus sale-proceeds withdrawn by registered owner—Limitation.

In execution of a mortgage decree, the plaintiff purchased one of the *mouzahs* within estate *K*. The entire estate *K*, was sold for arrears of Government revenue a few months after the plaintiff's aforesaid purchase. After payment of the arrears, a surplus was left with the Collector, who paid it to the defendant, the registered owner, on March 31, 1904. The plaintiff brought this suit on May 23, 1907, for recovery of the money as representing the mortgaged property purchased by him:

Held, (1) that the money received by the defendant, which belonged to the plaintiff, was money received by the defendant "for plaintiff's use" within the meaning of Article 62 of Schedule II of the Limitation Act of 1877, and that the suit was, therefore, barred, being brought after three years from the date on which the defendant received the money;

Mahomed Wahib v. *Mahomed Ameer*, 32 C. 527; 1 C. L. J. 167, relied upon:

(2) that the suit was not governed by Article 132, for the plaintiff having already purchased the property, could not be said to be seeking to pursue against the surplus sale-proceeds the remedy for the recovery of the money charged upon the immoveable property.

Appeal from the decree of the District Judge of Saran, dated March 19th, 1909, affirming that of the Sub-Judge of that District, dated May 29th, 1908.

Babus *Umakali Mukherji* and *Jotindra Nath Bose*, for the Appellants.

Babu *Dwarka Nath Mitter* and Moulvi *Khurshed Hossain*, for the Respondent.

JUDGMENT.—The plaintiffs and the defendant No. 2 were mortgagees of a certain revenue paying estate. In execution of the mortgage-decree obtained by the plaintiffs, they purchased one of the *mauzahs* situated in the estate named Khazaserai on the 19th May 1900. On the 7th January 1901, the entire estate, consisting of Khazaserai and another *lekhiraj* property Patirha, was sold for arrears of Government revenue. After payment of the arrears, a surplus of about Rs. 2,454 was left with the Collector and the defendant No. 1 who was the registered owner withdrew the surplus on the 31st March 1904. On the 2nd July 1905, the plaintiffs applied to the Collector for the payment of the surplus to them as representing the mortgaged property which they had already purchased in execution of the mortgage-decree. This application was rejected on the 4th August 1909 on the ground that the money had been paid out to the registered proprietor. The plaintiffs brought his suit on the 23rd May 1907 for the recovery of the money from defendant No. 1. The principal plea was that the suit was barred by limitation. Both the lower Courts have held that the suit is barred under Article 62 of Schedule I of the Limitation Act. It is contended before us that the suit is not one governed by Article 62 but that the Article properly applicable to the present case would be either 142 or 132 or 120. Article 62 contemplates a suit for money payable by the defendants to the plaintiffs for the money received by the defendants for the plaintiffs' use and provides three years as the period of limitation from the time when the money is received. The question to be first determined on this point is whether the money was received by the defendants for the plaintiffs' use. Although, in common parlance, it may be said that the defendants took out the money for his own use and not for the plaintiff's, yet the words "for the plaintiff's use" have received judicial interpretation almost in all the High Courts, in which it has been held that money received by the defendants, which belonged to the plaintiffs, would be money received by the defendants for the plaintiffs' use. The latest case on this point is *Mahomed Wahib* v. *Mahomed Ameer* (1), in which all the previous cases on the point have been considered. We think that this case would, according to the principles laid down in the case, be governed by Article 62 of Schedule II of the Limitation Act. It is contended that there is another class of cases, in which it has been held that when a suit is filed for recovery of money charged on immoveable property, when the immoveable property is represented by surplus sale-proceeds, the suit is governed by Article 132 of the Schedule. The facts of the present case are, however, distinguishable from those cases in that in the present case the plaintiffs had already made a purchase in execution of their mortgage-decree so that they cannot be said to be seeking to pursue against the surplus sale-proceeds, the remedy for the recovery of the money charged upon the immoveable property.

In this view of the case, the appeal must be dismissed with costs.

Appeal dismissed.

(1) 32 C. 527; 1 C. L. J. 167.

MULPURA LAKSHMAYYA v. VARADARAJA APPAROW.

MADRAS HIGH COURT.

[SECOND CIVIL APPEALS NOS. 575 TO 536 OF 1911.

September 27, 1912.

Present:—Mr. Justice Sundara Aiyar and Mr. Justice Sadasivar Aiyar.

MULPURU LAKSHMAYYA AND OTHERS—APPELLANTS

versus

Sri Rajah VARADARAJA APPAROW BAHADUR ZEMINDAR GARU—RESPONDENT.

Landlord and tenant—'Savaram'—Melvaram—Kudivaram—*Madras Estates Land Act (1 of* 1908), *s.* 185—*Leases granted after* 1*st July* 1898, *admissibility of*—*Evidence—Judge's personal knowledge of facts, whether can be imported into judgment.*

Per *Sundara Aiyar, J.*—The word '*Savaram*' does not necessarily import the absence of *kudivaram* right in the cultivating *ryot*—*Savaram* was compensation granted to a *zemindar* or Revenue Officer under the Muhammadan Government. In some cases land exempt from payment of rent was granted to him. But if no land was available, the grant to the *zmindar* would consist merely of the revenue on a portion of the lands for the assessment of which the *zemindar* was responsible to the State.

Per *Sadasiva Aiyar, J.*—In consequence of certain land being known as *savaram*, the Courts need not necessarily presume that both *melvaram* and *kudivaram* belong to the *zemindar*, but the Courts *may* presume such land to be of the above character.

Per *Sundara Aiyar, J.*—Under section 185 of the Madras Estates Land Act, 1908, it is the date of the contract that is material in deciding whether the evidence is admissible. The Act does not lay down any rule as to all the kinds of evidence that may be produced to prove that the land in question is the *zemindar's* private land, and evidence of dealings subsequent to 1st July 1898 is not altogether excluded.

Akhju Singh v. *Jagannath Prosad Singh*, 13 Ind. Cas. 1, referred to

Per *Sadasiva Aiyar, J.*—The leases granted after 1st July 1898 are shut out as evidence by section 185 of the Madras Estates Land Act if they are sought to be used for the purpose of proving the character of the tenure of the land and even if such leases are sought to be proved merely in order to show that the land was treated in the same manner after July 1898 as before July 1898. Leases granted before 1st July 1898, though they were only to come into force after 1st July 1898, are admissible in evidence.

Per *Sundara Aiyar, J.*—A Judge is not entitled to rely on specific facts not proved by the evidence in the case but known to him personally or otherwise. But a Judge may use his general knowledge and experience in determining the credibility of evidence adduced before him and applying it to the decision of the specific facts in issue in the case.

Hurpurshad v. *Sheo Dayal*, 3 I. A. 259 at p. 285; 26 W. R. 55 and *Durga Prosad Singh* v. *Ram Doyal Chaudhuri*, 38 C. 153; 10 Ind. Cas. 955, explained and distinguished.

Per *Sadasiva Aiyar, J.*—A Judge must be allowed to use even his personal knowledge of concrete private facts, provided he mentions his knowledge to the parties and they do not object to his deciding the case, and he must be allowed to use his knowledge of general orpublic facts, historical, scientifi c, political and otherwise, in coming to a conclusion.

Hur Prasad v. *Sheo Dayal*, 3 I. A. 259; 26 W. R. 55; *Lakmidas Khusal* v. *Bhaji Khusal*, 35 B. 317; 10 Ind. Cas. 914; 13 Bom. L. R. 313; *Kessowji Issur* v. *Great Indian Peninsular Railway Company*, 31 B. 381; 11 C. W. N. 721; 6 C. L. J. 5; 4 A. L. J. 461; 2 M. L. T. 435; 9 Bom. L. R. 671; 17 M. L. J. 347; 34 I. A. 115 and *Bourne* v. *Swan & Edgar Limited*, (1903), 1 Ch. D. 211 at p. 225; 72 L. J. Ch. 168; 51 W. R. 213; 87 L. T. 589; 19 T. L. R. 59; 20 R. P. C. 105, referred to.

Second appeals against the decrees of the District Judge of Kistna, dated the 24th day of October 1910, in A S. Nos. 149 to 154, 156 and 158 to 161, and 162 of 1910, presented against those of the District Munsif of Gudivada in Original Suit Nos. 268, 269, 272, 275, 367, 370 and 371 of 1908, 373 of 1908, 209 of 1909, 377 of 1908 and 210 of 1909, respectively.

The Hon'ble Mr. *T. V. Seshagiri Aiyar*, for the Appellants.

The Hon'ble Mr. *L. A. Govindaragava Aiyar*, for the Respondents.

JUDGMENT.

SUNDARA AIYAR, J.—These are appeals by *ryots* in the village of Manikonda in the proprietary estate of Gannavaram against whom decrees of ejectment were passed by the District Court of Kistna, reversing the decrees of the District Munsif of Gudivada, who held that *ryots* possessed occupancy-rights in their lands and could not be ejected. The lands in question were asserted by the proprietor to be his private lands in which both the *melvaram* and *kudivaram* rights were vested in him. He alleged that both by custom and contract he was the full proprietor and that the tenants had no occupancy-rights. The defendants, on the other hand, asserted that they were part of the public lands of the estate held by the *ryots* with occupancy-rights. They were, undoubtedly, known as *savaram* lands and were described as such in the *pattas*, *muchilikas* and leases executed between the parties. The plaintiff contended that the word '*savaram*' itself indicated his full proprietary right in the land. The District Munsif denied this but the District Judge accepted the interpretation claimed for the plaintiff. We are of opinion that on this point, the District Munsif was right in holding that the word did not necessarily

import the absence of *kudivaram* right in the cultivating *ryot*. Wilson's and Wilkins' Glossaries cited by the District Judge are both opposed to the interpretation accepted by him. Both these learned writers define *savaram* as an allotment of *land or of the Government revenue derivable from it held* by *zemindars* or other Revenue Officers under the Muhammadan Government as their personal compensation for services rendered by them. Mr. Grant, the author of the Survey of the Northern Circars, no doubt, describes it as a grant of land. See pages 7 and 155 of Vol. II of the Fifth Report of the Parliamentary Committee. The word is supposed to have the same meaning as '*Nunkar*' in Bengal. The latter word is defined by Baden Powell as 'money allowance' (or free land). In Maclean's Manual of Administration 1893, '*Savaram*' is treated as a grant of land. All that is clear, however, is that *savaram* was compensation granted to a *zemindar* or Revenue Officer under the Muhammadan Government. Sometimes, the *zemindar* was a descendant of a *ryot* family that enjoyed demesne or private lands and remained in possession of them after the family ceased to exercise sovereign powers, but continued to have *zemindari* rights under the Muhammadan rulers. The holder was allowed to retain these private lands as compensation for services rendered by him to the State and partly also in consideration of his being responsible for the collection and payment of the State revenue. The private land in his own occupation was itself exempt from the payment of any revenue. But the *zemindar* was sometimes a mere renter under Government holding his office at its pleasure. In such cases, some land was sometimes granted to him and exempted from the payment of any revenue. But if no land was available, the grant to the *zemindar* would consist merely of the revenue on a portion of the lands for the assessment of which the *zemindar* was responsible to the State. This is the view taken both by Wilson and Wilkins. The materials available for the interpretation of the word do not justify the Judge's view that *savaram* necessarily conveys the idea of full proprietary right in the *zemindar*. In Second Appeals Nos. 994 to 1024 of 1902, relating to the same estate, certain *savaram* lands were held not to be the *zemindar's* private property. In Second Appeals Nos 518 and 519 of 1910 also, which came up from the same District, '*savaram*' lands were held not to be the same as private lands. Mr. Seshagiri Iyer, the learned Vakil for the appellants, contends, that the finding of the District Judge against his clients is completely vitiated by the Judge's interpretation of the words '*savaram*.' This argument is not without foundation. The Judge observes: "Starting then with this finding (*i. e.*, that *savaram* was the actual grant of land and not of land revenue), we have to see whether the lands claimed now as *savaram* by the appellants were the original lands granted to him by the original Sovereign or were so accepted by the permanent Settlement or have so long been treated as *savaram* as to justify their acceptance as original *savaram*." There was, however, no serious dispute between the parties before the District Munsif that the lands on question were designated as '*savaram*' in the documents relating to them. In appeal, an attempt was made to show that in two cases, lands not originally described as *savaram* in the *zemindar's* accounts were so designated in the accounts of subsequent years. But these variations were found by the District Judge to be easily explicable. The judgment of the Appellate Court shows clearly to our minds that the Judge did not fail to address himself to the real question between the parties, *viz.*, whether the evidence was sufficient to establish that the *zemindar* was the owner of both the *melvaram* and the *kudivaram* in the lands. The discussion is not directed to the point whether the lands in this suit were proved to be *savaram* in ancient times or at the time of the permanent Settlement. The Judge first shows that *savaram* lands were treated in the accounts of the estate as different from the *seri* or public cultivable lands, that they were held by the *ryots* on rates of rent different from the *seri* lands, and that Government, by collecting water rates on *savaram* lands from the *zemindar*, while it levied it from the *ryots* in the case of *seri* lands, apparently treated the former as belonging to the *zemindar*. He then refers to evidence showing that from the year 1892 the *zemindar* asserted and the *ryots* admitted that the full proprietary right in the lands belonged to the former. He finds that in 1896 and 1897, the *zemindar* let these lands definitely as his own private

lands and that in 1898 and subsequently he substituted grain rents for money rents and put up the lands for auction to the *ryots* who offered the highest bids of rent. These are points directly relating to the question whether the *kudivaram* right belongs to the *zemindar* or to the *ryots* and have no bearing on the identity of the lands with these belonging to the *zemindar* as *savaram* in olden times. In summing up his conclusions, the Judge observes that the plaintiff has proved the lands to be private. We are, therefore, of opinion that the lower Appellate Court's incorrect interpretation of the word *savaram* does not affect the validity of the finding that the lands in question are the *zemindar's* private lands.

Another objection taken to the finding is, that the *pattas* of the year 1897, in which the lands were let as the private lands of the *zemindar*, ought not to have been taken into consideration, inasmuch as the leases evidenced by them were to operate from 1st July 1898, the beginning of the *Fasli* year 1308. The argument is based on section 185 of the Estates Land Act which enacts that,—"When in any suit or proceeding, it becomes necessary to decide whether any land is the landlord's private land, regard shall be had to local custom and to the question whether the land was before the 1st day of July 1898 specifically let as private land and to any other evidence that may be produced; but the land shall be presumed to be private land until the contrary is shown." We cannot accept this contention. The letting took place before 1st July 1898 although the period of the lease commenced only subsequently. It is the date of the contract that is material in deciding whether the evidence is admissible. The Legislature wished to make all contracts made from and after the 1st July 1898 inadmissible against the *ryots* on the ground that the proprietors had been making attempts to convert public lands into their own private lands for sometime before the Act was passed. Suppose a *zemindar* made a lease in 1895 for a period of three years and at the same time gave a lease to another person to come into operation on the expiration of the previous lease, it would be impossible to hold that the letting to the second lessee was after the 1st July 1898. Such an interpretation is not required either by the words or the mischief of the statute. See *Nilmoni Chuckerbutti* v. *Bykant Nath Bera* (1). Mr. Govinda Raghava Aiyar for the respondent asks us to hold that leases granted after 1st July 1898 are not shut out by the section and that it only provides affirmatively that leases prior to that date should be taken into account. This is hardly consistent with the object of the section, nor is it easy to see why there should be any provision to making a letting before 1st July 1898 admissible if leases both before and after that date were regarded as equally admissible. The appellants also contend that subsequent dealings after 1st July 1898 ought not to have been taken into consideration by the Judge for any purpose. But he was certainly entitled to take them into account for deciding whether they had not been held as private lands by the *zemindar* for a period of 12 years prior to the commencement of the Act. Moreover, it cannot be held that when a *zemindar* has proved that he let certain land as private land before 1st July 1898, subsequent letting of the land in the same character cannot be proved to show that it was treated in the same manner after July 1898 as in the letting previous to July 1898. The Act does not lay down any rule as to all the kinds of evidence that may be produced to prove that the land in question is private land, and it cannot be held that all evidence subsequent to 1st July 1898 is shut out altogether. See *Akhiu Singh* v. *Jagannath Prasad Singh* (2).

The third objection to the finding of the Appellate Court is that the Judge's opinion that the *khats* of 1896, which contained a statement that the tenants had no occupancy-right were not executed by the *ryots* with a knowledge of the contents of the documents, was based by him on his own personal knowledge and that he acted illegally in importing his own private knowledge in deciding the question whether the plaintiffs' witnesses who stated that the *ryots* had a talk over the terms of the *khats* and raised no objection to them, or the defendant's witnesses who denied all knowledge on the part of the *ryots* of the terms, should be believed. There is no doubt that a Judge is not entitled to rely on specific facts not proved by the evi-

(1) 17 C. 466.
(2) 13 Ind. Cas. 1.

dence in the case but known to him personally or otherwise. See *Hurpurshad* v. *Sheo Dyal* (3) and the cases cited in Ameer Ali and Woodroffe on Evidence at pages 115 and 806. But, at the same time, it is quite clear that a Judge may use, and cannot help using, his general knowledge and experience in determining the credibility of evidence adduced before him and applying it to the decision of the specific facts in dispute in the case. See Thayer's cases on Evidence, page 10, and Best on Evidence, page 176, section 187, where it is observed,—"But here an important distinction must be borne in mind, *viz.*, the difference between general information and particular personal knowledge." Wigmore in his Treatise on Evidence says (see section 2570 Vol. IV) that,—"A juror is entitled to use his knowledge of the conditions affecting various kinds of values 'of land.'" The data on which legal inference is based are not all proved by evidence. Very often, though not always, what may be said to be of the nature of a major premise has not got to be proved. The Judge is entitled to act upon his own knowledge of the conditions of society including the history of its economical progress. It is not necessary to prove that population has increased and that there is great demand for land on the part of the cultivators now in parts of the country while in former times land was plentiful and cultivators were scarce. The dividing line is not easy to fix in all cases. What the Judge has done in this case is to use knowledge gained by him from his own experience that in 1896 there was no such scarcity of land for cultivation as to induce *ryots* to sign any *muchilika* that they might be required to execute. That is merely a fact of economical history. The Judge has not used his own knowledge as to the conduct either of the particular *zemindar* or of his *ryots* or the relations between them in any particular case or to fix the exact time at which any particular change commenced. He does not use his knowledge of the character of any particular individual, which is necessarily of a variable kind (see Wigmore, section 2570 Vol. IV). No doubt, the private knowledge used by the Judge related to lands in the *Nuzvid Zemindari*. But that is really an extensive tract of territory and the Judge did not import into the judgment any knowledge of the village in question or even specifically relating to the *Gannavaram* Estate in the *Nuzvid Zemindari*. We do not think that the Judge over-stepped the boundary line in this case. The onus was on the *ryots* to prove that they had no knowledge of the contents of the *khats* which they executed and the Judge was entitled to disbelieve evidence of facts which *prima facie* required strong proof. *Durga Prasad Singh* v. *Ram Doyal Chaudhuri* (4) does not really help Mr. Seshagiri Iyer. There the Judge was using his knowledge of a fact of a specific character, *viz.*, that landlords were deliberately inducing ignorant *ryots* to sign documents describing themselves as temporary lessees, *ticadars* or *ijaradars*. The question whether pressure was used in that case undoubtedly required to be proved by evidence relating to the execution of the particular document. In *Hurpurshad* v. *Sheo Dyal*(3), the Privy Council merely held that a Judge cannot use his knowledge of the character of a particular witness in deciding as to his credibility

The objection taken to the finding of the District Judge on the question whether the *zemindar* is entitled to both the *varams* in the lands must, therefore, be held to be untenable and the second appeals must be dismissed with costs.

SADASIVA AIYAR, J.—The facts of the case have been fully set out in the judgment just now delivered by my learned brother and I need not repeat them. As two of the questions involved in the case are of some importance, I think it is not inappropriate to add a judgment of my own. As regards the meaning of the word *savaram*, this word, like *seri*, *Jeroyati* and similar words, seems to have different meanings in different parts of the country but, so far as this Presidency is concerned, the opinion of Mr. Grant, Dr. Maclean, Baden-Powell and of Sir G. S. Forbes seems to be that the word '*savaram*', when applied to a land in a *zemindari* tract, indicates usually that the land itself, both *melvaram* and *kudivaram*, belongs to the *zemindar* free from any obligation to pay revenue to Government on the extent of such land. I do not say that in consequence of a land being known as *savaram* it *should* be presumed to belong (both *melavaram* and *kudivaram*) to the *zemindar* but I think that

(3) 3 I. A. 259 at p. 282; 26 W. R. 55.

(4) 38 C. 153; 10 Ind. Cas. 955.

Courts *may* presume such land to be of the above character. The learned District Judge in this case seems to have put the presumption rather too strongly, but otherwise his judgment, which has gone very carefully into the evidence, seems to be not open to criticism.

As regards the other important question as to how far a Judge could use his own knowledge when arriving at a conclusion on the evidence adduced before him, the authorities are by no means clear. In the case of *Hurpurshad* v. *Sheo Dyal* (3), the Judge in the lower Court imported into the case his own knowledge of the fact that the family of the parties had recognised the division which one Chandan had made prior to his demise though there was no evidence let in about such recognition by the family. Their Lordships of the Privy Council held that this ought not to be done as the Judge's knowledge *might have depended on mere rumour or hearsay.* Their Lordships in the next sentence (page 286) state:—"But even if the Commissioner's statement of facts from his own knowledge be taken as evidence"—this shows that their Lordships did not finally decide that if the Judge's knowledge *was not based upon mere rumour or hearsay* but was the impression made directly on his own senses and if such knowledge had been communicated to the parties for criticism and comment, such knowledge could not be used by him in arriving at a conclusion on the evidence before him. In *Lakmidas Khushal* v. *Bhaiji Khushal* (5), a Subordinate Judge decided the suit after local inspection in which he found that a passage for rain-water spoken to by the plaintiff's witnesses as existing did not really exist. It was contended before the High Court that the Subordinate Judge acted illegally in importing his knowledge obtained at the local inspection in deciding the case and the appellant's Vakil relied on the oft-quoted and as often misunderstood case of *Kessowji Issur* v. *Great Indian Peninsular Railway Company* (6). But one of the learned Judges (Chandavakar, J.) easily distinguished that case on the ground that all that the Privy Council decided was that the learned High Court Judge's personal knowledge obtained on an inspection of the locality on a different day amidst possibly different surroundings was no safe criterion in deciding the question in issue in that particular case. The learned Judge (Chandavarkar, J.) in *Lakmidas Khushal* v. *Bhaiji Khushal* (5) clearly held that the Subordinate Judge did not act illegally in using his knowledge of the non-existence of the rain water passage in deciding the case before him. In *Bourne* v. *Swan & Edgar, Ltd.* (7), Farwell, J., said that two classes of cases must be distinguished in these matters and while in one class of cases the, Judge's direct knowledge can be used only for the purposes of enabling him to understand the questions that are being raised, to follow the evidence and to apply the evidence, there are cases of a different kind where it is the eyesight of the Judge that is practically the ultimate test. In cases of infringment of patent rights or infringment of trade-marks and in cases of 'passing off' the defendant's goods as plaintiff's, the Judge has mostly to rely upon the evidence of his own senses. As regards the demeanour of witnesses, the Judge has to depend upon the knowledge and the impression brought to his mind by his eyes and ears. Even as regards the credibility of witnesses, let us suppose that a person known to the Judge as of the highest character is produced as a witness before the Judge. Is it possible for him to put out of his mind his knowledge of the character of the witness in coming to a conclusion upon the evidence? It is simply asking the Judge to perform an impossible feat. As to using the observations made by the Judge at a local inspection merely to understand the evidence, I shall here quote the remarks of Bissel, J. in an American case,—"We are very frank to say we do not appreciate the refined distinction which is drawn by some authorities wherein it is held that the Jury are not at liberty to regard what they have seen as evidence in the case but must utterly reject it otherwise than as an aid to the understanding of the testimony offered. The folly of it is apparent from the constitution of the human mind and the well known processes by which Juries arrive at conclusions. If a dozen witnesses should

(5) 35 B. 317; 10 Ind. Cas. 914; 13 Bom. L. R. 313.

(6) 31 B. 381; 11 C. W. N. 721; 6 C. L. J. 5; 4 A. L. J. 461; 2 M. L. T. 435; 9 B. L. R. 671; 17 M. L. J. 347. 34 I. A. 115.

(7) (1903) 1 Ch. D. 211 at p. 225; 72 L.J. Ch. 168; 51 W. R. 213; 87 L. T. 589; 19 T. L. R. 59; 20 R. P. C. 105.

testify that there was no window on the north side of the house from which one had sworn that he had viewed the affray and the Jurors on view should see the window, all lawyers would know that it would be futile in the argument to insist on the Jury that their verdict must be based on the non-existence of the window since the point had been sustained by a vast preponderance in the number of witnesses" (11 Colo. App. 41.) I know that there are old dicta to the effect that a Judge should decide only on the evidence before him and should not at all use his private knowledge. Wigmore refers (paragraph 2569, note 2) to a case in Henry IV's time where the Judge allowed a prisoner to be convicted on the evidence but got a pardon for him from the King because the Judge knew of his personal knowledge that the accused was not guilty. This shows the absurd lengths to which the doctrine of not using personal knowledge in coming to a conclusion in the case could be carried and why it is that there is some agitation now in this country for village *panchayets* to be constituted as Judges so that they might use their own knowledge of the facts of the case and the character of witnesses to come to conclusions on facts. I do not, of course, wish to restore the days of Mariada Raman or Haroun-al-Raschid but a Judge must be allowed to use even his knowledge of concrete private facts, provided he mentions his knowledge to the parties and they do not object to his deciding the case and he must be allowed, of course, to use his knowledge of general or public facts, historical, scientific, political and otherwise in coming to his conclusions. Let us take the case of a witness who belongs to a hill tribe which is known to the Judge by his past experience as a Revenue Officer as consisting of persons who are generally incapable of telling complicated lies. Is not the Judge entitled to use his said knowledge in arriving at a conclusion on the evidence of that witness? Judges and Juries do use and, it seems to me, are entitled to use their general past experience of men and things in arriving at conclusions of fact and such experience is not only not considered as a disqualification but is a very necessary qualification for coming to sound conclusions of fact. I know that English Judges have laid down in some cases the rule as to the using of the Judge's own knowledge in coming to conclusions upon the evidence rather too strictly. [See. *London Omnibus Company Ltd.* v. *Lavel* (8)]. But, with great respect, I am inclined to think that the only restriction which can be imposed upon the Judge is that he should not import knowledge obtained by mere rumour or hearsay of concrete facts connected with that particular case before him for arriving at a conclusion. When a Judge is supposed to be reliable enough to come to a conclusion on the evidence of facts deposed to before him as seen or heard by witnesses, it is surely anomalous and even startling to hold that he cannot be relied on to use impartially the facts directly seen and heard by himself. The only result of thus holding would be that Judges would be induced to take some formal evidence of the same facts from much less reliable sources than themselves and to omit all mention of their own knowledge in their judgments and this course cannot be held as conducive to a satisfactory decision of the cases when they come up on appeal before the Appellate Court.

When a proposition of fact has to be established before a judicial tribunal, there are two principal heads under which the modes of presentation of the evidentiary facts fall. "The first is by the presentation of the thing itself as to which persuasion is desired" (Wigmore, section 24) and this mode is called immediate or direct real evidence (*Pratyaksha Pramana*). In cases of contempt of Court, committed in the presence of a tribunal, "it has direct real evidence of the fact." "The thing which is the source of the evidence is present to the senses of the tribunal." This first and best mode of proof (called *Pratyaksha* in Sanskrit) is sometimes rather pedantically called 'Autoptic proference' in English. When a Judge sees the demeanour of a witness or observes that a witness is blind or deaf or a prosecutrix who complains of rape is a brazen muscular woman or that an accused charged with running away from custody is a lame man, it is surely

(8) (1901) 1 Ch. D. 135; 70 L. J. Ch. 17; 83 L. T. 453; 17 T. L. R. 61; 18 R.P. C. 74.

open to him to use such direct knowledge in coming to his conclusions as to the rights and wrongs of the parties before him without having these facts proved by the statements of others as witnesses. The second principal head of proof (inference or *Anummanam*) falls under two sub-heads, *viz.*, (*a*) the evidence given by a human being heard or read by the tribunal and called testimonial or direct evidence and (*b*) other connected facts called circumstantial or indirect evidence (see Starkie 1-13).

When a tribunal knows a fact by direct real evidence, that fact is necessarily established much more satisfactorily than by the other kinds of evidence. It may be necessary to provide that when a fact is known to the Judge in this way, he should make a note of it in writing during the course of the trial and read it out to the parties so that the parties might be aware that the Court has knowledge of that fact and so that arguments and comments might be based and explanations offered by both sides on such fact so stated by the Judge as known to him before the Judge decides on the rights and liabilities of the parties. This is the principle of the rule enunciated in some Indian cases that the Judge who has made a local inspection should place on record the evidence and impressions gathered by him. [See *Rai Kishori Ghose v. Kumudini Kanta Ghose* (9)]. In England and America, Juries are mostly the Judges of fact and the Juries are presumed not to be able to arrive at proper conclusions without a pretty exhaustive summing up of the evidence by the Judge. Further, if one of the Jurors has previous private knowledge of a fact, the others might not know it. Hence, there is the rule that that juror must testify as witness in the case though his said private knowledge and his having testified as a witness do not make him incompetent to sit on the Jury as one of the judges of facts, as his knowledge after he gives his evidence is commented upon by the Judge in his summing up. The system of trial by Juries, who are returned "of the vicinage whence the cause of action ariseth", was originally based on the circumstance that "the law supposeth them hence to have sufficient knowledge to try the matter in issue though no evidence were given on either side in Court." If such evidence of witnesses is given, the Jury "may have evidence from their own personal knowledge by which they may be assured and sometimes are that what is deposed in Court is absolutely false" and "the Jury may know the witnesses to be stigmatized and infamous." (Vaughan, C. J., in Bushell's case 1670). But between 1650 and 1700, the necessity of controlling the Jury in some further way under the changed and changing conditions of society was felt and hence, the Judges who were guided by such motives gradually laid down a new rule. From 1702 the new rule had been established that a Juror should give evidence and be subjected to the test of cross-examination before he could use the facts in his own direct knowledge and communicate them to his fellow-Jurors, if those facts are not 'notorious' or 'unquestioned' facts or facts deducible from the common fund of experience and knowledge of which anybody could, reasonably, take 'notice' without proof and are not "matters of mere private interest."

If a Judge has knowledge of some particular concrete fact, which is a matter of mere 'private interest' peculiar to the particular case before him, which fact is not an existing natural fact (of relative permanence like the existence of a stream or a tree) but one that has already happened and which fact is a matter of strong controversy between the parties, he should, no doubt, retire from the case as Judge so as to be able to give his evidence for one side or the other before another Judge. But where a Judge has no personal or pecuniary interest in a case and merely uses his knowledge of human nature or his general opinion of large classes of people based on his previous experience or the testimony of his own senses in respect of things and persons observed by him in the course of the proceedings before him after he had given notice to the parties (or even outside the proceedings, provided he mentions such knowledge to the parties), I do not see how he could be prevented (except by asking him to do the impossible feat of forgetting everything and even not to be led sub-consciously by facts within his knowledge) from

(9) 15 C. L. J. 138; 14 Ind. Cas. 377.

using such knowledge. I cannot even bring myself to understand why he should be so prevented, especially if he has special technical learning, knowledge and general information which gives him very useful materials for arriving at a proper conclusion. A Judge is appointed presumably for the reason that his learning, impartiality and trained powers of observation are superior to and more reliable than the average learning, etc., of the litigants and witnesses before him. In systems of law where the Judge has very little to do with findings on facts, a Judge might be made merely to sum up the evidence before him impartially (without asking the Jury to consider what he knows) and leave it to the Jury to come to their own conclusions. But where, (as in India in all Civil cases and most Criminal cases), the Judge is a Judge of both facts and law, it is impossible to ask him not to use his knowledge of particular classes of people, and other like circumstances when arriving at a conclusion on facts. Of course, if an Appellate Court finds that a lower Court has unduly pressed such general knowledge (say, by unduly suspecting the genuineness of an unregistered document because it was executed in a town notorious for forgeries or because the writer was of a particular caste or profession), the appellate tribunal would use its own presumably sounder knowledge of human nature to set right the inferior Court and give advice to the lower Court not to be led too much away by such considerations. It has been sometimes laid down that a Judge must as Judge "ignore what he knows as a private man" and he "may have to ignore" as a private man what he knows as Judge. I respectfully dissent from such observations. In some old cases (collected in foot-note 4 in Wigmore, para. 2569), it was held that the Judge's personal knowledge of a witness's lack of credit should not be used. In a later case, however, the trial Judge's "great familiarity with that portion of the state" was considered as a ground for not reversing his judgment and a Judge's personal knowledge of the services of a Counsel (obtained as Judge sitting in the previous case) was allowed to be used by the Judge in fixing the remuneration of that Counsel in an action brought by the Counsel for such services. I think the only practical rule which can be laid down in these cases is that if a Judge knows of his own knowledge as an individual observer of a past relevent concrete private incident and that fact cannot be subjected to clear proof at the time of trial (such as a person's colour, resemblance of features, appearance, behaviour, chemical experiments on the present condition of the object) and if the truth of such incident is contested between the parties, he should mention his private knowledge of such incident to the parties and he should refuse to be the Judge in that case, unless both the parties, after he so mentions to them his said personal knowledge of that particular incident, state that they have no objection to his continuing as Judge. That the Judge was competent to give evidence in the witness-box and to subject himself to cross-examination and then to decide the case was the old rule but this has been discountenanced for obvious reasons in modern times and, in my opinion, should not be allowed. All that can be permitted is that the Judge's personal knowledge should (as in cases of proceedings for contempt) be recorded and be allowed to be commented upon in a moderate manner. In the case of concrete particular facts, the Judge who uses his own knowledge should only be obliged to state whether he knows it by direct knowledge or by rumour or hearsay and should not be subjected to cross-examination. General knowledge of the tenures in a particular area or of the character of certain populations as also direct knowledge gained by his own senses and mind—it is impossible to prohibit the Judge from using such knowledge in drawing inferences from the evidence before him and in coming to conclusions as to the rights of parties before him. In the present case, the learned Judge has not gone further than using the general knowledge which he had acquired as a past Revenue Officer and as a Revenue Court of experience in the course of the performance of his duties in *zemindari* tracts; and I hold that he was entitled to use such knowledge in coming to a conclusion on the facts after the consideration of the evidence let in in this case. One other short point has to be noticed, *viz.*, whether the leases granted after 1st July 1898 are wholly shut out as evidence by section 185 of the Estates Land Act. I am inclined to hold that they are so shut out if sought to be used for the purposes of proving the character of the tenure of the land and even

if such leases are sought to be proved merely in order to show that a land was treated in the same manner after July 1898 as before July 1898. I agree, however, with my learned brother that leases granted before 1st July 1898, though they were to come into force only after 1st July 1898, are admissible in evidence and in the result, I agree that these second appeals should be dismissed with costs.

Appeals dismissed.

CALCUTTA HIGH COURT.

MISCELLANEOUS CIVIL APPEAL No. 423 OF 1911 AND CIVIL RULE No. 4896 OF 1911.

August 27, 1912.

Present:—Sir Ashutosh Mookerjee, KT., Judge, and Mr. Justice Beachcroft.

SITO MAHTON AND OTHERS—DEFENDANTS—APPELLANTS

versus

F. F. CHRISTIEN—PLAINTIFF—RESPONDENT.

Injunction, temporary—Order to furnish security and submit accounts—Appeal—Civil Procedure Code (Act V of 1908), ss. 94 (e), 115, O. XXXIX, r. 1, O. XLIII, r. 1, cl. (r)—Interlocutory order for ends of justice—Revision.

In a suit for ejectment, the plaintiff prayed for the issue of a temporary injunction restraining the defendant from working mica mines on the disputed property. The Court ordered the defendant to furnish security to the extent of Rs. 5,000 and submit accounts every week. An appeal was filed against that order. Subsequently, the Court directed the issue of an injunction as the security and the accounts had not been furnished. No appeal was preferred against this order:

Held, (1) that the order appealed against did not grant a temporary injunction nor did it stay and prevent the wasting of the property; that it was not an order contemplated by rule 1 of Order XXXIX, and that, therefore, it was not appealable under clause (r) of rule 1 of Order XLIII;

(2) that the order was made under clause (e) of section 94 of the Civil Procedure Code for the ends of justice, and that the High Court should not set it aside under section 115.

Appeal from the order of the Sub-Judge of Hazaribagh, dated August 12th, 1911.

Babu *Khetra Mohan Sen*, for the Appellants.

Babus *Dwarka Nath Chakravarti* and *Lalit Mohan Mukherjee*, for the Respondent.

JUDGMENT.—The respondent instituted a suit for ejectment against the appellants on the 10th December 1910. On the 11th February 1911, he prayed for the issue of a temporary injunction restraining the defendants from working the mica mines on the disputed property and raising mica therefrom. The application for injunction was opposed by the defendants. The Court thereupon directed that the matter be taken up on the 12th August. On that date, an order was made in these terms,—"The plaintiff has brought a suit for ejectment. The defendant alleges himself to be a lessee of a mica mine. The plaintiff is afraid that the defendant will appropriate a major quantity of the mica in the mine and thus prejudice the plaintiff seriously. Notice has been served on the other side to show cause why he should not be prevented from working in the mica mines. Ordered that the defendant do furnish security to the extent of Rs. 5,000 and submit accounts of the monies appropriated every week from the date of the application for injunction. Date is fixed for 6th September."

The present appeal is directed against this order. The appellants also moved this Court on the 25th August 1911 and prayed for a Rule upon the plaintiff to show cause why the order in question should not be set aside. The Court granted a Rule and directed further proceedings to be stayed *ad interim*. Before this order was communicated to the Court below, on the 7th February 1911, the Subordinate Judge directed the issue of an injunction inasmuch as the security and the accounts had not been furnished within the date specified. No appeal, however, has been preferred against the order of the 7th September.

On behalf of the respondent, a preliminary objection has been taken to the competency of this appeal on the ground that it is not an order under rule 1 of Order XXXIX of the Code and is, consequently, not appealable under clause (r) of rule 1 of Order XLIII. In our opinion, this contention is well founded and must prevail.

Rule 1 of Order XXXIX provides that where in any suit it is proved by affidavit or otherwise that any property in dispute in the suit is in danger of being wasted, the Court may, by order, grant a temporary

injunction to restrain such act or make such other order for the purpose of staying and preventing the wasting of the property, as the Court thinks fit, until the disposal of the suit or until further orders. It is not disputed that the order in question does not grant a temporary injunction; nor can it be contended that the order stays and prevents the wasting of the property. Inspite of the order, the defendants were entitled to work the mine. They were merely called upon to furnish security and submit periodical accounts. The order in question is clearly one not contempleted by rule 1 of Order XXXIX. The appeal is, therefore, incompetent and must be dismissed with costs. We assess the hearing fee at two gold *mohurs*.

We have been invited, however, to set aside the order in the exercise of our revisional jurisdiction. But there is obviously no ground for such interference. The order was made under clause (*e*) of section 94 of the Code, which authorises the Court, in order to prevent the ends of justice from being defeated, to make such interlocutory orders as may appear to the Court to be just and convenient. This Rule must, consequently, be discharged but there will be no separate order for costs.

As the trial of the case has been delayed for nearly two years by reason of the application for injunction and the order therein, the records will be returned without delay to the Court below so that the hearing may be expedited.

Appeal dismissed; Rule discharged.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 672 OF 1912.

November 13, 1912.

Present:—Sir Arthur Reid, KT., Chief Judge.

SHER MUHAMMAD—DEFENDANT—APPELLANT

versus

NIKKA MAL—PLAINTIFF—RESPONDENT.

Mortgage—Refusal to deliver possession—Suit for mortgage-money and interest—Evidence Act (I of 1872), s. 92 (3) & (4)—Registered contract—Admissibillity of oral evidence.

The refusal by a mortgagor to deliver possession gives the mortgagee the right to sue for the mortgage-money and interest.

Hira Lal v. *Ghasitu*, 16 A. 318; A. W. N. (1894) 107, compared.

Soman Mull v. *Kanh Chand*, 15 P. R. 1870; *Gulam Husain* v. *Mehtab*, 57 P. R. 1873; *Gian Singh* v. *Mohan Singh*, 127 P. R. 1881, distinguished.

Oral evidence of modifications of a registered contract is inadmissible.

Second appeal from the order of the Divisional Judge, Amritsar Division, dated the 30th January 1912, modifying that of the Munsif, 1st class, Amritsar, dated the 27th April 1911, decreeing the claim.

Khawaja *Zia-ud-Din*, for the Appellant.

Lala *Dharm Das Suri*, for the Respondent.

JUDGMENT.—The only points of all those taken which have any force are that there was no finding by the lower Appellate Court that refusal by the appellant to deliver possession had not been proved, and that the lower Appellate Court had misdescribed the mortgage-deed.

The first point is met by the pleadings in which it was alleged and not denied that delivery of possession had been refused and the second point is immaterial having regard to the refusal to deliver.

The mortgage was not a simple mortgage, but refusal to deliver possession gives the mortgagee the right to sue for the mortgage-money and interest. *Cf. Hira Lal* v. *Ghasitu* (1) and Ghose on Mortgage, Edition 4, p. 278. *Soman Mull* v. *Kanh Chand* (2), *Gulam Husain* v. *Mehtab* (3) and *Gian Singh* v. *Mohan Singh* (4) do not apply to the facts of this case. Permission to withdraw the suit and file a fresh suit was obtained from the Small Cause Court, in which the previous suit, relied on as a bar to the present suit, was filed and oral evidence of modifications of the registered contract was rightly excluded, section 92 (3) of the Evidence Act being clearly inapplicable and section 92 (4) being specifically inapplicable to registered contracts. The appeal fails and is dismissed with costs.

Appeal dismissed.

(1) 16 A. 318; A. W. N. (1894) 104.
(2) 15 P. R. 1870.
(3) 57 P. R. 1873.
(4) 127 P. R. 1881.

SURATSINGH v. BALDEO.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 8 OF 1910.

March 30, 1912.

Present:—Mr. Batten, A. J. C.

SURATSINGH—APPELLANT

versus

BALDEO—RESPONDENT.

Evidence Act (I of 1872), s. 111—Position of active confidence—Experienced mukhtiar of inexperienced young man—Burden of proof—Allegation of benami transaction—Practice—Party waiting to be produced as witness by opposite party.

Where the affairs of an inexperienced young man, who has just come into possession of his property, are managed by an experienced *mukhtiar*, the latter stands in a position of active confidence to the former within the meaning of section 111 of the Evidence Act.

Where a sale to a person in a position of active confidence to the vendor is impugned on the ground that the vendor intended the sale-deed to be a *benami* document, the rule in section 111 as to burden of proof applies and it is for the vendee to prove that the transaction was for consideration and was entered into in good faith.

Moonshee Buzloor Ruheem v. *Shumsoonnissa Begum*, 11 M. I. A. 551; 8 W. R. (P.C.) 3, followed.

A party knowing the facts of his case personally, should appear as his own witness and not wait to be produced as a witness by the opposite party.

First appeal, against the decree of the District Judge, Nagpur, dated the 15th October 1909.

Messrs. *P. S. Kotwal* and *Madho Rao Padhye*, for the Appellant.

Mr. *F. W. Dillon*, *Sir B. K. Bose*, Rao Bahadur *Bapu Rao Dada* and Mr. *M. B. Kinkhede*, for the Respondent.

FACTS.—Suratsing sued to recover possession of landed property sold by his father Hanuman to the defendant Baldeo, on the ground that Baldeo was Hanuman's *mukhtiar* and induced Hanuman, who was of weak intellect, to execute the deed of sale in Baldeo's favour by falsely representing to him that it was necessary to execute a *benami* sale-deed in order to protect the property. The defence was that the sale was genuine and that full consideration had been paid as stated in the deed.

JUDGMENT.—A great part of the arguments in this Court has been devoted to the question of the burden of proof. The grounds on which it is argued that the burden of proving consideration lay on the defendant are two-fold, *firstly*, that Hanuman was of weak intellect, an imbecile, and, *secondly*, that the defendant was in a position of active confidence towards Hanuman within the meaning of section 111 of the Evidence Act. It was for the plaintiff to prove these circumstances. The District Judge has held that the plaintiff has failed to prove that Hanuman was an imbecile or of weak intellect, and I entirely agree with him. His reasons are given in paragraph 6 of his judgment. It would, in my opinion, be impossible to hold otherwise in face of the evidence of the plaintiff's own witnesses. For instance, the 12th witness, Vithoba, says Hanuman was a person of ordinary intelligence, like the witness himself.

It is an admitted fact that the defendant was Hanuman's *mukhtiar*, though it is not admitted that he did anything more than Court work for him. It is clear from the defendant's own written statement and evidence as 9th witness for plaintiff that defendant did a great deal for Hanuman as his *mukhtiar*. Hanuman was a young man who had just come into his property and Baldeo was a man of experience who had also been the *mukhtiar* of Hanuman's predecessor-in-title, *Musammat* Latkan Bai. No Indian cases of exactly a similar kind have been cited, nor have I been able to find such cases, but I have no hesitation in saying that Baldeo stood towards Hanuman in a position of active confidence, just as much as a Solicitor or Barrister. I would note here that a sale to a Solicitor is not necessarily invalidated by reason of the consideration having in part consisted of costs already incurred, though the fact of the client being indebted to the Solicitor is an unfavourable feature, on account of the additional influence it must necessarily have created (*vide* cases cited at page 44 of Dart on the Law of Vendors and Purchasers, 7th Edition). Similar considerations appear to me to apply in this case and, if section 111 of the Evidence Act applies, it is for the defendant to prove the fairness of the transaction, which on the pleadings means that it was for consideration.

An ingenious argument has been put forward on behalf of the respondent, namely, that section 111 of the Evidence Act is not applicable when, as here, the persons impugning the transaction do so on the ground that it was a nominal transaction,

and not on the ground that the executant was induced to believe that he was executing a genuine document for consideration whereas in fact there was no consideration. It is argued that when it is admitted that the executant knew that the document was not for consideration and not intended to take effect, the question of the fairness of the transaction does not arise, but only the question of the reality of the transaction, and that it lies on the person who alleges its unreality to prove it, and that the circumstances necessary for the application of section 111 do not exist. It appears to me that this argument, though ingenious, is fallacious. Here the defendant asserts that the sale-deed was in good faith, that is to say, for consideration, while the plaintiff says that it was not for consideration. The good faith of the transaction is certainly in question, and once it is established that the defendant was in a position of active confidence towards Hanuman, the section applies. The good faith of the transaction means the good faith of the whole transaction, that is to say, that the transaction was entered into in good faith by both the parties. A *benami* transaction may, as between the parties to it, be entered into in good faith just as much as any other transaction, and if, as the plaintiff alleges, the transaction was in fraud of Hanuman, the method of carrying out the fraud is of no importance as regards this provision of the law, whether it was by inducing him to execute a document which he believed to be genuine, or whether it was by inducing him to execute a document which he intended to be a *benami* document while the defendant intended to use it as a real transfer. I hold that section 111 is applicable. I am confirmed in this view by the ruling in *Moonshee Buzloor Ruheem* v. *Shumsoonissa Begum* (1), where it was alleged by the person impugning the transaction that it was *benami*. On the other hand, the defendant is entitled to take advantage of anything in the plaintiff's pleadings and evidence which supports his case, and if the plaintiff positively asserts that the fraud was committed in a particular way, and the story as told is improbable, the defendant is entitled to ask the Court to take that improbability into consideration in weighing the evidence. Moreover, though it lies on the defendant to prove that the transaction was *bona fide*, if the plaintiff seeks to gain any particular advantage from the fraud having been committed in a particular way, the plaintiff would, to gain that advantage, have to prove that the fraud was committed in that particular way before he could obtain that particular advantage. Thus, if the suit were time-barred if the fraud were of an ordinary nature, and not time-barred if Hanuman executed a *benami* deed, then it would lie on the plaintiff to prove that the deed was intended by Hanuman to be *benami*.

[After reviewing the evidence, the judgment proceeds :—]

I quite disbelieve the story of the transaction being believed by Hanuman to be nominal, and I agree with the District Judge that Baldeo has proved the payment of consideration by as good evidence as it was likely he could get after such a lapse of time.

I cannot ignore Baldeo's own evidence as 9th witness for the plaintiff. It has its unsatisfactory features but, on the whole, it is good evidence. Baldeo, I regret to remark, was examined as a witness for his adversary instead of for himself. This practice, which, I am sorry to say is not dying such a quick death as it should, considering the frequent criticisms of this Court, is bound to result in the evidence being recorded in an unsatisfactory manner.

It is clear that Baldeo did use his influence to induce Hanuman to sell his Central Provinces property to him, but the influence took the form of inducing him to sell to Baldeo rather than to some one else, Baliram. I can see nothing improper in this since Baldeo thus made sure of being paid what was owed him.

I agree with the District Judge that the respondent has sustained the burden of proving that the sale-deed was executed in good faith, and for consideration, and I dismiss the appeal with costs.

Appeal dismissed.

(1) 11 M. I. A. 551; 8 W. R. (P. C.) 3.

UTTAM SINGH *v.* HIRA.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL NO. 225 OF 1912.

November 9, 1912.

Present:—Sir Arthur Reid, KT., Chief Judge.

UTTAM SINGH—PLAINTIFF—APPELLANT

versus

HIRA AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), *s.* 11—Res judicata—*Suit for possession—Defence of adoption set up—Finding that adoption not established—Subsequent suit by alleged adopted son.*

A. sued *B.*, *C.* and *D.* for possession of land mortgaged to *C.* by one *E.* The defence set up, *inter alia*, was that *B.* had been adopted by *E.* The Court found the adoption not established and decreed the claim. *B.* thereupon sued *A. C.* and *D.* for possession on the ground that he was the adopted son of *E.*:

Held, that the suit was barred by section 11 of the Civil Procedure Code, as in the previous suit the question of adoption was directly and substantially in issue between *A.* and *B.* and in that suit there was a real adjudication of the question of title as between the parties.

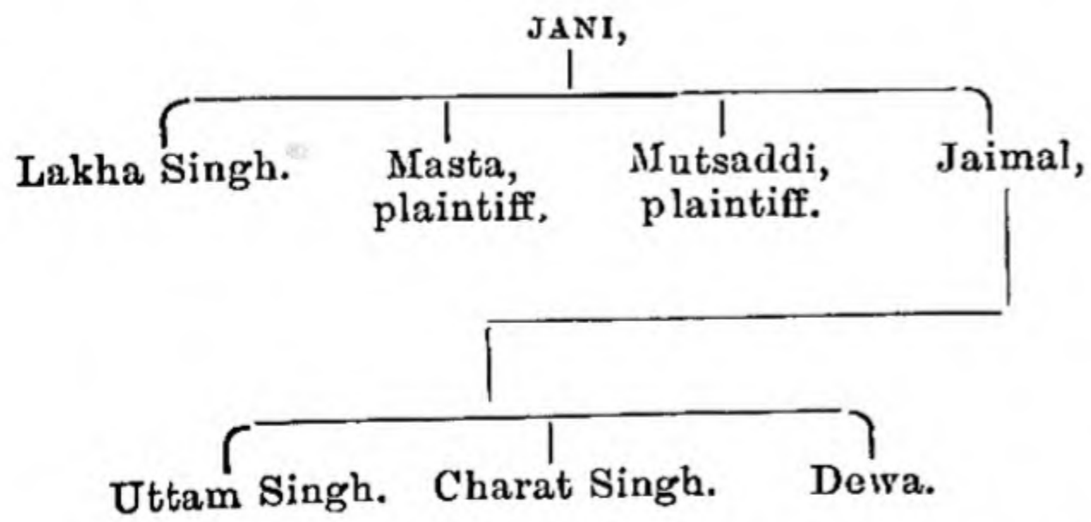
Zaman Ali v. *Manji*, 60 P. R. 1894 and *Labhu* v. *Hira Singh*, 41 P. R. 1899, distinguished.

Second appeal from the order of the Additional Divisional Judge, Ambala Division, at Ludhiana, dated the 18th November 1911, reversing that of the Subordinate Judge, Ambala, dated the 30th June 1911, decreeing plaintiff's claim.

Mr. *Daulat Ram*, for Mr. *Devi Dial*, for the Appellant.

Mr. *Roshan Lal*, for the Respondents.

JUDGMENT.—The following is the pedigree of the parties:—



On the 3rd November 1910, the defendants-respondents, sons of Masta and Mutsaddi, sued Uttam Singh, Charat Singh and Dewa for possession of 6 *bighas*, being 2/3rds of 9 *bighas*, mortgaged by Lakha Singh to Charat Singh shortly before Lakha's death. The defences set up were (1) that Lakha had adopted Uttam and that the then plaintiff, consequently, had no right to Lakha's land, (2) that the mortgage was for consideration and legal necessity.

The suit was tried by a Munsif of the first class, who devoted the greater part of his judgment to the first issue and decided that the alleged adoption had not been established and gave the then plaintiffs a decree on the 28th February 1911. On the latter date, the plaintiff-appellant, Uttam, filed a suit against the previous plaintiffs and his brothers, Charat and Dewa, for possession of Lakha's estate on the ground that he had been adopted, *i. e.*, appointed heir under the Customary Law, by Lakha. This suit was cognisable by a Munsif of the first class but was tried by a Subordinate Judge. The Court of first instance held that the suit was not barred by the rule of *res judicata*, embodied in section 11 of the Code of Civil Procedure, the question of adoption having arisen only between the collaterals and Charat, and the plaintiff before him having nothing to gain from that suit, being merely a "by-stander" and the issue not arising directly between him and the present defendant. The lower Appellate Court held that the suit was barred by section 11 and dismissed it on the ground that Uttam Singh had been impleaded in the former suit and set up his adoption in defence. The lower Appellate Court further held that the fact that Uttam Singh, subsequently, declined to submit to the jurisdiction of the Court and announced his intention of filing a suit on his own account did not help him, inasmuch as he had not obtained the permission of the Court to withdraw from the defence and file a separate suit. I see no reason for interfering with this conclusion. In the previous suit, the question of adoption was directly and substantially in issue between the then plaintiffs, and the present plaintiff-appellant. They were litigating under the same title and the Court was competent to try the present suit. The decision of the issue against the then plaintiffs would have entailed dismissal of their suit, and the fact that Charat Singh was then the defendant in possession does not obviate the fact that the present plaintiff-appellant was a party to the suit, and set up the adoption on which he now sues. The facts dealt with in *Zaman Ali* v. *Manji* (1) and *Labhu* v. *Hira*

(1) 60 P. R. 1894.

BHURA *v.* RAMRAO.

Singh (2), cited for the appellant, are so clearly distinguishable from those of the present case that they do not help him. Here there was in the former suit a "real adjudication" of the question of the title of those plaintiffs and the present plaintiff as between them. The greater part of the judgment of the Court in the previous suit, as already stated, was devoted to the adoption. For these reasons, I hold that section 11 bars the present suit and I dismiss the appeal, but, having regard to the circumstances under which this suit was filed, I leave the parties to bear their own costs of this Court.

Appeal dismissed.

(2) 41 P. R. 1899.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 180 OF 1911.

June 13, 1912.

Present:—Mr. Stanyon, A. J. C.

BHURA—APPELLANT

versus

RAMRAO—RESPONDENT.

Central Provinces Tenancy Act (IX of 1883*)*, s. 38 (1)—*Central Provinces Tenancy Act (XI of* 1898), s. 41 (1) — *Absolute-occupancy-holding — Widow's estate, nature of—Hindu Law*—Mitakshara—*Alienation—Necessity—Marriage of divided nephew of husband.*

An alienation by a Hindu widow of her deceased husband's estate in order to provide the expenses of his divided nephew's marriage is not binding on her husband's reversioners, as such expenses do not constitute legal necessity.

A Hindu widow, upon whom the absolute-occupancy-holding of her husband has devolved under section 38 (1) of the Central Provinces Tenancy Act, 1883 or section 41 (1) of the Central Provinces Tenancy Act, 1898, obtains an interest therein analogous in all respects to the estate of a Hindu widow in land inherited by her from her husband subject only to the provisions of the statute as to surrender and alienation.

Appeal against the decree of District Judge, Chhindwara, dated the 16th January 1911, confirming that of the Subordinate Judge, Chhindwara, dated the 26th August 1910.

Messrs. *Ramdas Chhabildas* and *A. C. Roy*, for the Appellant.

Messrs. *J. Mitra* and *P. S. Kotwal*, for the Respondent.

JUDGMENT.—It is expedient to briefly state the facts of the case. One Bapu Rao Mahratta had an absolute occupancy holding. He died on the 5th September 1884, not "in 1894" as stated in the judgment of the lower Appellate Court. Under the provisions of Act IX of 1883, his holding devolved on his widow, *Musammat* Laxmi Bai, there being no lineal descendant of her husband. Bapu Rao had two brothers, Aba Saheb and Balwant Rao. Neither of these was joint with him in the holding above mentioned. Aba Saheb predeceased Bapu Rao, leaving a son named Vithoba. In 1891, *Musammat* Laxmi Bai and Vithoba executed a mortgage of the holding in favour of one Khushal, part of the consideration being money borrowed to meet the expenses of Vithoba's marriage. In 1893, Laxmi Bai and Vithoba sold the holding to the defendant for Rs. 1,200, whereof Rs. 772 were applied in satisfaction of the mortgage and a grain debt, and Rs. 428 were advanced in cash. In 1902, *Musammat* Laxmi Bai died, and then, unless the alienation endures beyond her life-time, the holding devolved upon the heirs of her husband, who were Vithoba, the son of Aba Saheb, and Ramrao the son of Balwant Rao—also dead. The present plaintiff is Ramrao, and he claims half the estate. The defendant denied the plaintiff's alleged relationship with Bapu Rao, and asserted that holding had been alienated to him for legal necessity by the widow of Bapurao.

The first Court found,—

(1) that the plaintiff is Bapu Rao's brother's son and was one of two heirs in whom the reversion vested on the death of *Musammat* Laxmi Bai in 1902; and

(2) that, of the consideration of Rs. 1,200, a sum of Rs. 772 went to pay money borrowed for the marriage of Vithoba, which was a legal necessity.

The first Court, therefore, gave the plaintiff a decree for half the holding, on payment of Rs. 772 with interest thereon from the date of Laxmi Bai's death, *minus* whatever the defendant might be found to have recovered as profits of the holding from the same date.

Against this decree, both parties appealed to the District Judge, who dismissed the

appeal of the defendant, holding on the appeal of the plaintiff,—

(1) that only Rs. 666 represented the amount connected with Vithoba's marriage; and

(2) that Vithoba's marriage was not a legal necessity binding on the estate of his uncle Bapurao, since it was an estate in severalty wherein Vithoba had no co-parcenary interest.

The District Judge, therefore, cancelled the condition appended by the first Court to plaintiff's decree for possession. The defendant has now made this second appeal, and the grounds pressed before me are,—

(1) that the marriage of Vithoba was a legal necessity; and

(2) that the right of Laxmi Bai in the holding was a right created by contract and statute, and her power to alienate the holding as the tenant thereof for the time being was not governed or restricted by the Hindu Law, but only by the Tenancy Act. In support of this argument, reference was made to *Ghanya* v. *Ukund Rao* (1).

With regard to the first of these points, it was urged that the *dictum* from the case of *Sundra Bai* v. *Shivnarayana* (2), quoted by the lower Appellate Court, is *obiter*. That is, no doubt, the case: but no text or authority is forthcoming in support of the view that a Hindu is so far bound to provide the marriage expenses of the son of his divided deceased brother, as to justify an alienation of his estate by his widow for that purpose. A Bombay case was cited, wherein it was held that it is the pious duty of a Hindu widow to adopt a son whenever she can to a husband who has died sonless, in order that his name and line may be perpetuated, and his obsequies duly performed: and it was sought to draw an analogy from this case to sustain the argument of the appellant. No doubt Bapu Rao died without lineal issue: but, on the authority cited, the widow's duty was to adopt a son, and not to waste the inheritance on a nephew. Assuming adoption was not permissible in the present case, Bapu Rao left a brother and two nephews, besides his widow, to look after the ceremonies necessary for his spiritual benefit, and the analogy claimed does not hold good. I have no reason, as at present advised, to differ from the lower Appellate Court on the question of legal necessity, and the appeal, therefore, fails under this head.

Then, as to the power of Laxmi Bai to alienate. In *Ghanya* v. *Ukund Rao* (1), I decided that an agricultural holding governed by the Central Provinces Tenancy Act " is an estate created by contract and statute, and its devolution is governed by the same statute ". And I added that, although the statute makes such devolution follow the personal law of the tenant, "it is not enacted that all the principles of such personal law shall be applied to the estate. The statute merely directs that when it becomes necessary to find the heir of a deceased tenant, he shall be the person who would be heir to an estate of ownership in land. The Tenancy Act does not recognize such things as succession by right of survivorship, the vesting of a son's interest by birth, and so on". I might add that it is only in the case of an absolute occupany that the personal law is fully followed. It is only partly followed in the case of occupancy and ordinary tenant-right.

The learned Counsel for the appellant inferred from this ruling that the Tenancy Act provides, not only the devolution, but also the *quantum* of the estate held by an agricultural tenant as such, and that it contains none of the limitations imposed by Hindu law on a widow. It was, therefore, wrong to go into questions of legal necessity and reversionary rights under Hindu Law. A Hindu widow holding an absolute occupancy-right has precisely the same right of alienation as any other tenant, the enactment making no distinction between male and female tenants. If she can surrender, she can sell.

This argument is, no doubt, plausible : but there are several reasons why I must decide against it. In the first place, it comes as an eleventh hour surprise. The case was fought out in the lower Courts on the assumption by both parties that the estate of Laxmi Bai in the absolute occupancy was that of a Hindu widow, and, though the question now raised is purely one of law, it is nevertheless an entirely new ground of defence, neither pleaded nor put

(1) 4 N. L. R. 9 at p. 13.
(2) 32 B. 81; 9 Bom. L. R. 1366; 3 M. L. T. 44.

in issue. However, I should not put it aside on this ground alone. But there is against it the much stronger argument arising out of the maxim of *stare decisis*. Ever since an absolute occupancy tenure was made heritable, it has been accepted law in these Provinces that, when held by a Hindu widow, as such, it is governed by all the restrictions applied by Hindu Law to the estate of a Hindu widow in land inherited by her from her husband. It is only necessary to refer to the cases of *Fakira* v. *Hari* (3); *Musammat Salita* v. *Sitaram* (4) and *Sheoshankarpuri* v. *Musammat Rakhma* (5). I should require very strong reasons to disturb a view of the law so settled. Such reasons are entirely wanting. I have no doubt, as already decided in *Ghanya* v. *Ukund Rao* (1), that the Tenancy Act does not make the holding of a Hindu tenant an estate at Hindu law; and that the nature and extent of the interest of every agricultural tenant must depend upon his contract with the landlord, supplemented and controlled by the enactment, and by nothing else. But, by using the personal law as a guide to devolution, the statute necessarily introduces such limitations as the personal law provides for the purpose of securing such devolution. If the statutory devolution is to follow Hindu law, it must secure that, after the death of a widow who has inherited the tenancy from her husband, the holding shall devolve upon the heirs of her husband, and not upon her heirs. That is what the Tenancy Act does provide, and it is, therefore, not correct to say that it makes no difference between male and female tenants. Where the tenant is a Hindu female, upon whom the Tenancy has devolved from a male *propositus*, she is not a fresh stock of descent. I do not interpret the enactment to mean that the heir is to be found for each tenant in turn. The words "shall devolve as if it were land" mean a continuous devolution along a chain of heirs reckoned from the first tenant. Therefore, the Tenancy Act, by its application of the Hindu Law rule of inheritance, necessarily gives Hindu females, who have become tenants by devolution, a qualified estate, saddled with a reversion: and it seems reasonable to asume that the Legislature intended, in this particular instance, to apply the personal law for the purpose of fixing those qualifications.

I, therefore, hold that a Hindu widow, upon whom the absolute occupancy holding of her husband has devolved under section 38 (1) of the Central Provinces Tenancy Act, 1883, or section 41 (1) of the Central Provinces Tenancy Act, 1898, obtains an interest therein analogous in all respects to the estate of a Hindu widow in land inherited by her from her husband, subject only to the provisions of the statute as to surrender and alienation.

For the above reasons, this appeal fails and is dismissed with costs.

Appeal dismissed.

(1) 6 C. P. L. R. 135.
(2) 6 C. P. L. R. 138.
(3) 15 C. P. L. R. 89.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 53 OF 1911.
October 17, 1912.

Present:—Mr. Justice Sundara Aiyar and Mr. Justice Sadasiva Aiyar.

VENCATRAMA AIYAR—APPELLANT

versus

RANGASAWMI AIYANGAR AND OTHERS—RESPONDENT.

Transfer of Property Act (IV of 1882), ss. 76, 83—Tender of mortgage money—Mortgagor claiming to split up the mortgage—Dispute as to extent of mortgagor's right—Refusal of mortgagee to receive tendered amount—Mortgagor's claim for mesne profits—Interest.

The provisions of the Transfer of Property Act relating to the tender of mortgage amount and the cessation of interest from the date of such tender, do not, in terms, refer to a case where the mortgagor claims to split up the mortgage in consequence of the mortgagee having become the owner of a portion of the equity of redemption, or to a case where there are disputes between the parties as to the extent of the subsisting interest of the mortgagor in the equity of redemption so as to compel the mortgagee to take upon himself the task of deciding such disputes rightly for himself at the risk of losing the interest on the money due to him and becoming accountable for mesne profits.

Searles v. *Sadgrove*, 5 E. and B. 639; 103 R. R. 658; 25 L. J. Q. B. 15; 2 Jur. (N. S.) 21; 4 W. R. 53; 26 L. T. (O. S.) 189, referred to.

Second appeal against the decree of the Subordinate Judge of Kumbaconam, in A. S. No. 62 of 1910, preferred against that of the District Munsif of Kumbaconam, in O. S. No. 215 of 1907.

VENCATARAMA AIYAR v. RANGASAWMI AIYANGAR.

Mr. *T. R. Vencatrama Sastri*, for the Appellant.

Mr. *K. Ramachandra Aiyar*, for 1st Respondent.

JUDGMENT.—The only question argued before us is that the finding on the question whether Ramachandra Rao was entitled to one-half or only one-fifth of the properties should not be accepted. The decision of the question depended upon whether Ramachandra Rao was adopted to Triambaka Rao, the uncle of Narayana Rao and Krishna Rao, or not. The Subordinate Judge has considered in detail the evidence on the question and has referred to the conduct of the parties which was relied on as proving an adoption. It is argued that there was evidence given of an oral partition at which Ramachandra Rao was given one-third of the property. This partition is said to have been in 1894, seven years before the mortgage, which was in 1901. The Subordinate Judge has referred to Exhibit III in which this oral partition was set up and he was not prepared to place reliance on Exhibit III. We cannot say that the absence of express reference to the oral evidence of the partition in 1894 would vitiate the finding when the Subordinate Judge found himself unable to accept Exhibit III, in which the oral partition was referred to, as reliable against the plaintiff. We must, therefore, dismiss the appeal with costs.

The question raised in the memo. of objections is, whether the plaintiff is entitled to mesne profits on the four-fifths share sought to be redeemed from the date of plaint up to the time of his being put in possession of one-half share subsequent to the decree of the District Munsif. It is argued that he is, because he tendered four-fifths of the mortgage amount to the 1st defendant and the latter refused to receive it. It is urged that the mortgage-money ceased to carry interest after the 1st defendant's refusal to accept payment and to deliver four-fifths of the properties; and that 1st defendant was bound to account for four-fifths of the mesne profits from that date under section 76, clause (*e*), of the Transfer of Property Act. The claim is not and cannot be rested on the ground that the plaintiff has actually sustained any damages by any wrongful act on the part of the 1st defendant. The right claimed is a statutory one. Does it exist in a case of this sort? The 1st defendant, in his written statement, did not deny the tender. He alleged that the plaintiff was not entitled to demand apportionment of the mortgage-amount with respect to the share of the property belonging to him and to ask for partition and redemption in the same suit. He denied the plaintiff's right to get mesne profits till possession of the land was obtained. It is clear that the plaintiff could not be put into possession of what he claimed without a partition. The parties were not agreed whether the plaintiff was entitled to recover one-half or four-fifths of the land. The plaintiff did not offer to pay the amount tendered and agree to leave the question of the share which he was entitled to recover to be determined by Court. He had no right to require the defendant to accept the amount on the footing that his claim to recover four-fifths of the land was well founded. The provisions of the Transfer of Property Act do not, in terms, refer to a case where the mortgagor claims to split up the mortgage in consequence of the mortgagee having become the owner of a portion of the equity of redemption, or to a case where there are disputes between the parties as to the extent of the subsisting interest of the mortgagor in the equity of redemption so as to compel the mortgagee to take upon himself the task of deciding such disputes rightly for himself at the risk of losing the interest on the money due to him and becoming accountable for mesne profits. In *Searles* v. *Sadgrove* (1), it was observed: "The sum tendered must include the full amount due upon the mortgage for principal, interest and costs and the tender of such amount is not made valid by the mortgagor having a set-off for the balance." A statutory right of this character should not be extended where there are disputes between the parties of the kind that existed in this case, so as to throw on the mortgagee an undue amount of responsibility. The claim for mesne profits must, therefore, be disallowed and the memo. of objections dismissed with costs.

Appeal dismissed; Memo. of Objections dismissed.

(1) 5 E. & B. 639: 103 R. R. 658; 25 L. J. Q. B. 15; 2 Jur. (N. S.) 21; 4 W. R. 53; 26 L. T. (O. S.) 189.

MADHO *v.* UMRAO.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 342 OF 1911.

July 15, 1912.

Present:—Mr. Drake-Brockman, J. C.

MADHO—APPELLANT

versus

UMRAO—RESPONDENT.

Central Provinces Tenancy Act (IX of 1883), s. 38 (2)—Occupancy holding—Intention to mortgage, notice of—Criterion for determining necessity for notice—Interest—Calculation—Interpretation of statutes—Object of statute.

The criterion for determining whether a landlord is entitled to notice under section 38 (2) of the Central Provinces Tenancy Act, 1883, of an intention to mortgage an occupancy holding, is the annual rent of the entire holding if the entire holding is to be transferred; if only a part of the holding is to be transferred, then only so much of the annual rent as corresponds with that part.

The provisions of a statute should not be evaded by shift or contrivance. To carry out effectually the object of a statute, it must be so construed as to defeat all attempts to do or avoid in an indirect or circuitous manner that which it has prohibited or enjoined.

The mere fact that re-payment in full of mortgage-money is contemplated within a period shorter than five years should not be looked upon as limiting the calculation of interest to that period when applying to the transaction the test prescribed by section 38 (2) of the Tenancy Act. The whole interest payable on the principal during the five years immediately succeeding the mortgage should be taken into consideration.

Appeal against the decree of the District Judge, Nagpur, dated the 13th May 1911, confirming that of the Munsif, Ramtek, dated the 25th January 1911.

Messrs. *T. V. Deshmuk* and *Atmaram Bhagwant*, for the Appellant.

Mr. *A. C. Roy*, for the Respondent.

JUDGMENT.—On the 4th November 1886, Anand Rao, one of two joint tenants of an absolute occupancy holding, rented at Rs. 24 per annum, mortgaged it to the present appellant for a sum of Rs. 75, made up of Rs. 60 principal and Rs. 15 prospective interest. That sum was made payable by three instalments of Rs. 25 each, the first in *Chet* (March—April) 1887, the second in *Chet* (April—May) 1888 and the third in *Chet* (April) 1889. On each defaulted instalment, interest at 2 per cent. per mensem was to be paid. The appellant eventually foreclosed, and in July 1909 obtained possession of the share. The suit out of which this appeal arises was then brought by the respondents as landlords to recover possession on the ground that notice of the mortgage was not given to them as required by section 38 (2), Central Provinces Tenancy Act of 1883.

The appellant's case in the Courts below was, that the provision just cited is inapplicable, inasmuch as eight times the annual rent of the entire holding is Rs. 192, *i.e.*, much in excess of any sum that could possibly have become due during the five years immediately succeeding the mortgage. The Courts below have concurred in holding that, for the purpose of testing the validity of the mortgage, half the rent, not the whole, should be looked to, inasmuch as only half was mortgaged. Both Courts considered the interest payable during the aforesaid period of five years to be in excess of Rs. 36 and the plaintiffs' claim for possession was accordingly decreed.

In this Court, the appellant's case is two-fold. In the first place, it is argued that according to the strict terms of section 38 (2), Tenancy Act of 1883, it is "the annual rent of the holding" which has to be looked to, while in section 3 (7) the term "holding" was defined as "a parcel of land held by a tenant of a landlord under one lease or one set of conditions". If this contention is allowed, nothing could be easier than to evade the provision in question. To take the simplest kind of case, a sole tenant paying Rs. 10 as annual rent might mortgage half his field to-day for Rs. 80 and the remaining half for a like sum to-morrow. He would thus have effected what is tantamount to a single mortgage for Rs. 160, which would clearly require to be preceded by a notice to the landlord. Similarly, where there are two joint tenants of a holding rented at Rs. 10, each might mortgage his undivided half for Rs. 80 with a similar result. Common sense, therefore, demands that the annual rent of the entire holding should be looked to only when some right extending over the entire holding is to be transferred. This view finds support in the *dictum* that to carry out effectually the object of a statute, it must be so construed as to defeat all attempts to do or avoid in an indirect or circuitous manner that which it has prohibited or enjoined: see Maxwell on the Interpretation of Statutes, page 171 (4th Edition). I may also quote as pertinent to the subject under consideration

a remark by Fry, L. J., in *In re Burdett* (1):—

"In our judgment, clauses in statutes avoiding transactions or instruments are to be interpreted with reference to the purpose for which they are inserted, and when open to question are to receive a wide or a limited construction, according as the one or the other will best effectuate the purpose of the statute."

This principle that the provisions of a statute shall not be evaded by shift or contrivance was applied by Straight, C. J., in *Harjas* v. *Radha Krishan* (2), where the words "held by him as *sir*" in section 7 of the North-Western Provinces Rent Act, 1881, had to be construed. That section runs thus:—

"Every person who may hereafter lose or part with his proprietary rights in any *mahal* shall have a right of occupancy in the land held by him as *sir*....."

It was contended that, where a proprietor was out of possession of his *sir* at the time of selling his proprietary rights, having previously mortgaged it with possession to the vendee, he did not "hold" the *sir*. To this, the learned Chief Justice replied:—

"I think that the words '*held by him as sir*' must be construed to mean land belonging to him, or to which he was entitled, as *sir*. In my opinion, we ought to give as liberal an interpretation as is consistent with the canons of construction to these words. Otherwise, it is easy to foresee how the door may be opened to the very mischief at which the Act aimed, by sales in future being preceded by a possessory mortgage of the land subsequently conveyed, so that the purchaser should be in possession of the *sir* at the date of sale, and thus be able to say that he and not the ex-proprietor held it at that time. Thus, the provisions of the statute would be easily evaded."

For these reasons, I agree with the Courts below that Rs. 96, not Rs. 192, is the sum by which the landlord's right to notice of intention to effect the mortgage of 1886 should be tested.

It is further contended on the appellant's behalf that the rate of interest primarily charged under the mortgage contract was only Rs. 15 in 2½ years or Rs. 6 per annum. To my mind, there is an obvious fallacy underlying this contention. Rupees 15 were added as prospective interest to the principal and, given punctual payment of all the three instalments, that sum only would have been recovered *qua* interest. But the mortgage-deed nowhere lays down that each instalment of Rs. 25 included one and the same amount as interest. The lower Appellate Court has correctly calculated that the contract is identical in effect with one to pay interest at Rs. 1-7-0 per cent. per mensem on Rs. 60, the 1st instalment including Rs. 4-5-0, the 2nd Rs. 6-14-3 and the third about Rs. 4 on account of interest. Even leaving out of consideration the enhanced rate chargeable after default, the interest payable on the principal during the five years immediately succeeding the mortgage was over Rs. 50. The mere fact that re-payment in full within 2½ years was contemplated should not be looked upon as limiting the calculation of interest to that period when applying to the transaction the test prescribed by section 38 (2) aforesaid: see *Rekchand* v. *Krishna* (3).

The appeal accordingly fails and is dismissed with costs. There is, however, an obvious clerical error in the lower Appellate Court's decree, the plaintiffs being given possession of only one-fourth instead of one-half of the holding. This will now be corrected.

Appeal dismissed.

(1) (1888) 57 L. J. Q. B. 263 at p. 264; 20 Q. B. D. 310; 36 W. R. 345; 5 Morrell 32; 58 L. T. 708.

(2) 8 A. 256.

(3) 11 C. P. L. R. 127.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 607 OF 1909.

October 31, 1912.

Present:—Sir Arthur Reid, KT., Chief Judge, and Mr. Justice Rattigan.

CHOGHATTA—PLAINTIFF—APPELLANT

versus

ASO MAL AND ANOTHER—DEFENDANTS—RESPONDENTS.

Guardian and Ward—Power of guardian to mortgage ward's property—Ward seeking equitable relief—Compensation for benefit received by ward—Specific Relief Act (I of 1877), s. 41.

Where a minor plaintiff seeks equitable relief, such as the cancellation of a document, the Courts will no

CHOGHATTA *v.* ASO MAL.

grant that relief unless and until the plaintiff is willing and agrees to restore any benefits that he may have received under the transaction covered by such document.

A., the *de facto* guardian of a minor, mortgaged the latter's ancestral property in order to pay off a just debt contracted by the father of the minor; the minor sued to recover the mortgaged property on the ground that A. had no authority in law to mortgage his property:

Held, (1) that the estate of the minor, which came to him through his father, could not have been made liable, either directly or indirectly, in respect of claims against his father for monies lent, as during his life-time the latter did not charge the estate in his possession with the payment of those debts;

Jagdip Singh v. *Narain Singh*, 173 P. L. R. 1912; 160 P. W. R. 192; 15 Ind. Cas. 866, followed.

(2) that the minor could not, under the circumstances, be ordered to make any compensation at all.

Though, under section 41 of the Specific Relief Act, a Court has ample power, on adjudging a cancellation of a mortgage debt in favour of the plaintiff, to require the latter to make such compensation to the other as justice may require, such power will not be used if it is shown that the defendant has been in possession for several years and been enjoying the produce during that time.

Second appeal from the decree of the Divisional Judge, Multan Division, dated the 24th February 1909, reversing that of the Munsif, 1st class, Multan, dated 6th April 1908, decreeing the claim.

Mr. *Shah Nawaz*, for the Appellant.

Bhagat *Gobind Das*, for the Respondents.

JUDGMENT.—The Munsif and the Divisional Judge have concurred in holding that Pahlwan, the paternal uncle of the plaintiff, had no authority, as his *de facto* guardian, to mortgage his property to the defendant, Asa Mal, and it is now admitted that this finding is correct in law. It is, however, urged on behalf of the defendant that the mortgage was effected in order to pay off a just debt incurred by Sultan, the father of the minor plaintiff, and that *Anant Ram* v. *Nazir Hussain* (1) and other decisions of this and other High Courts to a similar purport, are authorities for the proposition that in a case where a minor plaintiff seeks for equitable relief, such as the cancellation of a document, the Courts will not grant that relief unless and until the plaintiff is willing and agrees to restore any benefits that he may have received under the transaction covered by such document. In the present instance, the contention is that the money was lent to the late father of the plaintiff for various necessary purposes, such as the payment of Government land revenue, the improvement and repairs of the wells on the land and the like and it is urged that as the plaintiff has inherited his father's estate which had benefited by those loans, he should be compelled to restore the amount of his father's debt to the defendant before he is granted the relief. In this connection *Balak Ram* v. *Dadu* (2) is quoted.

In view of the Full Bench decision reported as *Jagdip Singh* v. *Narain Singh* (3), it is quite clear that the estate of the minor which has come to him through his father could not have been made liable, either directly or indirectly, in respect of the claims which the defendant had against Sultan for monies lent to the latter, it being admitted that Sultan himself, during his life-time, did not charge the land in his possession with the payment of that debt. In these circumstances, it follows that there was no legal liability enforceable against the minor plaintiff or against the estate in his hand to pay his father's debt. Mr. Gobind Das concedes that this is so under the authority of the Full Bench ruling, but he submits that in a case of this kind, it is not necessary for the creditor to show that the minor has received any benefit of a kind which might in some events be legally enforceable against him. He argues that under section 41 of the specific Relief Act, this Court has ample power, on adjudging a cancellation of a mortgage-debt in favour of the plaintiff, to require the latter to make any compensation to the other which justice may require. There is force in this argument, but in the present instance, we do not feel called upon to order plaintiff to make any compensation at all. In our opinion, the defendant, who has been in possession of the land for the last 12 years and been enjoying its produce during that time, has been sufficiently compensated, and nothing further can reasonably be demanded of the plaintiff as compensation to the defendant.

We accordingly accept the appeal and setting aside the decree of the Divisional

(1) 144 P. R. 1883.

(2) 76 P. R. 1910; 7 Ind. Cas. 1000; 112 P. W. R 1910; 98 P. L. R. 1910.

(3) 173 P. L. R. 1912; 160 P. W. R. 1912; 15 Ind. Cas. 866.

Judge we restore that of the Court of first instance. We direct further that the parties shall bear their own costs both in the lower Courts and also in this Court.

Appeal allowed.

MADRAS HIGH COURT.

SECOND CIVIL APPEALS NOS. 1465 AND 1466 OF 1911.

October 17, 1912.

Present:—Mr. Justice Sundara Aiyar and Mr. Justice Sadasiva Aiyar.

IN No. 1465

THE SECRETARY OF STATE FOR INDIA IN COUNCIL, REPRESENTED BY THE COLLECTOR OF KISTNA—APPELLANT

versus

CHINNAPRAGADA BHANUMURTY—RESPONDENT.

IN No. 1466

THE SECRETARY OF STATE FOR INDIA IN COUNCIL, REPRESENTED BY THE COLLECTOR OF KISTNA—APPELLANT

versus

KALIPATNAPU SRIRAMULU—RESPONDENT.

Madras Act (II of 1894), *s.* 17—*Service* Inam—*Resumption by Government—'Granted or continued' by Government—Non-interference by Government with holder's rights—Whether amounts to 'continuance.'*

Under section 17 of Madras Act II of 1894, Government has no right to resume land granted by the proprietor of an estate. In order that Government may have the rights of resumption, the right to the land must, in the first instance, either have emanated from Government, or the continuance of the right must have been due to an act of Government. Mere sufferance by Government, or forbearance from taking steps which it might have been open to the Government to take, will not amount to a 'continuance' by the Government of the land in respect of the office. Mere collateral expressions of opinion which were not intended to be a recognition or confirmation of the right of the holder would equally be insufficient to amount to a continuance.

Second appeals against the decrees of the Subordinate Judge of Kistna at Ellore, in A. S. Nos. 391 and 392 of 1910, presented against those of the District Munsif of Narsapur, in O. S. Nos. 423 and 432 of 1908 respectively.

Mr. *L. A. Govindaragava Iyer*, Acting Government Pleader, for the Appellant.

Mr. *V. Ramesam*, for the Respodents.

JUDGMENT.

SUNDARA AIYAR, J.—This is a suit for a declaration that Government had no right to resume and assess certain lands which the Government treated as Karnam service *inam* and enfranchised under the provisions of section 17 of Act II of 1894. The plaintiff's case is that the lands were never Karnam service *inam*, and that they were *jirayati* lands held by his predecessors-in-title at a special rate of rent under an *Agraharamdar*. The District Munsif held that the lands were enjoyed as emoluments for service on favourable rents under the *Agraharamdar*, and that they must be held to be *inam* lands. On appeal, the Subordinate Judge reversed the Munsif's finding and held that it was not proved that the lands were service *inam* lands. Exhibit B, an extract from the *Inam* Register, shows that in 1787 the lands were in the possession of the Karnams on favourable rates of rent. The *Agraharam* was in the *Zemindary* of Mogalatore at that time. There is nothing to show, assuming that the lands were Karnam service *inam*, that they were granted by Government. Government's right to enfranchise under section 17 of Act II of 1894 exists only if the remuneration of a village office consists in the whole or any part of lands or assignments of revenue payable in respect of lands *granted* or continued in respect of or annexed to such office by the State. The section requires that the land or assignment of revenue in respect of the land in question must have been either '*granted or continued*' by the State. The argument of the learned Government Pleader is that, though there may be nothing to show that the Government made the grant originally, the land was continued by Government. What appears from the evidence, putting it at the best in favour of Government, is that Government did not interfere with the enjoyment of the lands by the Karnams, although they granted the *Agraharams* within which the lands are situated in 1813 to a certain person as a whole and that in 1860, when the *inam* inquiry was held, Government did not interfere with the rights of the *ryots* when they confirmed the *Agraharam* to the holder of it, and gave him the *inam patta*. The statements in the *Inam* Register, Exhibit B, have been the

subject of much discussion at the Bar. It states as follows: "The Karnams state that they enjoy *Kattubadi inams* in the village. In the accounts of *Fasli* 1197, 8¾ *putties* of land are stated to be held on a *cist* of 3 *pagodas* per *putti*, whilst other lands pay 6 *pagodas* per *putti*. The former appear to be held by the family of the Karnams and the *shist* in question is *nimmabandi* or half". Then follows a reference to a statement made by the *Agraharamdar*. Then the Register proceeds to say:—"These remarks are merely made for record". It is then stated that the *Agraharamdar* desired to have a title-deed for the whole *Agraharam* in confirmation of the grant of 1813. The Special Assistant recommends the grant of it to the *Agraharamdar* and he states that the request might be acceded to "as we need not interfere with the subordinate tenures, though the right of the holders to them is unquestionable and must be respected by the *Agraharamdar*". As we read the document, the Special Assistant was of opinion that the Karnams had a right to hold the lands they were in possession of; but he did not consider it necessary to decide that question. The observation,—"These remarks are merely made for record", makes this clear to us. We do not think it can be said that there was any confirmation or recognition by Government of the title of the Karnams. They did not consider it necessary to confirm or to recognise the right, because it was considered unnecessary to arrive at a final decision about the rights of the Karnams to the lands they claimed. The result is that in 1860 Government merely left the rights of the Karnams, if they had any, undisturbed. We cannot hold that there was any act done by Government which could be relied on by the Karnams as a recognition or confirmation of their rights. For the same reason, we think there was nothing done by Government which it could rely on as an act of recognition or confirmation by it of the rights of the Karnams.

On these facts, can it be held that the land was "granted or continued" by Government in respect of the office? Under the section, Government has no right to resume land granted by the proprietor of the estate. The principle adopted appears to be that, in order that Government may have the right of resumption, the right to the land must either have, in the first instance, emanated from Government, or the continuance of the right must have been due to an act of Government. At any rate, there must have been recognition by Government of the right which could be set up by the holder in support of his possession. Mere sufferance by Government, or forbearance from taking steps which it might have been open to the Government to take, will not, we think, amount to a 'continuance' by the Government of the land in respect of the office. Mere collateral expressions of opinion which were not intended to be a recognition or confirmation of the right of the holder would equally be insufficient to amount to a continuance. Our attention has not been drawn to any decided case or other authority in favour of the view that the continuance of the lands in the possession of the holder and non-interference of Government with his possession would be sufficient under the section. On this ground, we agree in holding that this second appeal must be dismissed with costs. In the opinion of one of us, the finding of the Subordinate Judge is defective on the question whether the lands were really Karnam's service *inam* lands or not. It is unnecessary to make any further observation on that matter in view of the conclusion we have arrived at.

Second Appeal No. 1466 follows.

SADASIVA AIYAR, J.—As I said during the course of the argument, I do not think that this Court can interfere with the finding of fact of the lower Appellate Court, that the lands in dispute are not service *inam* lands and, on this short ground, the second appeal must be dismissed.

As I, however, concur with my learned brother in his opinion on the question of law, on which opinion also, these second appeals fail, it is unnecessary to elaborate my reasons for holding that the Appellate Court's judgment, though it is not as full as it might be desired, should be accepted as regards the facts found.

Appeals dismissed.

BAGGU SIMMANNA *v.* ITRAGULU CHINNAYA.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1260 OF 1910.

October 23, 1912.

Present:—Mr. Justice Sundara Aiyar and Mr. Justice Sadasiva Aiyar.

BAGGU SIMMANNA—APPELLANT

versus

ITRAGULU CHINNAYA AND OTHERS—RESPONDENTS.

Declaratory suit—Petition by Hindu widow for transfer of patta *to the name of another—Suit to declare such transfer not binding on reversioner not maintainable.*

A petition to the Revenue Authorities by a Hindu widow for transfer of *patta* in respect of her husband's lands to another person's name would not, by itself, furnish a cause of action to a reversioner for a declaration that his reversionary right cannot be affected by the widow's conduct, as such petition does not amount to the assertion of a right to the property sought to be affected.

Second appeal against the decree of the District Court of Ganjam, in A. S. No. 103 of 1909, presented against that of the District Munsif of Chicacole, in O. S. No. 30 1908.

Mr. *V. Ramesam*, for the Appellant.

Mr. *K. V. L. Narasimham*, for the Respondents.

JUDGMENT.—This is a suit by the reversioners of the 1st defendant's husband. The prayer in the plaint is for a declaration that a petition put in by the 1st defendant before the Revenue Authorities for the transfer of the *patta* of her husband's lands to the 2nd defendant, her daughter's husband, cannot affect the plaintiff's reversionary right to succeed to the property on the 1st defendant's death. The only allegation in the plaint in support of this prayer is that the 1st defendant presented a petition to the Revenue Authorities asking for transfer of the *patta* standing in her name to the 2nd defendant's name. There is no allegation in the plaint that, prior to the suit, either the 1st or the 2nd defendant set up that the 2nd defendant was the *illatom* son-in-law of the 1st defendant. The question for decision is whether this plaint discloses a cause of action for a declaration that the plaintiff's reversionary right is unaffected by any act of the widow which would be prejudicial to their right. We are unable to find any allegation of an act done by the widow, which, *prima facie*, would affect the reversioner's rights. A mere petition to transfer the *patta* of her husband's properties to another person's name would be perfectly consistent with the intention that the person to whose name the *patta* is to be transferred should enjoy the property during the widow's life-time. In answer to the plaint, both the first and second defendants did set up that the 2nd defendant was the first defendant's *illatom* son-in-law and the lower Courts have found that they failed to prove this case. Our attention, however, has not been drawn to any evidence of an assertion, before the date of the plaint, by either the 1st or the 2nd defendant of the latter's status as an *illatom* son-in-law. The 2nd defendant was born in the 1st defendant's house and afterwards married her daughter. It cannot be said that the 1st defendant's act of keeping him in her house would itself amount to any assertion of right in the 2nd defendant to live there as *illatom* son-in-law. It is not the plaintiff's case that the 2nd defendant was introduced into the 1st defendant's house as *illatom* son-in-law and began to live with her in consequence of any assertion of a right to the property of the 1st defendant's husband. We must, therefore, hold that neither the plaint nor the evidence shows that, prior to the institution of the suit, there was any assertion of the right of the 2nd defendant to succeed to the property in the possession of the 1st defendant as *illatom* son-in law. The petition for transfer of the *patta* would not be evidence of any such assertion. In Second Appeal No. 601 of 1903, this Court held that an application by a widow for transfer of *patta* to another person's name would not, by itself, furnish a cause of action to a reversioner for a declaration that his reversionary right cannot be affected by the widow's conduct. We are, therefore, constrained to reverse the decrees of the Courts below and to dismiss the plaintiffs' suit, but, in the circumstances, the parties will bear their own costs throughout.

Appeal allowed.

JAGAR NATH *v.* AJUDHYA SINGH.

ALLAHABAD HIGH COURT.

LETTERS PATENT APPEAL No. 59 OF 1912.

November 2, 1912.

Present:—Sir Henry Richards, Kt., Chief Justice, and Mr. Justice Banerji.

JAGAR NATH AND ANOTHER—PLAINTIFES—APPELLANTS

versus

AJUDHYA SINGH—DEFENDANT—RESPONDENT.

Agra Tenancy Act (II of 1901), s. 95--Suit between rival claimants to occupancy holding—Jurisdiction—Civil or Revenue Court.

The question of title to a tenancy arising between rival claimants to that tenancy is a question which is cognizable by a Civil Court.

Zubeda Bibi v. *Sheocharan*, 22 A. 83; *Hamid Ali Shah* v. *Vilayat Ali*, 22 A. 93; *Bhup* v. *Ramlal*, 33 A. 795; 8 A. L. J. 1109; 11 Ind. Cas. 263, followed.

Such a question is not a matter which can be determined under section 95 of the Tenancy Act.

Appeal under section 10 of the Letters Patent against the following judgment of Mr. Justice Chamier, dated 11th of April 1912, in Second Appeal No. 775 of 1911:—

"The plaintiffs in the present suit brought a suit against the first defendant under section 58 of the Agra Tenancy Act, alleging that he was a tenant-at-will of certain land. The first defendant replied that he was the occupancy-tenant of the land and he at once took steps by instituting another proceeding to have the Revenue Record corrected. Both cases came before the Assistant Collector together and were disposed of by one judgment. The suit under section 58 was taken on appeal to the Commissioner, who decided that it was not maintainable, because one of the present plaintiffs did not wish to eject the defendant. The result was, that in that suit no decision was given as to the rights of the first defendant. Meanwhile, the Revenue Record had been corrected in the manner suggested by the first defendant. The plaintiffs instituted the present suit in the Court of the Munsif, saying that the first defendant had taken the land from them as a tenant, that he had resisted the suit under section 58, that when doing so, he had pleaded that he was the occupancy tenant of the land, and that this amounted to a denial of the plaintiff's title with the result that the plaintiffs were entitled to treat him as a trespasser and they asked for a decree for possession against him. The Munsif decreed the claim and his decision was confirmed by the Subordinate Judge on appeal. In second appeal, it is contended on behalf of the first defendant that the suit is not maintainable. It appears to me that this contention is sound and must be accepted. The plaintiffs admit that the first defendant was their tenant. They say that he is liable to be treated as a trespasser, because he set himself up as an occupancy-tenant. Before I can hold that the defendant, who admittedly was, till recently, a tenant of some kind, has become a trespasser, I must hold that he was wrong in claiming to be an occupancy-tenant of the land. I cannot decide that he was wrong in claiming to be an occupancy-tenant without trenching on the jurisdiction of the Rent Court. The question whether a person is a tenant-at-will or an occupancy-tenant is one in respect of which a suit can be brought under the Tenancy Act and the decision is reserved exclusively for the Revenue Court. I hold that the present suit is not maintainable. I allow the appeal and dismiss the plaintiffs-respondents' suit with costs in all Courts. I have said nothing about the effect of the order that the Revenue Record should be corrected, for it is not clear whether it was made under the Revenue Act or a declaration made under the Tenancy Act."

The plaintiff appealed.

Mr. *P. L. Banerji*, for the Appellant.

Mr. *Shafiuzaman* (for Mr. *Ghulam Mujtaba*), for the Respondent.

JUDGMENT.

RICHARDS, C. J.—This Letters Patent Appeal arises out of a suit in which the plaintiffs sought to recover possession of certain immoveable property, treating the defendant as a trespasser. The facts, so far as I consider them material, are as follows:—Prior to the institution of the present suit, the plaintiffs brought a suit in the Revenue Court seeking to eject the defendant as their sub-tenant. They claimed that they were the occupancy-tenants and that the defendant was their sub-tenant. The plea put in by the defendant was that he was not a sub-tenant but the occupancy-tenant of the holding. The Assistant Collector was of opinion that the defendant was, as he alleged, the occupancy-tenant. In other words, he held that the relation of landlord and tenant did not exist between the plaintiffs and the defendant. As a result of this finding, the suit for eject-

ment in the Revenue Court necessarily failed. There was an appeal to the Commissioner, who held for other reasons that the ejectment suit brought by the plaintiffs failed. The plaintiffs then instituted the present suit to get possession of the property. The question, of course, upon which the success or failure of the suit depended, was whether or not the defendant was the occupancy-tenant. The learned Munsif decided in his favour. On appeal, the learned Subordinate Judge confirmed the decision of the Munsif. On second appeal to this Court, a learned Judge held that the present suit was not cognizable by the Civil Court and on that ground allowed the appeal and dismissed the plaintiff's suit.

It seems to me that the question of title to a tenancy, arising between rival claimants to that tenancy, is a question which is cognizable by a Civil Court. This has been decided, I think, in principle in the case of *Zubeda Bibi* v. *Sheo Charan* (1) in the case of *Hamid Ali Shah* v. *Wilayat Ali* (2) and in the case of *Bhup* v. *Ram Lal* (3). The learned Judge of this Court says:—"Before I can hold that the defendant, who admittedly was till recently a tenant of some kind, has become a trespasser, I must hold that he was wrong in claiming to be an occupancy-tenant of the land. I cannot decide that he was wrong in claiming to be an occupancy-tenant without trenching on the jurisdiction of the Rent Court. The question whether a person is a tenant at-will or an occupancy-tenant is one in respect of which a suit can be brought under the Tenancy Act and the decision is reserved exclusively for the Revenue Court". I cannot altogether agree with what the learned Judge has stated above. It is quite true that if a person was claiming to be an occupancy-tenant, whilst his landlord was contending that he was a mere tenant-at-will, this would be a question exclusively triable by the Revenue Court. But that is not the question in the present suit. The question in the present suit is,—"to whom does the tenancy belong; does it belong to the plaintiffs or to the defendant?" If the tenancy belongs to the plaintiffs, then they are clearly entitled to treat the defendant as a trespasser, having regard to the plea that he put forward in the Revenue Court in which he totally denied their title and claimed that he alone was the occupancy-tenant. If, on the other hand, the tenancy belongs to the defendant, it is quite clear that the plaintiffs' suit must be dismissed. It has been contended that the present suit is of the nature mentioned in section 95 of the Tenancy Act. In my opinion, it is only necessary to read the opening words of that section to see that the section deals with questions arising between landlord and tenant and that it does not in any way apply to rival claimants to any of the various classes of tenants mentioned in the Tenancy Act.

I, therefore, would allow the appeal as no other question arises.

BANERJI, J.—I am also of opinion that the jurisdiction of Civil Court was not excluded by reason of the provisions of the Tenancy Act. The suit in this case would be cognizable by the Civil Court unless it came within the purview of any of the clauses of section 95 of that Act. I adhere to the view, expressed in the case of *Bhup* v. *Ram Lal* (3), that where a dispute arises between rival claimants to a tenancy, that is not a matter which can be determined under section 95. In the present case, the dispute is between persons who claimed to be entitled to the tenancy. There is no question as between either of them and the landlord. The plaintiffs allege that the defendant is a trespasser and they claim to eject him as such. Such a suit could not be brought in the Revenue Court and the only Court which could take cognizance of it is the Civil Court. It is true that the plaintiffs sued in the Revenue Court to eject the defendant on the allegation that the defendant was their sub-tenant. Had the Revenue Court decided that question and had held that the defendant was the tenant of the holding, there might have been some difficulty in the plaintiffs' way but in this case, as pointed out by the lower Appellate Court, the Commissioner did not determine the question whether the plaintiffs were the tenants of the holding or the defendant was so. He dismissed the plaintiff's suit by reason of a defect in the frame of the suit. So that the question, "who is the tenant of the holding", remained undecided by the Revenue Court. As both parties claimed to

(1) 22 A. 83.
(2) 22 A. 93.
(3) 33 A. 795; 8 A. L. J. 1009; 11 Ind. Cas. 268.

be tenants, the question was one between rival claimants to the tenancy and it could not be taken into the Revenue Court in any of the forms of suits mentioned in section 95 of the Tenancy Act. The Civil Court, therefore, had jurisdiction to hear the case. On the merits, that Court found in favour of the plaintiffs. They were, therefore, entitled to the decree which was granted by the Courts below and this appeal must prevail.

BY THE COURT.—The order of the Court is that we allow the appeal, set aside the decree of the learned Judge of this Court, and restore the decree of the lower Appellate Court with costs of both hearings in this Court.

Appeal allowed.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 810 OF 1909.

November 20, 1912.

Present:—Mr. Justice Robertson and Mr. Justice Beadon.

AHMADJI AND OTHERS—PLAINTIFFS—APPELLANTS

versus

SHAHANCHI AND OTHERS—DEFENDANTS—RESPONDENTS.

Custom—Succession—Pathans *of* Chhach, *District Attock—Daughters preferred to collaterals of 4th degree.*

Among *Pathans* of the *Chhach* tract of the Attock District, the collaterals in the 4th degree do not succeed in preference to daughters.

Second appeal from the order of the Divisional Judge, Rawalpindi Division, dated the 14th April 1909, affirming that of the District Judge, Attock District, at Campbellpur, dated the 2nd December 1908, dismissing plaintiffs' claim.

Lala *Lajpat Rai* and Bhagat *Govind Das*, for the Appellants.

Messrs. *Pestonjee* and *Morrison*, for the Respondents.

JUDGMENT.—The instances on the record, the entry in the *Riwaj-i-am* and Volume VI of Customary Law drawn up at the 1880-86 Settlement, page 10, and the entry in the *Riwaj-i-am* drawn up at the recent Settlement, with the instances given in the Volume of Customary Law prepared by Mr. Kitchen for the Attock District, of which the Attock Tahsil now forms part, page 15, Volume XXIV, make it quite clear that the case has been rightly decided by the lower Courts which have come to a concurrent finding. The plaintiffs, who are related to the deceased in the 4th degree, are not entitled to succeed in preference to the defendants, who are the daughters of the deceased, the parties being Pathans of the *Chhach* tract of the Attock District. The learned Pleader for the appellants admitted that on the record he could not hope to contest the concurrent finding of the lower Courts. Without calling upon the respondent, therefore, we dismiss the appeal with costs.

Appeal dismissed.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 73 OF 1912.

August 9, 1912.

Present:—Mr. Drake-Brockman, J. C.

DAJI—APPELLANT

versus

Musammat RUKHMA—RESPONDENT.

Master and servant—Liability of servant for wrong done on behalf of master.

Inasmuch as the law holds the doer of a wrong liable for it, a wrong-doer cannot escape liability on the ground that he was a servant acting for the benefit of his master.

Appeal against the decree of the District Judge, Bhandara, dated the 4th November 1911, confirming that of the Subordinate Judge, Bhandara, dated the 20th July 1911.

Mr. *M. Chuckerbutty*, for the Appellant.

JUDGMENT.—The only point pressed in this second appeal is that the defendant-appellant Kodu should not have been mulcted in costs. It is found, however, by the lower Appellate Court that Kodu took an active part in dispossessing the plaintiff-respondent and so giving rise to this suit which was brought to eject Kodu and his master as trespassers. The law seems to be clear that whoever commits a wrong will be held liable for it himself and cannot be excused on the ground that he was a servant acting for the benefit of his master. Thus in *Stephens* v. *Elwall* (1), Lord Ellenborough, C. J., and Le Blanc, J., held that a

(1) 16 R. R. 458; 4 M. & S. 259.

servant may be charged in trover, although the act of conversion be done by him for the benefit of his master. The learned Chief Justice said:—

"A person is guilty of a conversion who intermeddles with my property and disposes of it, and it is no answer that he acted under authority from another who had himself no authority to dispose of it. And the Court is governed by the principle of law, and not by the hardship of any particular case. For what can be more hard than the common case in trespass, where a servant has done some act in assertion of his master's right, that he shall be liable, not only jointly with his master, but if his master cannot satisfy it, for every penny of the whole damage; and his person also shall be liable for it; and what is still more, that he shall not recover contribution ?"

The decision in *Bennett* v. *Bayes*(2) proceeds upon the same ground, though it was therein laid down that a servant acting as a mere conduit pipe for communicating an authority from his master to another person might not render himself liable for damage resulting from the act done under that authority.

The lower Appellate Court's order mulcting Kodu jointly with his master in costs is perfectly legal. This appeal is accordingly dismissed without notice to the respondent.

Appeal dismissed.

(2) (1860) 29 L. J. Ex. 224; 5 H. & N. 391; 2 L. T. 156; 8 W. R. 320.

PUNJAB CHIEF COURT.

FULL BENCH.

SECOND CIVIL APPEAL No. 1813 OF 1880.

July 4, 1882.

Present:—Mr. Justice Smyth, Mr. Justice Elsmie, Mr. Justice Barkley and Mr. Justice Rattigan.

BARKAT RAM—DEFENDANT—APPELLANT

versus

JAGAT RAM AND ANOTHER—PLAINTIFFS—RESPONDENT.

Specific Relief Act (I of 1877), s. 42—"Legal character"—"Right to any property"—Declaratory suits, nature of—such suits to be kept within legal limits—Discretion—Hindu Law—Adoption—Daughter's son—Nephews not competent to contest adopton.

A., a Hindu, governed by the *Mitakshara*, died leaving two widows, a daughter and a daughter's son, *B. B.* set up a title to succeed to *A.*'s estate on the ground that he had been adopted by *A. A*'s brother's son, *C.*, brought a suit to obtain a declaration that *B.* was not the adopted son of *A. A.*'s widows and daughters did not oppose *B.*'s title.

Held, (1) that the suit was not maintainable under section 42 of the Specific Relief Act;

(2) that *C.* could not be said to be entitled to a legal character or a right as to *A.*'s property;

(3) that *B.* was not a person entitled to deny *C.*'s title;

(4) that even if the suit were maintainable, it would be a proper exercise of the discretion given by section 42 to refuse to grant a declaratory decree on account of the remoteness of *C.*'s interests being affected.

Jindkaur v. *Majlis Rai*, 23 P. R. 1876; *Rani Anund Kunwar* v. *The Court of Wards on behalf of Chandra Shikhar*, 8 I.A. 14; 6 C. 764; 8 C.L R. 381, distinguished not applied.

Per *Elsmie, J.*—*B.*'s heirs would be the same whether he succeeded to *A.*'s property as adopted son or as daughter's son.

Per *Rattigan, J.*—To entitle a plaintiff to maintain a declaratory suit under section 42 of Act I of 1877, it must be shown that his "legal character" or his "right to any property" has been denied by the defendant, or if not denied, that the defendant is at least "interested to deny one or the other." As declaratory suits are an exceptional form of litigation, the power conferred by section 42 to institute such suits ought not to be extended beyond what the law absolutely requires.

Second appeal from the order of the Commissioner, Lahore Division, dated 22nd July 1880.

ORDER OF REFERENCE.

SMYTH AND ELSMIE, JJ., (11th May 1882.)—The first point in appeal is that the plaintiffs are not the immediate reversioners and have, therefore, no right to sue. The first Court held that it was unnecessary to consider whether the plaintiffs were immedaite reversioners or not as the point was unimportant with reference to the decision passed at the same time in another case which had been brought by *Musammat* Tara Devi, one of the widows of the deceased, against the same defendant, Barkat Ram, in which it was held by the Court that Barkat Ram was not the adopted son of Dhari Mal. The decision in that case has now been set aside by the Court in appeal in accordance with a compromise come to by the parties, and it becomes, therefore, necessary in the present case to decide whether the plaintiffs were entitled to bring the present suit.

The facts are these:—

Dhari Mal died leaving two widows, a daughter, Ananti, by one of the widows, and

BARKAT RAM *v.* JAGAT RAM.

a grandson, Barkat Ram, the son of Anunti. Barkat Ram set up a title to succeed to Dhari Mal's estate on the gronnd that he had been adopted by Dhari Mal. The plaintiffs, who are the brother's sons of Dhari Mal, brought the present suit against Barkat Ram to obtain a declaration that Barkat Ram was not the adopted son of Dhari Mal. One of the pleas taken for Barkat Ram was that the plaintiffs were not entitled to bring the suit, because (1) in the presence of Dhari Mal's daughter, they were not the immediate reversioners and (2) in the presence of Dhari Mal's daughter's son, Barkat Ram, who, if not adopted by the deceased, would succeed to the property as full proprietor on his mother's death, the plaintiffs were not reversioners at all.

The right of the daughter and of her son to succeed to the property after the death of the widows has not been inquired into by the lower Courts. It is contended by Mr. Higgins that the point is not one which it was necessary to consider in the present case, because, even assuming that the allegation of the defendant as to the right of his mother as the daughter of the deceased, and of himself as the daughter's son to succeed to the property are correct, the plaintiffs would still be entitled to bring this suit for the purpose of contesting the status of the defendant as adopted son of the deceased. As regards the daughter, Mr. Higgins alleges that she is colluding with the defendant, and that, therefore, the plaintiffs as the next reversioners not colluding are entitled to sue and in support of this contention, he relies on cases reported as *Raghu Nath* v. *Thakuri* (1) and *Rani Anund Kunwar* v. *The Court of Wards on behalf of Chandra Shikhar* (2). He refers also to cases decided by this Court and reported as *Sikandar Khan* v. *Bahadar Khan* (3), *Mehtab Khan* v. *Mehtab Bibi* (4) and *Gulam Haidar* v. *Sikandar Khan* (5). As regards the daughter's son, Barkat Ram, Mr. Higgins urges that his position in the present case is not that of daughter's son but that of alleged adopted son of the deceased and that for the decision of the question of the plaintiff's right to bring the present suit, only the latter position of the defendant can be regarded; and in support of that view, he relies on the case reported as *Jindkaur* v. *Majlis Rai* (6).

With regard to the daughter; we find no evidence on the record that she is acting in collusion with the defendant, and we consider that the case would, under any circumstances, have to go back for inquiry and decision on that point. As regards the question of the plaintiff's right to bring this suit in presence of a daughter's son, if we assume as alleged by the defendant, that he, if not adopted by the deceased, would be entitled to succeed upon his mother's death to all the property of the deceased as full proprietor, we think that it should be answered in the negative. As, however, the decision cited by Mr. Higgins, *Jindkaur* v. *Majlis Rai* (6), is the other way, we consider that the question should be referred to a Full Bench for a ruling. The question which we refer, is, whether the plaintiffs, the nephews of Dhari Mal, are entitled to bring a suit against the defendant to contest his adoption by Dhari Mal, in view of the fact that the defendant, even if held not to be the adopted son of Dhari Mal, is, as the son of Dhari Mal's daughter, entitled (as we must assume that he is for the purpose of the present reference) to succeed to Dhari Mal's estate as full proprietor on the death of his (defendant's) mother.

Mr. *K. P. Roy*, for the Appellant.

Mr. *Higgins*, for the Respondent.

JUDGMENT OF THE FULL BENCH.

ELSMIE, J.—The circumstances under which this reference was made are set out at length in the order of Division Bench dated 11th May last. The nephews of one Dhari Mal, deceased, sued to set aside or to obtain a decree declaring the alleged adoption by Dhari Mal of his daughter's son, Barkat Ram, to be invalid. As Dahri Mal had left two widows, a daughter and a daughter's son, all of whom were entitled to succeed to the property before the nephews, it was contended that the plaintiff's suit would not lie. But Mr. Higgins urged that, even assuming that the plaintiffs were not immediate reversioners, they were nevertheless entitled to bring this suit for the purpose of contesting the status of the alleged adopted son, and further that as the daughter

(1) 4 A. 16.
(2) 8 I. A. 14; 6 C. 764, 8 C. L. R. 381.
(3) 39 P. R. 1876.
(4) 24 P. R. 1877.
(5) 66 P. R. 1878.
(6) 23 P. R. 1876.

was colluding with defendant, the plaintiffs could come in as the next non-colluding reversioners. Mr. Higgins merely relied on the cases reported as *Rani Anand Kunwar* v. *The Court of Wards on behalf of Chandra Shikhar* (2) and *Jindkaur* v. *Majlis Rai* (6).

The Division Bench, after referring to the file and ascertaining that it contained no evidence that the daughter was acting in collusion with the defendant, decided that the following question from which, as I understand it, the alleged collusion by the daughter is excluded, should be laid before the Full Bench.—

"Whether the plaintiffs, the nephews of Dhari Mal, are entitled to bring a suit against the defendant, to contest his adoption by Dhari Mal, in view of the fact that the defendant, even if held not to be the adopted son of Dhari Mal, is, as the son of Dhari Mal's daughter, entitled, as we must assume that he is for the purpose of the present reference, to succeed to Dhari Mal's estate as full proprietor on the death of his (defendant's) mother ?"

The Division Bench, while expressing its opinion that the question should be answered in the negative, felt bound to make the reference to the Full Bench, because the case of *Jindkaur* v. *Majlis Rai* (6) appeared to lay down the opposite view without express qualification. In that case, a widow had adopted her daughter's son to be the son of her deceased husband and it was contended that the plaintiff, who was not an heir presumptive or indeed an heir at all, could not bring a suit to contest the adoption. The Court held, however, that there was no doubt that the suit would lie, but the Court also pointed out that the plaintiff was the nearest non-colluding heir and it seems open to doubt whether in the absence of proved collusion, the Judges would have held that the suit was maintainable. However that may be, the case was decided before the Specific Relief Act come into force, and I presume that the question now before us must be answered with reference to section 42 of that Act. The words of the section, in so far as they are material at present, are the following: "Any person, entitled to any legal character or to any right as to any property, may institute a suit against any person denying or interested to deny his title to such character or right, and the Court may, in its discretion, make therein a declaration that he is so entitled."

Now, the plaintiffs in the present case are persons whose interest in Dhari Mal's estate is allowed, for the purpose of this reference to be remote, future and contingent. They are not the presumptive heirs or men having a vested remainder whose estates are ready to come into possession at any moment when the existing estate may happen to determine. It, perhaps, might be doubted whether their position as contingent remainder-men and possible reversioners on the failure of heirs to the daughter and her son, gives them a "legal character or a right to" Dhari Mal's property which would permit them to bring this suit. I observe that while the illustration of section 42 clearly contemplates a suit of the present nature, when brought by a presumptive heir, there is no illustration which appears to cover the facts in the present case. I should, therefore, be inclined to say, with reference to section 42 of the Specific Relief Act, that it is doubtful whether that section was intended to apply to such a suit brought by persons in the position of the present plaintiffs and that, as the granting of decrees under that section, is entirely discretionary, it cannot be held that plaintiffs are "entitled" to maintain the action. But, however that may be, and assuming for the sake of argument that the plaintiffs are *prima facie* entitled to a "legal character" or right in regard to property within the meaning of the section, the question then arises whether the defendant has denied or is "interested to deny" the plaintiffs' title to such character or right. Here no actual denial is alleged, and I fail to see that the defendant is "interested to deny" the title. Under the terms of the reference, the defendant, as daughter's son, has a right to succeed to the property after widows and the daughter and before the plaintiffs. As adopted son, he would succeed before the widows and daughter, but the fact of his adoption would not have the effect of putting him or any other existing person in a more favourable position in regard to the property than he is now, so as to injure the plaintiffs' chances of succession. If it be said that defendant may die before his mother and may, therefore, as daughter's son never take the property at all, whereas if he be an adopted son,

his personal heirs would succeed on his death whenever it might occur, I do not think that we can fairly regard him, the defendant, as interested, on behalf of his possible heirs, to deny plaintiff's title as a contingent reversioner. Moreover, I have not been able to find any authority for supposing that if defendant takes the property as adopted son, his heirs would be other than those who would be his heirs, if he succeeded as daughter's son. In the absence of lineal descendants, the plaintiffs apparently would be the heirs in any case, and I know of no authority for holding that the lineal heirs of a daughter's son would not represent their father and take the property before male collaterls such as the plaintiffs. In the case put in illustration of section 42, Specific Relief Act, it is clear that a suit would lie against a stranger who by his position as adopted son deprives the person presumptively entitled to possession of the property on the death of the widow of his right to immediate succession and places him at least one degree further off from the inheritance. In the present case, whether defendant is an adopted son or not, the plaintiffs have no right to come in until after defendant and his lineal heirs. Under this view, therefore, I think the question referred for our decision should be answered in the negative.

I have referred to the various authorities to which our attention was drawn at the hearing. All of them relate to cases which arise prior to the date on which the Specific Relief Act came into force. The latest decision on an analogous point appears to be that of the Privy Council in the case reported as *Rani Anund Kunwar* v. *The Court of Wards on behalf of Chandra Shikhar* (2), where it was held, in conformity with previous rulings, that such a suit must, as a general rule, be brought by the presumptive reversionary heir. If it should be held that we are not at liberty to interpret the meaning of the Specific Relief Act without reference to the rulings of the Privy Council on the former law relating to declaratory decrees, then, I think, the *dictum* which I have just quoted would be a sufficient authority to enable us to reply negatively to the present reference from which, as I have before explained, I take the element of alleged collusion to have been excluded. The general rule, as already stated, was sufficient to enable their Lordships in the Privy Council to dispose of the case before them, because the plaintiff had not come into Court alleging that any acts or omissions by way of collusions or otherwise, on the part of the nearer reversioners, had given him a right to sue. It is true that their Lordships state their opinion that a suit of this nature may be brought by a contingent reversionary heir under certain circumstances such as when the nearest reversionary heir refuses to institute proceedings or he has precluded himself by his own act or conduct from suing or has colluded with the next heir or concurred in the act alleged to be wrongful. But the expression of this opinion does not appear to have been strictly necessary to the decision of the case, as it had not been alleged that any of these circumstances had arisen in the plaintiffs' favour and it would probably have been sufficient to say that there had been no attempt to show why plaintiffs' case should not be governed by the general rule that such a suit could only be maintained by the nearest reversioner. Moreover, the suit which came before their Lordships on appeal had been instituted in India on the 28th August 1870 *i.e.*, many years before the passing of the Specific Relief Act in 1877, and their Lordships decided it with reference to the former law and to precedents [see *Bhikaji Apaji* v. *Jaggan Nath Vithal* (7) and *Kooer Gulab Singh* v. *Rao Kuran Singh* (8)] of date prior to that year. But, even if we take this case as our guide in disposing of the present reference, I think we should say, on the facts stated in the question, that the plaintiffs are certainly not entitled to maintain the present suit and that the Courts to place the matter on the narrowest ground should, at all events, refuse to grant a declaratory decree.

SMYTH, J.—The latest ruling on the subject of this reference is that by the Privy Council quoted by my learned colleague [*Rani Anund Kunwar* v. *The Court of Wards on behalf of Chandra Shikhar* (2)]. I think it is desirable to refer to it somewhat more at length. It was in a suit brought by a contingent reversionary heir to contest an adoption made by a Hindu widow of a son to her deceased husband, and upon the question whether the contingent reversionary interest which the plaintiff had was sufficient to enable him to

(7) 10 B. H. C. R. 351.
(8) 14 M. I. A. 176.

maintain the action, their Lordships were of opinion that "although a suit of this nature may be brought by a contingent reversionary heir, yet that, as a general rule, it must be brought by the presumptive reversionary heir, that is to say, by the person who would succeed if the widow were to die at that moment. They are also of opinion that such a suit may be brought by a more distant reversioner if those nearer in succession are in collusion with the widow or have precluded themselves from interfering. They consider that the rule laid down in *Bhikaji Apaji* v. *Jaggan Nath Vithal* (7) is correct. It cannot be the law that any one who may have a possibility of succeeding on the death of the widow can maintain a suit of the present nature, for, if so, the right to sue would belong to every one in the line of succession, however remote. The right to sue must in their Lordships' opinion be limited. If the nearest reversionary heir refuses, without sufficient cause, to institute proceedings, or if he has precluded himself by his own act or conduct from suing or has colluded with the widow, or concurred in the act alleged to be wrongful, the next presumable reversioner would be entitled to sue. See *Koer Gulab Singh* v. *Rao Kuran Singh* (8). In such a case, upon a plaint stating the circumstances under which the more distant reversionary heir claims to sue, the Court must exercise a judicial discretion in determining whether the remote reversioner is entitled to sue and would probably require the nearer reversioner to be made a party to the suit."

Now, upon the facts as stated in the order of reference to the Full Bench, and which, for the purpose of disposing of the reference, we must assume to be true, the plaintiffs in the present case are not the nearest reversioners. Even if we set aside the alleged adoption of Barkat Ram as not yet proved, if the widows were to die, the plaintiffs would not be entitled to succeed to the property. Dhari Mal's daughter, Anunti, would first succeed for life, and after her, her son, Barkat Ram, would succeed as full proprietor. It would only be on the death of Barkat Ram without leaving a widow or issue that the plaintiffs would succeed to the property and their interest in the property is thus very remote and merely contingent.

At the same time, I think their interest in the property is of such a nature as would enable them to maintain the suit under section 42, Act I of 1877, if they could show that the act, of which they complain, was one which wrongfully affected their interest in the property, and that it was done in collusion with the nearer reversioners or that the nearer reversioners were precluded by their conduct from suing; or if they could show that the defendant, "denied or was interested to deny" their reversionary title to the property within the meaning of the above section, and was acting in collusion with the nearer reversioners. But nothing of this kind is shown to be the case here. The act of which the plaintiffs complain is the setting up of a title in Barkat Ram as adopted son of Dhari Mal, and the suit is brought for a declaration that Barkat Ram is not such adopted son. But taking, as we must, for the purpose of this decision the rule of succession to Dhari Mal's property to be correctly stated in the order of reference, it is not clear how the plaintiffs' interest in the property is injuriously affected by the title of adopted son set up by Barkat Ram. Whether adopted or not, he is in either case entitled to succeed to the property as full owner before the plaintiffs. If adopted, he is entitled to the present possession of the property as the son of the deceased; if not adopted, he cannot claim to be put in possession till after the death of the two widows and of his mother. If he got present possession as adopted son and died without leaving a widow or issue of his own, the property would go to the plaintiffs; and from that point of view, his adoption is rather favourable than otherwise to the plaintiffs' interest; for if he was not adopted, and if he succeeded to the property, the property would pass on his death to his own heirs and not to the heir of Dhari Mal, and the plaintiffs in that event might be excluded altogether from the succession. Nor does the defendant by setting up his title as adopted son deny the title or character of the plaintiffs as the reversionary heirs, nor is it clear how he is interested to deny such title or character. As already stated, the defendant, whether as adopted son of Dhari Mal or as son of Dhari Mal's daughter, would be entitled to succeed before the plaintiffs, and accordingly he has no object in denying nor does he deny that

plaintiffs are entitled to succeed as reversioners in the event of his dying without leaving a widow or descendants.

There is another point of view from which the question now before us may be considered. The question whether a Court will entertain a suit for a declaratory decree is one for the exercise of judicial discretion. In the case already cited, the Privy Council remarked that "upon a plaint stating the circumstances under which the more distant reversionary heir claims to sue, the Court must exercise a judicial discretion in determining whether the remote reversioner is entitled to sue." And see also the case of *Rani Brohmomoyee* v. *Raja Anund Lall Roy* (9). Under the circumstances of the case before us, as stated in order of reference, I think a Court would exercise its discretion wisely if it refused permission to the plaintiffs to sue. For this is not a case where the property has been alienated or wasted, and, as already stated, it is not apparent how the plaintiffs' interest in the property is injuriously affected by the title (even assuming it to be false) set up by Barkat Ram. The adoption here set up is not that of a stranger; if it had been so, no doubt the plaintiffs' interests might have been injuriously affected. It is the adoption of a person who was already in the line of heirs and who, if he lived long enough, would have been entitled to succeed to the property as an heir before the plaintiffs. It may be that one of the widows and the boy's mother are acting in collusion for the purpose of conferring on the boy a right to the present possession of the property, but if any one has reason to complain of this, it is the other widow and she does not now complain.

The answer I would give to the question referred for our decision is that the suit is not maintainable under section 42, Act I of 1877.

RATTIGAN, J.—The question referred to us by the reference order assumes that between the plaintiff and the estate of deceased Dhari Mal, there are four intervening lives, namely, those of the two widows of Dhari Mal, his daughter and daughter's son, who also claims to be the adopted son of Dhari Mal. This being so, the "legal character" which the plaintiff may be said to possess, on the supposition that there had been no valid adoption of the daughter's son, is that of possible contingent reversioner who would have a right of succession to the estate of Dhari Mal in three possible events, *e. g.*,

(*a*) if he survived the widows and if the daughter and daughter's son both predeceased them, the former leaving no other issue entitled to inherit by Hindu Law;

(*b*) if having succeeded to the widows, the daughter outlived her son and then died in the plaintiff's life-time, leaving no other descendants of her own, entitled to inherit by Hindu Law;

(*c*) if the daughter's son, having succeeded either the widows of Dhari Mal or his own mother, subsequently died in the plaintiff's life-time without direct or collateral heirs of his own, and without having validly alienated the estate.

Now, to entitle the plaintiff to maintain a declaratory suit under section 42 of Act I of 1877, it must be shown that the plaintiff's "legal character" or his "right to any property" has been denied by the defendants, or, if not denied, that the defendants are at least "interested to deny" one or the other. Assuming, however, the plaintiff's "legal character" and his right to succeed to Dhari Mal's estate to be as described above, and no other character or right can be assigned to him under the reference order, it is difficult to see how the defendants can be said to be "interested to deny" the one or the other, and it is not alleged that they have in point of fact denied either his character of a contingent reversioner or his right of succession subject to the limitation above stated. For the daughter's son, by setting up a title by adoption, at most merely expedites the devolution of Dhari Mal's estate into his own hands, but he does not thereby necessarily deny, nor is it to his interest to deny the plaintiff's legal character to succeed to the estate in the events above enumerated because in any case he would have a prior right of inheritance to the plaintiff. And, inasmuch as it is apparent from the reference order that the widows and the daughter admit the title thus set up, it may be taken that they are willing to relinquish their own prior title in favour of the daughter's son, which it is quite competent

(9) 13 B. L. R. 225 (note); 19 W. R. 419.

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for them to do [*Kamessur Pershad* v. *Kadir Khan* (10); *Protap Chander Roy* v. *Sreemuty Joy Monee Debee* (11), *Mohunt Kishen Geer* v. *Busgeet Roy* (12)]. So that even if the daughter's son had no valid claims to the status of an adopted son of Dhari Mal, the surrender of the estate by the intervening heirs in his favour, he being the next reversionary heir, would as effectually cut off the plaintiff's reversionary rights as if the alleged adoption had really taken place (for he would then take as full owner and succession would pass to this heir, Mayne's Hindu Law, section 479). The only advantage the title by adoption would convey to the daughter's son, as far as the plaintiff is concerned, would be a superior right of collateral to the plaintiff himself than he would possess as the daughter's son of Dhari Mal. But that circumstance would not entitle the plaintiff to maintain a declaratory suit under section 42, Act I of 1877.

In the case reported in *Rani Anund Kunwar* v. *The Court of Wards on behalf of Chandra Shikhar* (2), the adoption was of a stranger, whose introduction into the new family might very seriouly prejudice the reversioners in that family and in a case of that kind, as their Lordships of the Privy Council pointed out, a more distant reversioner might bring a suit to challenge the adoption, if those nearer in succession were either in collusion with the widow or had concurred in the act alleged to be wrongful. The reason for permitting a distant reversioner to bring a suit under such circumstances is obvious and it is quite reasonable also that he should not be deprived of that right by the consent or collusion of the nearer heirs because, although the latter might legally relinquish their own right of succession, they could not vest that right in another to the prejudice of the proper heir. The personal law of the parties would then determine who was to be regarded as the proper heir, and the devolution of the estate would pass to him. But the peculiarity of the present case is that the alleged adopted son is himself the person who would be the next heir if the widow and the immediate reversionary heir, (his own mother), who concurred in his title, were excluded. So that by admitting this person into immediate possession, the intervening heirs only relinquished their own prior rights but they do not prejudicially affect the plaintiff's legal status or his rights to any property. It is wholly immaterial, therefore, by what title the daughter's son claims to have succeeded, for whether he has done so as daughter's son with the consent of the widows and his own mother, or as adopted son, he has not in either veiw of the case denied by that act the plaintiff's legal character as a contingent reversioner next after himself, nor the ultimate right of succession which he was entitled to claim under the Hindu Law.

Declaratory suits are an exceptional form of litigation, and it is not desirable that the power to institute such suits, conferred by section 42 of the Specific Relief Act, should be extended beyond what the law absolutely requires. In the present case, I do not think the plaintiff brings himself within the purview of the section, which, in my opinion, should be interpreted strictly, and I accordingly concur in the proposed answer to the reference.

BARKLEY, J.—I concur in answering the question referred to the Full Bench in the negative. It being assumed in the reference that the daughter's son is entitled to succeed as full proprietor to Dhari Mal's estate, (immediately after his own mother's interest, which will arise upon the death of the widows, comes to an end), it appears to me extremely doubtful whether the plaintiff can be said to be entitled either to any legal character, or to any right as to Dhari Mal's property, within the meaning of section 42 of the Specific Relief Act. He has rather the mere possibility of becoming so entitled on the happening of one of the three events described in Mr. Justice Rattigan's judgment, which I have had the advantage of perusing. If there were no daughter's son, the plaintiff might be described as the persumptively entitled to possess property if he survived the widows and the daughter, as in that case all the interests, prior to his own, would be restricted interests, and he would then be the nearest reversioner who could take an absolute estate. But it is not easy to see how he can be so described when there is a daughter's son who, if he survived, would take an absolute estate, to which the plaintiff would have a bare possibility of

(10) 20 W. R. 393.
(11) 1 W. R. 98.
(12) 14 W. R. 379.

succeeding only in case the daughter's son died before him, leaving no heirs, direct or collateral, of his own, and not having alienated the estate. While I am not prepared to go the length of holding, with a Division Bench of the Calcutta Court, in a case reported as *Greeman Singh* v. *Wahari Lall Singh* (13), that section 42 of the Specific Relief Act "refers only to existing and vested rights, and not to contingent rights," in the case put in illustration (*c*) of the person presumptively entitled to possess the property, if he survives a Hindu widow, is not a case of a vested right. I think the test of whether a reversionary heir can be said to be entitled either to any legal character, or to any right to property is furnished by the question whether he would succeed if all restricted estates prior to his own were at once to terminate; and I observe that the cases cited with approval by the Judicial Committee of Privy Council in *Rani Anund Kunwar* v. *The Court of Wards on behalf of Chandra Shikhar* (2), in which a person who was not the nearest reversioner was held entitled to sue, are both cases in which the reversioner nearer than the plaintiff was entitled only to a restricted estate. The case in *Bhikaji Apaji* v. *Jaggan Nath Vithal* (7) was one in which the nearest reversioner, a daughter, had resigned her rights in the particular property in the plaintiff's favour, and that in *Koer Gulab Singh* v. *Rao Kuran Singh* (8) was one in which the nearest reversioner was the mother of the last male owner, and was alleged to have concurred in the widow's alienation. But, supposing that the plaintiff has a title to any legal character or to any right to the property left by Dhari Mal, his suit must be against "some person denying or interested to deny his title to such character or right," and I agree with my learned colleagues that the defendant, who is not alleged to deny the plaintiff's title to succeed next after him and his heirs, is not a person interested to deny such title. The adoption, which the defendant alleges would merely accelerate his own estate, and it would, at the same time, make the plaintiff one of his collateral heirs, who would succeed if he died leaving no lineal heirs.

Even if the suit could be maintained by the plaintiff against the defendant, I also agree in considering the case to be one in which it would be a proper exercise of the discretion given by section 42 for the Court to refuse to grant a declaratory decree on account of the remoteness of the possibility of the plaintiff's interests being affected.

(13) 8 C. 12; 9 C. L. R. 249.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1237 OF 1909.

July 16, 1912.

Present:—Mr. Justice Sundara Aiyar and Mr. Justice Sadasiva Aiyar.

MUTHALA KANDI KATTURI KOYA MOLLA—DEFENDANT—APPELLANT

versus

PALLI VEETIL ABU BAKER—PLAINTIFF—RESPONDENT.

Muhammadan Law—Mosque—Right to worship—Religious institution—Right to offer prayers—Right to recite Koran.

Every Muhammadan worshipper has the right both to offer prayers and to recite the Koran as a part of his right of worship in a mosque.

There is nothing to prevent a worshipper from receiving at the mosque money offered to him there by others or from distributing sweetmeats. But no worshipper can claim to use the mosque as of right for such purposes.

Second appeal against the decree of the District Court of South Malabar, in A. S. No. 54 of 1909, preferred against that of the Court of the District Munsif of Calicut, in O. S. No. 531 of 1907.

Mr. *J. C. Rosario*, for the Appellant.

Mr. *C. V. Anantakrishna Iyer*, for the Respondent.

JUDGMENT.

SUNDARA AIYAR, J.—The plaintiff in this suit sought a declaration of his right to perform certain ceremonies in the Muchanti Mosque in Calicut and to restrain the defendant from preventing him in any way from performing them. He also asked for damages alleged to have been sustained by him in consequence of an obstruction caused by the defendant. Now, the plaint states in paragraph 3 (4) that the plaintiff was in the habit of offering prayers and reciting the Koran in the mosque for 5 days consecutively from the 20th to the 24th in the month of *Shaban* and distributing sweetmeats, *kapu*, etc., that were brought for the said purpose by the persons who went there.

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The prayer in the plaint is that the defendant should be restrained from preventing the plaintiff from performing the usual ceremonies such as reciting the Koran, etc. Reading the prayer with paragraph 3 (4) of the plaint, it is probable that the plaintiff wished to obtain an injunction restraining the defendant from interfering with the performance of any part of the ceremonies set out in paragraph 3 (4) including the distribution of sweetmeats, *kapu*, etc., brought by other persons on the occasion of his offering prayers and reciting the Koran. The defendant denied altogether the plaintiff's right to recite the Koran in the mosque and alleged that that was not one of the rights which the members of the congregation of the mosque had as a part of their right of worship.

Both the lower Courts have found that any Muhammadan worshipper has the right both to offer prayers and to recite the Koran as a part of his right of worship in the mosque. The Courts do not base this finding on any special right which the plaintiff has in consequence of the reputed sanctity of his father or any special right possessed by the plaintiff in connection with the celebration of the anniversary of his father. The finding proceeds on the ground that as the plaintiff as a worshipper had the right to offer prayers and to recite the Koran, he was entitled to do so on the days mentioned in the plaint, namely, from the 24th to 28th of *Shaban*. There is no reason for not accepting the lower Courts' finding as so understood. The lower Courts do not find that the plaintiff was entitled, as of right, to use the mosque either for collecting subscriptions or for distributing sweetmeats. It may be that there is nothing to prevent a worshipper from receiving at the mosque money offered to him there by others. But it is a very different thing to say that the plaintiff can claim to use the mosque as of right for the purpose of collecting subscriptions or distributing sweetmeats. A claim as of right to use the mosque for such purposes appears *prima facie* to be an extraordinary one. As the plaintiff does not, in his prayer, in terms ask, except by the use of the word *et cetra*, for any right beyond offering prayers and reciting the Koran and as neither of the Courts below has found that he has the right to use the mosque for collecting subscriptions or distributing sweetmeats, the injunction as framed in the decree of the lower Court must be regarded as vague.

It is necessary to make one further observation with reference to the prayer in the plaint and the phraseology of the injunction. The plaintiff asks for an injunction restraining the defendant from interfering with the plaintiff's performance of *ceremonies including the offering of prayers* and the recital of the Koran. If he meant that he had any special right to celebrate a ceremony in connection with the anniversary of his father, the findings of fact arrived at by the lower Courts do not support any such pretension. It is at least doubtful whether the lower Courts intended to recognize any such special right. It is necessary to modify the terms of the injunction so as to make it clear that the plaintiff's claim can be supported only on the rights possessed by him as an ordinary worshipper to offer prayers and recite the Koran on any day and at any time he chooses. His right must, of course, be subject to similar rights possessed by other members of the community. It is quite clear that the plaintiff's exercise of his right cannot be carried out in such a manner as to cause disturbance to other persons engaged in worship. If the defendant has any rights as the Mulla to enforce the exercise by the plaintiff of his right in such a manner as not to disturb others, the declaration in favour of the plaintiff of his right to offer prayers and to recite the Koran cannot affect the right of management or of discipline.

The decree must, therefore, be modified by its being declared that the plaintiff is entitled to offer prayers and to read the Koran in the Muchanti mosque as a worshipper. The injunction must be that the defendant be restrained from preventing the plaintiff's exercise of the above rights as an ordinary worshipper without prejudice to any rights that the defendant may have as Mulla to require the plaintiff to exercise his right without infringing the rights of other persons. In the circumstances, each side will bear their own costs throughout.

SADASIVA AIYAR, J.—I was at first inclined to reverse the judgment of the lower Courts and dismiss the suit wholly, because the defendant did not deny the plaintiff's right

to recite the prayers in the mosque and because the plaintiff based his right to recite the Koran, not as an ordinary worshipper, but as part of the annual ceremony which he was entitled to perform for 5 or 6 days in connection with his father's death. It appears from the evidence of 4th plaintiff's witness that about 200 persons used to congregate in the mosque on such occasions and that this assembled crowd used to bring offerings and subscriptions and they used to have these offerings distributed among the crowd collected. Surely, the plaintiff cannot be allowed to have the ceremonies in connection with his deceased father's anniversary performed in the mosque? However, as defendant went too far in denying the right of even ordinary worshippers to recite the Koran in the mosque without his permission, it is better that an injunction do issue in the terms now made very clear in the judgment of my learned brother.

Injunction issued.

PUNJAB CHIEF COURT.

CIVIL REVISION PETITION No. 2038 OF 1911.

May 31, 1912.

Present:—Sir Arthur Reid, Kt., Chief Judge.

BUDH SINGH AND OTHERS—DEFENDANTS—PETITIONERS

versus

RAM NATH AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Civil Procedure Code (Act V of 1908*), s.* 104 *(*1*)(a), O. XXXII, r.* 7*, Sch. II, cls.* 8 *and* 15 *(*1*) (a)—Reference for minor to arbitration—Superseding arbitration—Appeal—Revision.*

Unless an award is superseded under Schedule II, para. 8 of the Civil Procedure Code, section 104 (1) (*a*) bars an appeal; but if the Court has, in superseding an award, adopted a procedure not authorised by law, and there is no other remedy available, the Chief Court will interfere on revision.

Hira v. *Dina*, 37 P. R. 1895, followed.

Where matters in dispute are referred to arbitration through the Court, and an arbitrator is deliberately selected, a plea that the reference was bad by reason of the parties being minors and sanction of the Court not having been granted under Order XXXII, rule 7 of the Code, has no force.

Petition, under section 70 (*a*) of Act XVIII of 1884 as amended by Act XXV of 1899, for revision of the order of the District Judge, Ferozepore, dated 27th July 1911, setting aside the appointment of an arbitrator.

Mr. *Nand Lal*, for the Petitioners.

Rai Sahib Pundit *Sheo Narain*, for the Respondents.

JUDGMENT.—I concur with Mr. Justice Shah Din, who issued notice, in the opinion that no appeal under section 104 (1) (*a*) of the Code of Civil Procedure lies, the arbitration not having been superseded under Schedule II, clause 8 of the Code, and I also concur in the opinion that revision lies, the proceedings of the Court below in superseding the arbitration having been materially irregular. The arbitrator had not delivered an award and the proceeding held by the Court below to indicate prejudice was preliminary. The provisions of the Code for dealing with awards are, therefore, inapplicable and the learned Pleader for the respondents has been unable to cite any authority for the procedure adopted by the Court below. Schedule II, clause 15 (1) (*a*), cited by him, is limited to awards. Here there was no award. The plea that the reference to arbitration was bad by reason of the parties being minors and sanction of the Court not having been granted under Order XXXII, rule 7, has apparently no force, even if the rule applies to references to arbitration, the submission to arbitration having been through the Court and the arbitrator having been delibrately selected.

Hira v. *Dina* (1) is authority for interference on the revisional side when the Court below has adopted procedure not prescribed by the law and no other remedy is available.

The application is allowed and the order of the 27th July 1911, setting aside the appointment of L. Rama Nand as arbitrator, is set aside with costs. Counsel's fees fifty rupees.

Application allowed.

(1) 37 P. R. 1895.

MURUGAPPA CHETTIAR *v.* NARAYANASAMY PILLAI.

MADRAS HIGH COURT.

CIVIL REVISION PETITION NOS. 157 AND 158 OF 1910.

August 16, 1912.

Present:—Mr. Justice Sankaran Nair.

A. M. MURUGAPPA CHETTIAR—PLAINTIFF—DECREE-HOLDER—PETITIONER

versus

NARAYANASAMY PILLAI AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), *s.* 73—*Order for rateable distribution—Whether open to revision by High Court.*

An order under section 73 of the Civil Procedure Code deciding that a person is not entitled to rateable distribution, is not open to revision by the High Court, even though the order is wrong, as the person affected has his remedy by suit.

Petition, under section 115 of Act V of 1908, praying the High Court to revise the order of the Court of the Subordinate Judge of Tuticorin, dated 24th January 1910, in A. P. No. 449 of 1909 in O. S. No. 34 of 1909.

Petition, under section 115 of Act V of 1908, praying the High Court to revise the order of the Court of the Subordinate Judge of Tuticorin dated 24th January 1910 in M. P. No. 452 of 1909, in O. S. No. 248 of 1909, on the file of the Court of the District Munsif, Tuticorin.

Mr. *K. Srinivasa Iyengar*, for the Petitioner.

Mr. *C. V. Ananthakrishna Iyer*, for the Respondents.

JUDGMENT.—The Subordinate Judge decided that the petitioners are not entitled to rateable distribution under section 73, Code of Civil Procedure, as they did not apply to execute their decrees before the assets were realized by the Court, though they had attached the properties sold before judgment. The contention of the petitioners is that their subsequent application relates back to the attachment.

Assuming the Subordinate Judge is wrong in his decision on this question of law, the High Court will not interfere with his decision; further, the petitioners have their remedy by suit.

Revision dismissed.

S. N. DAR, B. A. LL. B.,
Vakil High Court,
SRINAGAR (Kashmir)

JAITUM BI *v.* NABI SAHEB.

MADRAS HIGH COURT.

CIVIL APPEAL NO. 24 OF 1909.

August 13, 1912.

Present:—Mr. Justice Sankaran Nair and Mr. Justice Napier.

JAITUM BI—PLAINTIFF—APPELLANT

versus

NABI SAHEB AND OTHERS—DEFENDANTS—RESPONDENTS.

Arbitration, agreement to refer to—Arbitrators appointed but unwilling to act—Reference to other arbitrators—Award inoperative—Specific Relief Act (I of 1877), *s.* 21—*When bars suit.*

Certain matters in dispute were referred to three named arbitrators, two of whom were unwilling to act: the agreement to refer to arbitration contained no provision to appoint arbitrators in the room of those unwilling to act:

Held, that the agreement was inoperarive and of no effect.

Appeal against the decree of the District Court of Kurnool, in O. S. No. 31 of 1907.

Dr. *S. Swaminadhan* and Mr. *S. Ranganadha Iyer*, for the Appellant.

Mr. *J. Adam*, for Mr. *J. C. Adam*, for the Respondents.

JUDGMENT.—The suit was brought by the plaintiff for partition and recovery of her share of her father's estate. It was dismissed by the District Judge on the ground that the parties had agreed to refer the matters in dispute between them to arbitration and that the suit was, therefore, barred by section 21 of the Specific Relief Act.

It is proved that on the 23rd October, the plaintiff's husband, acting under a general power-of-attorney, and the defendants executed a *muchilika* (Exhibit B) by which they agreed to refer the dispute to arbitration. Three arbitrators were appointed by that *muchilika*; Mustan Saheb for the plaintiff, Gafur Saheb for the defendants and Venkatarangiah for both parties. On the 30th October, the plaintiff's husband issued a notice (Exhibit C) revoking the reference to arbitration as illegal because he said it was only to three persons and not to five. The plaintiff's husband also stated in the notice that unless in five days the defendants chose five arbitrators, the matter would be put into Court. The Judge has held that this notice, though erroneous, was *bona fide*. Venaktarangiah, plaintiff's witness No. 1, says that he was appointed an arbitrator without his knowledge or without his consent being taken; that he was and is unwilling to act as an

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arbitrator. Mustan Saheb, plaintiff's witness No. 2, gives evidence to the same effect; it is clear, therefore, that the agreement between the parties to refer the differences between them to the arbitration of these three persons named in the *muchilika* cannot now be carried out and, as there is no provision in the *muchilika* (Exhibit B) for the appointment of new arbitrators in their place Exhibit B, has become inoperative and has no effect.

Under section 11 of the Common Law Procedure Act, 1854, it was held, in *Deutsche Springs Stoff Actien Gesellschaft* v. *Briscoe* (1), that if there is no subsisting agreement or agreement capable of being carried into effect, the suit is maintainable. In India section 21 of the Specifie Relief Act provides that if any person has entered into a contract with another to refer a controversy between them to arbitration and has refused to perform, it "the existence of such contract" shall bar any suit by him in respect of any subject which he has contracted to refer. This section, in our opinion, requires that there must be a subsisting contract to bar the plaintiff's suit. Because if, as in this case, the agreement cannot be carried out and the plaintiff's suit is not maintainable there is, no tribunal for the determination of the disputes between the parties.

The case in *Ram Kumar Singh* v. *Jaganmohan Singh* (2) is directly in point. In that case, the disputes were referred for decision to three named arbitrators. One of the parties gave notice to the arbitrators asking them not to make any award. The arbitrators took no action after that nor did the other party for many years. It was held on the facts that the agreement had ceased to be operative at the time of the suit. Section 21 of the Specific Relief Act was, therefore, held not to be applicable.

It was then argued that there is a general agreement to refer the controversy to arbitration and the fact that two arbitrators refuse to act does not entitle the plaintiff to maintain the suit. But, as we have pointed out, the agreement was to refer the dispute to three named arbitrators without any provision for the appointment of other arbitrators.

(1) 20 Q. B. D. 177 at p. 180; 57 L. J. Q. B. 4; 36 W. R. 557.

(2) 33 A. 315; 8 A. L. J. 66; 9 Ind. Cas. 80.

We, therefore, reverse the decree of the Court below, direct the suit to be restored to file, and to be disposed of in accordance with law. The appellant is entitled to the costs of the appeal. The costs in the lower Court will be provided for in the revised decree.

Decree reversed.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL NO. 577 OF 1912.

October 12, 1912.

Present:—Mr. Justice Rattigan.

SULTAN SINGH—JUDGMENT-DEBTOR—APPELLANT

versus

BAHADUR SINGH—DECREE-HOLDER—RESPONDENT.

Partition suit—Final decree in the first instance—Decree for possession of share, whether executable.

There is no reason why in a partition suit, where the claim is for a certain share in joint property, a final decree should not be passed in the first instance, especially where the subject-matter of the suit is a house and the share can be ascertained without difficulty in execution.

A decree in a partition suit directing the plaintiff to receive possession by partition of a definite share in a house is not merely declaratory and is capable of execution.

Second appeal from the order of the Divisional Judge, Delhi, dated 9th February 1912, confirming that of the Munsif, 1st class, Delhi, dated 9th October 1911, dismissing objections of appellant to execution of decree.

Mr. *Santanam*, for the Appellant.

Lala *Sangam Lal*, for the Respondent.

JUDGMENT.—In my opinion, the decree of this Court under consideration was a *final* decree and gave plaintiff a right to receive possession of one-third of the house. It did not merely *declare him entitled* to the one-third, but actually provided that he "*do receive possession* by partition of the one-third". Whether or not a *final* decree should have been passed in such a case unless and until the third share had been defined after local inquiry, is another matter with which I am not here concerned, though I confess I see no reason why in certain cases of claims for shares in joint property, a final decree should not be passed in the first instance, especially where, as here, the subject matter of the suit is a house, and the shares can be ascertained

without difficulty in execution. In the present instance, the Munsif, in executing the decree, issued a commission to a respectable person to effect a partition of the house and the Commissioner's report, in compliance with the Munsif's orders, is on the record. I hold that the Courts below were right in treating this Court's decree as "*final*," and as capable of execution, and I dismiss this appeal with costs.

Appeal dismissed.

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 159 OF 1912.

September 16, 1912.

Present:—Mr. Justice Sadasiva Aiyar.

In re KOLLIPARA VENKAMMA—PLAINTIFF—PETITIONER.

Pleader and client—Compromise—Power of Vakil to compromise—Civil Procedure Code (Act V of 1908), s. 115—Revision not competent when there is an appeal—Position of Vakil.

In a suit for maintenance, the Vakil of the plaintiff consented to the rate proposed by the defendant: the plaintiff sought to revise the order on the ground that the consent of her Vakil was not binding on her :

Held, that as the order was appealable, an application for revision was not competent.

A Vakil, who has an engagement *vakalat* empowering him to compromise an action, does not need to get a special and separate power in order to effect a compromise.

Mathews v. *Munster*, 57 L. J. Q. B. 49; 20 Q. B. D. 141; 57 L. T. 922; 36 W. R. 178; 52 J. P. 260; *Butler* v. *Knight*, 36 L. J. Ex. 66; L. R. 2 Ex. 109; 15 L. T. 621; 15 W. R. 407, referred to.

Rajunder Narain Rai v. *Bejoi Govinn Singh*, 2 M. I. A. 253; *Jagapathi Mudaliar* v. *Ekamba Mudaliar*, 21 M. 274, distinguished.

Petition, under section 115 of Act V of 1908, praying the High Court to revise the decree of the Court of the District Munsif of Ellore, in Original Suit No. 271 of 1910.

Mr. *T. Prakasam*, for the Petitioner.

JUDGMENT.—The petitioner who was plaintiff before the District Munsif's Court could have appealed to the District Court against the Munsif's decision, if she considered that decision was legally wrong. If she had done so, and if she failed even in appeal, she could have come up in second appeal to this Court, in a suit relating to a claim for maintenance.

Instead of doing so, she has put in this revision petition under section 115 of the Civil Procedure Code, 225 days after District Munsif's decision. This is not a case in which "No appeal lies" to the High Court and hence section 115 cannot apply. There is no question of jurisdiction, perversely illegal decision, or material irregularity of procedure involved but only a question whether the District Munsif committed an error of law in allowing the plaintiff's Vakil's consent to bind the plaintiff in the decision of the suit. It is admitted that the Vakil's *vakalat* empowered him to compromise the suit but the contention is that without a special and separate *vakalat* (other than the engagement *vakalat* which empowered the Vakil to compromise), the Vakil's consent to the rate of maintenance proposed by the other side is not binding on the plaintiff.

I see no reason to hold that a Vakil who has got a *vakalat* empowering him to compromise an action should get a second *vakalat* which contains the same power simply because the first *vakalat* empowers him to do other things also besides empowering him to compromise. A Vakil in the Indian Courts is both the Solicitor who acts and a Counsel who pleads for his client. In *Mathews* v. *Munster* (1), it was held that, where the defendant's Counsel, in the absence of the defendant and without his express authority, assented to a verdict for the plaintiff for £350 with costs and withdrew all imputations against the plaintiff, the settlement was a matter which was within the apparent general authority of Counsel and was binding on the defendant. In *Butler* v. *Knight* (2), it was held that, even when the client had expressly prohibited her Solicitor to accept any compromise, and even though she had obtained judgment and decree, she was bound by the act of her Solicitor in accepting a compromise so far as the other party was concerned, if that other party had no notice of any limitation having been imposed on her Solicitor's authority and that her only remedy lay in an action for negligence against her Solicitor. In the present case, the Vakil had express authority to compromise the suit. I think that serious inconvenience would result to the administration of justice by Courts if, even

(1) 57 L. J. Q. B. 49; 20 Q. B. D. 141; 5 7 L. T. 922 36 W. R. 178; 52 J. P. 260.

(2) 36 L. J. Ex. 66; L. R. 2 Ex. 109; 15 L. T. 621; 15 W. R. 407.

after a Vakil has been given power to compromise the suit by the plaintiff who engages him and after the opposite party, on the faith of that *vakalat*, has offered terms of compromise which were accepted and acted upon, and after the Court has, on the faith of the assurance of the legal practitioners, passed its decision by their consent, the plaintiff should be allowed to take the objection that she did not give a special second *vakalat* mentioning only the power to compromise. There is no allegation even in the revision petition that she had prohibited the Vakil to compromise the suit notwithstanding that the *vakalat* to act gave him such power and that the defendant knew that her Vakil had no such power (that the *vakalat* gave him such power is spoken to by her Vakil who was examined in the review petition case. See Mr. Gomoji Row's order on the Review Petition.)

The Privy Council held, in *Rajunder Narain Rae* v. *Bijai Gobind Singh* (3), that when a Vakil admitted that the rental of a *zemindari* in dispute was a certain sum, the admission was binding on his client. *Jagapati Mudaliar* v. *Ekambara Mudaliar* (4) was a case in which the *vakalat* did not give power to the Vakil to compromise the suit. That there is no distinction between Vakils and Counsel in these matters is clear from *Venkata Narasimha Naidu* v. *Bhashyakarlu Naidu* (5).

This petition in revision put in by the plaintiff is, therefore, rejected.

Petition rejected.

(3) 2 M. I. A. 253.
(4) 21 M. 274.
(5) 22 M. 538.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 668 OF 1911.

July 31, 1912.

Present:—Mr. Justice Shah Din and Mr. Justice Beadon.

ALA SINGH AND OTHERS—PLAINTIFFS—APPELLANTS

versus

KHARK SINGH—DEFENDANT—RESPONDENT.

Custom—Succession—Ancestral property—Onus probandi.

The burden of proving that the entire estate left by a land-owner is ancestral rests on the person who asserts that it is. The fact should be proved conclusively.

Atar Singh v. *Thakar Singh*, 42 P. R. 1910; 128 P. W. R. 1908; 6 Ind. Cas. 721; 12 C. W. N. 1049; 35 C. 1039; 8 C. L. J. 359; 17 M. L. J. 379; 35 I. A. 206, followed.

If the property in the possession of an adopted son is not ancestral, the collaterals of his adoptive father cannot succeed to the property, although the adoption is invalid by custom.

Sant Singh v. *Sadda Singh*, 63 P. R. 1912; 222 P. W. R. 1912; 14 Ind. Cas. 23, followed.

Second appeal from the order of the Divisional Judge, Amritsar Division, dated 1st March 1911, modifying that of the Sub-Judge, Gurdaspur, dated the 30th May 1910 decreeing the claim.

Pandit *Jawala Pershad*, for the Appellant.

Sardar *Kharak Singh*, for the Respondent.

JUDGMENT.—Kharak Singh, defendant-respondent, was the step-son of Labha's brother. He was adopted by Labha and on Labha's death, he has taken Labha's land as adopted son.

Plaintiffs-appellants in the present suit repudiated the adoption and claimed the whole land.

The claim has been decreed as regards a part of the land held to be ancestral, but it has been dismissed as regards 147 *kanals*, 9 *marlas*, on the ground that plaintiffs appellants have failed to prove that this portion is ancestral.

In view of *Sant Singh* v. *Sadda Singh* (1), Counsel for the plaintiffs-appellants does not press ground of appeal No. 1 and, if the land is not proved to be ancestral, it is clear that plaintiffs-appellants cannot disturb defendant-respondent's possession.

It is not disputed that this area of 14 *kanals*, 9 *marlas*, was acquired by purchase, but there is no means of ascertaining whether it was purchased by Nidnan Singh, the common ancestor or by his sons. No doubt, it is not unlikely that Nidhan Singh was the purchaser but the lower Appellate Court has rightly held, on the authority of *Atar Singh* v. *Thakar Singh* (2), that this is not sufficient.

Plaintiffs-appellats must prove conclusively that the land is ancestral, and this they have failed to do.

(1) 63 P.R. 1912; 222 P.W.R. 1912; 14 Ind. Cas. 23.
(2) 42 P. R. 1910; 128 P. W. R. 1908; 6 Ind. Cas. 721; 12 C. W. N. 1049; 35 C. 1039; 8 C. L. J. 359; 17 M. L. J. 379; 35 I. A. 206.

We maintain the decree of the lower Appellate Court and dismiss the appeal with costs.

Appeal dismissed.

MADRAS HIGH COURT.
SECOND CIVIL APPEAL No. 1145 OF 1911.
August 5, 1912.
Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Napier.
KARNAM NARASIMHULU—APPELLANT
versus
SECRETARY OF STATE FOR INDIA IN COUNCIL, REPRESENTED BY THE COLLECTOR OF NORTH ARCOT—RESPONDENT.

Limitation Act (IX of 1908), s. 12—Time required for obtaining copy of judgment.

An appellant is entitled to deduct the time occupied in obtaining a copy of the judgment in addition to the time requisite for obtaining a copy of the decree.

Silamban Chetty v. *Ramanadhan Chetty*, 33 M. 256; 7 M. L. T. 29; (1910) M. W. N. 141; 21 M. L. J. 152; 4 Ind. Cas. 301, followed.

Second appeal against the decree of the Court of the Temporary Subordinate Judge of North Arcot, in Appeal Suit No. 119 of 1910, presented against that of the Court of the District Munsif of Tirupathi, in Original Suit No. 327 of 1908.

Messrs. *T. Venkatasubha Iyer* and *Narayana Sastri*, for the Appellant.

The *Government Pleader*, for the Respondent.

JUDGMENT.—The case in *Silamban Chetty* v. *Ramanadhan Chetty* (1) shows that the appellant is entitled to deduct the time required for obtaining the copy of the judgment of the District Munsif in addition to the time required for obtaining the copy of the decree. If such time is deducted, the appeal to the lower Appellate Court from the District Munsif's judgment was not barred.

The lower Appellate Court's judgment dismissing the appeal to it as barred by limitation is, therefore, reversed, and the

(1) 33 M. 256; 7 M. L. T. 29; (1910) M. W. N. 141; 21 M. L. J. 152; 4 Ind. Cas. 301.

Court will hear the appeal and dispose of it according to law.

The costs here and in the lower Appellate Court will abide the result.

MADRAS HIGH COURT.
ORIGINAL SUIT APPEAL No. 22 OF 1910.
September 17, 1912.
Present:—Sir Ralph Benson, KT., Offg. Chief Justice, and Mr. Justice Sankaran Nair.
GOLLAPUDI VENKATAKRISHNAMA CHETTI AND ANOTHER—APPELLANTS
versus
LAKSHMI NARASIMHAM AND OTHERS—RESPONDENTS.

Insolvency Act (11 & 12, Vic. C. 21), s. 24—Voluntary and fraudulent transfer.

C. executed a promissory-note, and in order to secure the amount thereof, executed a mortgage by deposit of title-deeds. Two days after, he absconded whereupon one of his creditors presented a petition to have him adjudged an insolvent. It was found that full consideration for the note had not passed:

Held, that inasmuch as full consideration had not passed the mortgage was voluntary and fraudulent within the meaning of section 24 of the Insolvency Act and void against the Official Assignee.

Appeal from the judgment of the Honourable Mr. Justice Wallis, dated the 24th day of August 1910, in the Ordinary Original Civil Jurisdiction of this Court, in C. S. No. 295 of 1908. See 8 Indian Cases 293; [1910] M. W. N. 532; 8 M. L. T. 247.

Mr. *M. O. Parthasarathy Iyengar*, for the Appellant.

Mr. *M. A. Tirunarayana Chariar*, for the 2nd Respondent.

Mr. *C. E. Odgers*, for the 1st Respondent.

JUDGMENT.—The question is whether the mortgage by deposit of title-deeds is fraudulent within the meaning of section 24 of the Insolvency Act, 11 and 12, Victoria, C. 21.

A promissory-note was executed and the title-deeds were deposited to secure the amount of the note on the 10th August 1908, by the Insolvents, Cantham & Co., defendants Nos. 1 to 4. They carried on their business on the 11th, the 12th was holiday. On the 13th, it was found that they had absconded and a creditor presented a petition of adjudication the same day. The insolvents have not appeared since.

GOLLAPUDI v. LAKSHMI NARASIMHAM.

The promissory-note is for a sum of Rs. 20,962-1-6. This is made up as follows:—Rupees 6,500 is alleged to have been paid by the plaintiffs at the time of the execution of the pro-note.

Rupees 2,500 is said to have been paid to one Mallikarjunudu at defendants' request.

Rupees 3,000 is said to have been paid to Sanku Ramasami Chetti.

Rupees 1,700—the amount the plaintiffs undertook to pay to one Radhakrishna's son on account of the defendants who owed that sum under a pro-note.

Rupees 1,200, another amount the plaintiffs undertook to pay another creditor.

Rupees 6,062-1-6—the amount which was due at that time to the plaintiffs by the defendants on account of prior dealings between the parties.

Rupees 20, 962-1-6.

It is stated before us that the sum of Rs. 1,200 was not really due to the creditor and the real debt is only about Rs. 500. Wallis, J., decided that the plaintiffs had failed to prove that they paid the sum of Rs. 6,500 to the insolvents or Rs. 2,500 to Mallikarjunudu and declared the promissory-note and the mortgage to be fraudulent within section 24 of the Insolvency Act. This is an appeal from that decision. Mallikarjunudu is a near relation of the insolvents and a partner in their cotton-press business. Their accounts show that he was indebted to them in the sum of Rs. 58. Why, then, it was necessary to pay him the sum of Rs. 2,500 has not been explained. He has not been examined as a witness by the plaintiffs. In these circumstances, we are not prepared to interfere with the finding of the learned Judge, who considers the oral evidence of payment of no weight.

The witnesses, who speak to the payment of Rs. 6,500, speak also to the payment to Mallikarjunudu which we have found is false. With the exception of the 1st plaintiff and Papiah plaintiff's 4th witness, they are all *gumastas* of the plaintiffs or the insolvents. There is evidence that on the 8th, two days before the execution of the pro-note, a creditor, defendant's 2nd witness, knowing that the insolvents were in bad circumstances, brought pressure to bear on them and obtained from them valuable jewels as security. The plaintiffs are neighbours and friends of the defendants and must have known this. It is also conceded that the defendants had to utilize for their own purposes a sum of Rs. 3,000 which they had borrowed as agents for the minor son of their relative, and the plaintiffs were informed of this before the loan It is clear, therefore, when the defendants asked the plaintiffs for a further loan of Rs. 12,000, they must have known that the defendants were in difficulties. In these circumstances, it is not likely that the plaintiffs would have paid anything without securing more satisfactory evidence of such payment. We agree with the learned Judge, and find that the plaintiffs have failed to prove this payment also.

It is then urged that the mortgage should be upheld to the extent of the consideration conceded or proved. It is contended that the transfer cannot be said to be "voluntary" within section 24 of the Indian Insolvency Act as there was consideration and it must have been made under pressure. But there is no evidence of any claim or demand by the plaintiffs. The evidence shows, on the other hand, that it was the defendants who took the initiative and requested the plaintiffs for the loan. No pressure by the plaintiffs can explain the mortgage for a far larger sum than was really due. If the plaintiffs had only taken a transfer to secure the amount advanced by them and which they undertook to pay to the insolvents' creditors, a different question would have been raised on which it is unnecessary for us to express any opinion. The whole must be treated as one transaction and on the finding that there was no consideration to the extent of Rs. 9,000, the reasonable conclusion is that the mortgage was really granted to secure the property to that extent from the clutches of the creditors. It was in consideration of the plaintiffs' preserving the property for the defendants that the plaintiffs obtained a mortgage for their own debts. The plaintiffs were really trustees for the defendants insolvents with a charge on the property to secure the debts due to them. It was, therefore, voluntary and fraudulent and void against the Official Assignee.

The appeal is dismissed with costs.

Appeal dismissed.

PUNJAB CHIEF COURT.

FIRST CIVIL APPEAL No. 631 OF 1911.

April 20, 1912.

Present:—Mr. Justice Shah Din.

MIRAN BAKHSH—PLAINTIFF—APPELLANT

versus

FEROZE DIN AND ANOTHER—DEFENDANTS—RESPONDENTS.

Land Acquisition Act (I of 1894), s. 18 (2) (b)—Collector's award when complete—Application for reference to Court—Limitation.

The actual payment of the compensation awarded under the Land Acquisition Act is not part of the Collector's award, and is not necessary to the completion of it: the award is complete as soon as the Collector apportions the amount of the compensation between the parties concerned.

An application, therefore, to make a reference to Court made more than six months after this latter event is barred by section 18 (2) (*b*) of the Land Acquisition Act.

First appeal from the order of the Additional Divisional Judge, Lahore, dated the 24th March 1911, dismissing plaintiff's claim.

Lala *Gopal Chand*, for the Appellant.

Lala *Mehar Chand*, for the Respondents.

JUDGMENT.—It is not necessary to go into the merits of this case, as the decree of the lower Court can be maintained on the ground of limitation which has been decided by the lower Court against the respondent, Feroze Din. The award by the Collector, as regards the apportionment of the compensation among all the persons known or believed to be interested in the land, which was acquired by Government was made on the 3rd September 1909, and on the 4th September, the appellant, Miran Bakhsh, objected to Rs. 23-2 6 being awarded to Feroze Din in respect of his alleged share in the land. It is unnecessary to refer to the intermediate orders, which were passed by the Collector, until we come to the order of the 4th March 1910, by which money was directed to be actually paid to Feroze Din. On the 21st March 1910, Miran Bakhsh put in an application under section 18 of the Land Acquisition Act asking the Collector to make a reference to the Court. The Divisional Judge is wrong in holding that that application was within time. Under sub-section (2) (*b*) of section 18, that application should have been made within six months from the date of the Collector's award supposing that the appellant was not present or represented before the Collector at the time when the award was made; and it is quite clear that the application of the 21st March 1910 was not made within that period. The lower Court seems to have thought that the order of the Collector, dated the 4th March 1910, as to actual payment of the money to Feroze Din, was part of the award so far as the apportionment of the compensation between the parties was concerned; but that view is not correct, inasmuch as the award was made by the Collector as soon as he apportioned the amount of compensation among the proprietors of the village, including the parties, according to their respective shares in the land, the actual payment of the money to the parties entitled not being necessary to the completion of the award. I hold, therefore, that the application filed by the appellant on the 21st March 1910 under section 18 of the Land Acquisition Act was barred by limitation and the lower Court should have rejected the claim on that ground. The appeal fails and is dismissed with costs.

Appeal dismissed.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 725 OF 1911.

August 12, 1912.

Present:—Mr. Justice Sundara Aiyar and Mr. Justice Sadasiva Aiyar.

CHIDAMBARA MUDALI AND OTHERS—PLAINTIFFS—APPELLANTS

versus

KOZHANDAVELU MUDALI AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXIII, r. 1—Withdrawal of suit—Leave to bring fresh suit—Facts set out with no clear conception of nature of rights.

Where, from the plaint and the proceedings in the lower Court, it is apparent that the plaintiff has no clear conception of his rights, the High Court will grant permission to withdraw the suit with leave to bring a fresh suit under Order XXIII, rule 1 of the Civil Procedure Code.

Second appeal against the decree of the Court of the Temporary Subordinate Judge of North Arcot, in Appeal Suit No. 159 of 1910, presented against that of the Court of the District Munsif of Ranipet, in O. S. No. 1011 of 1909.

FACTS.—This was a suit to declare the plaintiff's right to the joint management of the plaint temple and its properties along

with the defendants. Plaintiff's case was that the suit temple was the property of a certain sect of weavers now represented by both the parties. Nos. 1 to 5 defendants were their agents to look after the temple. The village later on broke into two factions, one represented by plaintiffs and the other by defendants Nos. 6 to 15. Plaintiffs alleged that defendants Nos. 1 to 5 joined the defendants and were denying the plaintiffs' title to participate in the control of the temple and its properties. The Munsif gave a decree for the plaintiffs declaring that the right of control for the plaint templed rested with the entire body of the sect of weavers including plaintiffs and defendants and that the actual managers defendants Nos. 1 to 4 are their subordinates. The Sub-Judge on appeal found that the plaint temple was a public temple, that the plaintiffs were not entitled to the management of the plaint temple and that the suit was not maintainable under section 42 of the Specific Relief Act as the plaintiffs could have asked for joint possession also. The plaintiffs then appealed to the Hight Court.

Mr. *B. Doraiswamy Iyengar*, for the Appellants.

Mr. *T. Narasima Iyengar*, for the Respondents.

JUDGMENT.—We are asked by the appellants' Vakil to allow his clients to withdraw their suit with leave to bring a fresh suit with regard to the same matter. The plaint and the proceedings in the lower Courts show that while the facts relating to the right of management of the plaint temple are set out and proved, the plaintiffs had no clear conception of the exact nature of their rights. We think that enough has been shown to justify us in allowing the suit to be withdrawn with leave to bring a fresh suit under Order XXIII, rule 1 of the Civil Procedure Code Act V of 1908. The appellants must pay the respondents' costs in the second appeal.

PRIVY COUNCIL.

APPEAL FROM THE COURT OF JUDICIAL COMMISSIONER OF OUDH.

June 18, 1912.

Present:—Lord Shaw, Sir John Edge and Mr. Ameer Ali.

Chaudhri MOHAMMAD MEHDI HASAN KHAN—DEFENDANT—APPELLANT

versus

Sri MANDIR DAS—PLAINTIFF—RESPONDENT

AND

Sri MANDIR DAS—PLAINTIFF—APPELLANT

versus

Chaudhri MOHAMMAD MEHDI HASAN KHAN—DEFENDANT—RESPONDENT.

Practice—Suspicion, decision cannot be founded on—Evidence Act (I of 1872), s. 114—Presumption—Burden of proof—Production of document with endorsement of payment.

Suspicion, though a ground for scrutiny, cannot be made the foundation of a decision.

In view of the presumption under section 114 of the Evidence Act, the production of a bond with an endorsement of payment, casts upon the plaintiff the burden of proving that the debt is still outstanding, *i.e.*, that the bond came into defendant's hands by dishonest means, and that the signatures to the endorsement are either forgeries or unauthorised.

Two consolidated appeals from a judgment and decree of the Court of the Judicial Commissioner of Oudh, dated the 31st of July 1907, which set aside a decree of the Subordinate Judge of Barabanki in Oudh, dated the 31st of January 1907.

FACTS.—The suit was brought by the plaintiff, Sri Mandir Das, to recover from the defendant Rs. 62,717-2-3 on the basis of a mortgage-bond, dated the 22nd of December 1898. The defendant produced the bond containing the endorsement of payment, and the Subordinate Judge made an interlocutory order as follows:—

"Taking the provisions of section 114, Act I of 1872, into consideration, I am of opinion that the *onus* lies on the plaintiff to prove that the bond has not been discharged."

In the result, the Subordinate Judge held that the plaintiff failed to discharge the *onus* that lay on him and dismissed the suit. On appeal, the Court of the Judicial Commissioner dealt with the evidence "on the assumption that the *onus* of proving payment is on the defendant" and decreed the claim of the plaintiff, but did not award the full amount of interest claimed. Both

MOHAMMAD MEHDI HASAN KHAN v. MANDIR DAS.

parties appealed to His Majesty in Council, and their appeals were consolidated.

Mr. *G. E. A. Ross*, for the Defendant, submitted that the Subordinate Judge was right in holding that the *onus* was on the plaintiff to prove that the bond had not been discharged. See the Indian Evidence Act, 1872, section 114, Illustration (*i*). The Court was entitled to presume the fact of the payment unless and until it was disproved: section 4 of the same Act. Both Courts agreed in disbelieving the plaintiff's witnesses and the said appeal should, therefore, be dismissed. Section 34 of the Indian Evidence Act was also referred to.

The plaintiff did not appear.

JUDGMENT.

Mr. Ameer Ali.—These are two consolidated appeals from a judgment and decree of the Judicial Commissioner of Oudh, dated the 31st of July 1907, and arise out of a suit brought by the plaintiff in the Court of the Subordinate Judge of Barabanki on the basis of a mortgage-bond executed by the defendant, Chowdhri Mehdi Hassan, on the 22nd of December 1898, in favour of one Sukh Dei, since deceased. It appears that Sukh Dei carried on in her life-time a money-lending business, and that the plaintiff has obtained a succession certificate, under Act VII of 1889, to collect the debts due to her estate. The present action was launched on the 16th of February 1906 for the recovery of over Rs. 62,000, principal and interest, by the sale of the mortgaged premises. At the time of the institution of the suit, the plaintiff produced only a copy of the document, alleging that the original had been lost. The defendant in his answer admitted its execution, but alleged that the debt was discharged. In support of his allegation, he produced the original document containing the endorsement of payment by Sukh Dei and her general agent, Bansidhar.

In view of the presumption embodied in section 114 of the Indian Evidence Act, I of 1872, the Subordinate Judge was of opinion that the burden of establishing that the obligation created by the bond was still outstanding lay on the plaintiff. Their Lordships consider this to be the real meaning of the issue framed by him on the 6th of September 1906 after argument. The plaintiff accepted the *onus* and obtained an adjournment for the production of evidence in rebuttal of the presumption arising from the possession of the document by the defendant. The hearing of the case was resumed in January 1907, and the plaintiff examined a number of witnesses to prove that the defendant had dishonestly obtained possession of the bond after Sukh Dei's death through the instrumentality of Bansidhar. He also attempted to establish that Sukh Dei was not at Barabanki on the date of the alleged payment. The defendant then went into evidence regarding the fact of payment and the delivery of the document to his servants on his behalf. The Subordinate Judge disbelieved the plaintiff's witnesses. With regard to the defendant's evidence, he observed as follows:—

"I would have hesitated in believing the testimony of defendant's witnesses also, had it not been corroborated by the facts that the bond bearing an endorsement of payment was filed from the defendant's custody, and it was stated by plaintiff's own witnesses that the said endorsement was in the handwriting of Sukh Dei's general agent, Bansidhar."

In the result, the Subordinate Judge dismissed the suit with costs.

From this decree, the plaintiff appealed to the Court of the Judicial Commissioner of Oudh. The learned Judges who heard the appeal were of opinion that at the trial the *onus* had been wrongly thrown on the plaintiff. In this view, the learned Judge who delivered the principal judgment proceeded to examine, in the first instance, the evidence produced by the defendant and came to the conclusion that it was not reliable. He then considered the testimony of the plaintiff's witnesses and was of opinion that it was false. As regards the fact that the document on which the suit was based was in the possession of the defendant, and produced by him with the admitted endorsement of Sukh Dei's general agent, he held that it must have come into the defendant's hands by some dishonest means. He accordingly reversed the decision of the first Court and decreed the plaintiff's claim; and his learned colleague concurred in this judgment. The defendant has appealed to His Majesty in Council and there is a cross-appeal by the plaintiff on the question of interest disallowed by the learned Judges in the Court below. But he has not appeared either in

support of the judgment in his favour or to argue his own appeal.

Their Lordships, after a careful consideration of the case, have come to the conclusion that the judgment and decree of the Judicial Commissioners cannot be sustained.

Assuming that the question of *onus* remained after the parties had gone into evidence, and that it lay on the defendant to establish the allegation of payment, he appears to have proved facts which strongly support the presumption of law arising from the possession of the bond.

He showed that the endorsement of payment on the document was in the handwriting of Bansidhar, who, it is admitted, was the "recognised" and general agent of Sukh Dei and held a power-of attorney from her, and that it bore his signature. The defendant also produced a letter of demand on behalf of Sukh Dei, dated some seventeen days before the date of the alleged payment, signed by Bansidhar. He proved, further, that this Bansidhar used to give acquittances on Sukh Dei's behalf. Matadin, who, according to the plaintiff's own witnesses, is the defendant's treasurer, states that he and two other fellow servants carried the money to Sukh Dei's house and that she, after payment, signed the document in *Hindi* in his presence below the endorsement written by Bansidhar, and returned it to him. There is not a trace of cross-examination in the evidence of this witness with regard to genuineness of Sukh Dei's signature. That statement remains uncontradicted, for no attempt, so far as their Lordships can see, was made to re-call the plaintiff's witnesses to say the alleged signature of Sukh Dei was not in her hand.

To meet the case made by the defendant, the plaintiff produced three classes of testimony. He attempted to show that the defendant was heavily involved in debt at or about the time of the alleged payment, and he wished the Court to draw from this circumstance the inference that re-payment was unlikely. The trial Judge very properly, in their Lordships' opinion, observed that the fact of the defendant's indebtedness "in itself would not go to prove that he did not re-pay the debt in question." And he referred to the evidence of one of the plaintiff's witnesses to show that the defendant was in funds in June 1902 and re-paid other debts.

The real and substantial case put forward by the plaintiff was of a two-fold character—*first*, that the bond was dishonestly and fraudulently made over to the defendant by Bansidhar after Sukh Dei's death; and, *secondly*, that Sukh Dei was not at Barabanki on the date of the alleged payment. It is to be remarked that, although a book was produced by a Pujari, whom the Subordinate Judge calls "a tutored and untruthful witness," to prove Sukh Dei's absence from Barabanki, no attempt was made by the plaintiff to produce her *mahajani* books of account regularly kept in the course of business.

The Subordinate Judge disbelieved the story told by the plaintiff's witnesses, and the Appellate Court agreed with him in holding that their testimony was worthless. But it has built up a theory of its own, based, chiefly, on surmises, regarding the manner in which the bond came into the possession of the defendant. The gist of the Appellate Court's judgment is to be found in the following statements, which also show how the learned Judges have looked at the case. Referring to the testimony of the plaintiff's witnesses, they say:—

"Worthless as this evidence is, it does not, in any way, make the defendant-respondent's case more probable. In the view that I have taken of the evidence of payment, it is difficult to account for the possession of the bond on the part of the defendant; yet there are documents on the record whence it may be inferred that some person for his own ends laid his hands on the document soon after the death of *Musammat* Sukh Dei and that through him it came into possession of the defendant."

And after referring to the disputes among Sukh Dei's relations after her death, they go on to say,—

"The plaintiff's inability to account for its disappearance, no doubt, suggested to him the reprehensible course of procuring false evidence, but when the question is considered whether the possession of the endorsed bond on the part of the defendant raises a presumption of payment, due weight should be attached to the possibility during this state of confusion of some person purloining the bond or

even of its being lost and afterwards found and coming into the defendant's possession."

Their Lordships cannot help considering this mode of treating a case, where two distinct conflicting sets of facts are opposed to each other, as unsatisfactory. The plaintiff came into Court with a definite story to account for the possession of the document by the defendant. The learned Judges agree with the first Court in holding that story to be false, and yet they proceed to build up a case for the plaintiff on what they call a "possibility." As already observed, the defendant did not rest his case merely on the legal presumption which arose from the possession of the document; he produced positive testimony. which received corroboration from that presumption, and he proved facts which made his statement probable. The learned Judges, having disbelieved the evidence on both sides, have set aside the presumption under section 114 of the Evidence Act, which only embodies the ordinary rule of law, by a possibility, based on surmises. Now, it is a settled principle that suspicion, though a ground for scrutiny, cannot be made the foundation of a decision, and that is exactly what appears to have happened in this case.

With reference to the conflicting views of the two Courts in India regarding the question of *onus*, in view of the presumption under section 114 of the Indian Evidence Act, their Lordships are of opinion that the Subordinate Judge was right in holding that the production by the defendant of the bond with the endorsement of payment cast on the plaintiff the burden of establishing the affirmative proposition that the debt was still outstanding, in other words, of showing that the bond came in defendant's possession by dishonest means and that the signatures to the endorsement were either forgeries or unauthorised.

On the whole, their Lordships are of opinion that the judgment and decree appealed against should be set aside and the plaintiff's suit dismissed with costs in all the Courts. And they will humbly advise His Majesty accordingly. The plaintiff will pay the costs of these appeals.

Appeal allowed; Cross-appeal dismissed.

Solicitors for the Defendant: *Messrs. T. L. Wilson & Co.*

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 297 OF 1911.

August 16, 1912.

Present:—Mr. Justice Sundara Aiyar and Mr. Justice Sadasiva Aiyar.

ABDUL KHADIR AND ANOTHER—APPELLANTS

versus

NAGASARUPU AND ANOTHER—RESPONDENTS.

Specific Relief Act (I of 1877), s. 22—Contract to sell—Suit for specific performance—When limitation commences to run—Delay in suit, when fatal to suit.

Where, in a suit for specific performance of a contract to sell, no date is fixed for performance, limitation commences to run from the date when performance is demanded by one party to the contract and refused by the other.

Delay in instituting a suit for specific performance is not fatal to the suit, unless it can be shown that the delay has in any way prejudiced the defendant.

Second appeal against the decree of the District Court of Guntur, in A. S. No. 83 of 1910, preferred against that of the Court of the District Munsif of Guntur, in O. S. No. 461 of 1909.

FACTS.—This was a suit for specific performance of a contract of sale entered into by plaintiff's father with the defendant in September or October 1899. Plaintiff's case was that there was an agreement that the sale-deed must be executed by defendant on demand. The suit was brought in July 1906. It was found by both the Courts that such a condition was not attached to the contract. The lower Courts then considered whether the suit for specific performance was in time. The District Munsif found that the contract of sale was meant to be performed on the very date and held the suit was barred. The Distict Judge was of opinion that as no date was fixed for the performance of the agreement, delay or laches would not operate to the prejudice of the party with whom the contract was made unless and until the contracting party called upon him to perform his part of the contract. *Mohendra Nath Mookerjee* v. *Kali Proshad Johuri* (1). He also held, relying on *Boyle* v. *Boyle* (2) as against *Nawab Begam* v. *A. H. Creet* (3), that the wording of section 22 of the Specific Relief Act showed that

(1) 30 C. 265 at p. 276; 7 C. W. N. 229.
(2) 30 C. 631.
(3) 27 A. 678; A. W. N. (1905) 147; 2 A. L. J. 405.

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where there was no intention to abandon the right under the contract, the plaintiff must have a decree for specific performance notwithstanding the delay in the institution of the suit. The defendant appealed.

Mr. *K. Ramanath Shenai*, for the Appellant.

Mr. *K. Srinivasa Iyengar*, for the Respondents.

JUDGMENT.—We cannot say that there is any legal objection to the finding that the Exhibit I was not satisfactorily proved. The Subordinate Judge referred to Exhibit C as showing that the plaintiff treated the land as the owner and that Exhibit I could not, therefore, be genuine.

With regard to the question of limitation, the finding is that there was no time fixed for the execution of the conveyance and that time, therefore, ran from the time when demand was made and defendant refused performance The Subordinate Judge's view on the question was right.

It is next argued that the plaintiff was guilty of undue delay in instituting the suit ; but it has not been shown that the delay has in any way prejudiced the defendant. We dismiss the second appeal with costs.

Appeal dismissed.

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 550 OF 1912 AND CIVIL MISCELLANEOUS PETITION No. 1790 OF 1912.

September 18, 1912.

Present:—Mr. Justice Sadasiva Aiyar.

In re MANJESHWAR PADMANABHA BATTA AND ANOTHER—PETITIONERS.

Revision—Material irregularity—Discretion of Judge.

Where a Judge uses his discretion to grant or refuse leave to institute a suit, he does not act illegally or with material irregularity, nor is any question of jurisdiction involved.

Petition, under section 115 of Act V of 1908, praying the Hight Court to revise the order of the District Court of South Canara, dated 19th August 1912, in O. P. No. 148 of 1911.

Petition praying that, in the circumstances stated in the affidavit filed therewith, the High Court will be pleased to direct stay of proceedings in O. P. No. 148 of 1911 on the file of the District Court of South Canara pending disposal of C. R. P. No. 550 of 1912 preferred therefrom to the High Court.

JUDGMENT.—The case in *Ramanathan Chettiar* v. *Ananthanarayana Iyer* (1) shows that the District Judge has power to make inquiries before granting sanction under section 18 of the Reglious Endowments Act.

The District Judge has carefully gone into the whole matter on the affidavit filed on both sides and has come to the conclusion (*a*) that 3rd respondent is himself to blame for not taking up the duties of trustee and that respondents Nos. 2, 4, 5 and 6 against whom alone the application was really directed were not to blame ; (*b*) that the application is not *bona fide* and as really set up by 1st respondent (one of the trustees), who could not have his own way in the temple management, and (*c*) that the respondents Nos. 2, 4, 5 and 6 have not been *prima facie* proved to be guilty of any misappropritation or of any such misconduct as will justify the granting of the leave to sue.

I am unable to find that in using his discretion to grant or refuse leave to the petitioners to institute the suit, the District Judge has committed any illegality or material irregularity or that any question of jurisdiction is involved.

The revision petition is rejected. The petition for stay of proceedings is also rejected.

Petition rejected.

(1) 33 M. 412; 7 M. L. T. 126; 5 Ind. Cas. 291.

RAM PARSHAD v. EMPEROR.

ALLAHABAD HIGH COURT.

CRIMINAL REVISION PETITION No. 531 OF 1912.

September 3, 1912.

Present:—Mr. Justice Rafique.

RAM PARSHAD—PETITIONER

versus

EMPEROR—OPPOSITE PARTY.

Penal Code (Act XLV of 1860), s. 199—Declaration—False statement—Declaration not admissible in evidence, whether can be basis of prosecution.

A declaration, before it can be made the foundation of a prosecution under section 199, Indian Penal Code, must be one which is admissible in evidence and which the Court before which it is filed is bound or authorized by law to receive in evidence.

Iswar Chander Guho, In the matter of the petition of, 14 C. 653; *Abdul Majid* v. *Krishna Lal Nag,* 20 C. 724; *Chandi Proshad* v. *Abdur Rahman,* 22 C. 131, referred to.

Application for revision against an order of the District Magistrate of Cawnore, dated the 30th of July 1912.

Mr. *Wallach*, for the Applicant.

Mr. *Satya Chandra Mukerji*, for the Opposite Party.

ORDER.—This is an application in revision praying that the order of the District Magistrate of Cawnpore, dated the 30th of July 1912, sanctioning the prosecution of the applicant under section 199, Indian Penal Code, be set aside. The circumstances which led to the grant of the sanction are as follows:—On the 19th of February 1912, three complaints were filed in the Court of the City Magistrate of Cawnpore, namely, *Musammat* Rupiya v. Ram Dial, Ram Dial v. Gauri Shanker and Ram Sahai v. Gauri Shanker. The learned City Magistrate transferred the three complaints to a Bench of Honorary Magistrates composed of Nawab Khakaun Husain and Pandit Kundan Lal for disposal. There were several postponements during the trial of the three cases and on the 21st of May 1912, charge-sheets were framed. On the 31st of May 1912, three applications were filed in the Court of the District Magistrate of Cawnpore by Ram Sahai and Ram Dial for the transfer of the three cases from the Bench of the Honorary Magistrates to some other Court. The applicants for transfer made certain allegations against the Honorary Magistrates. The three applications were accompanied by three declarations, the latter being made by Ram Prasad, Puttan Lal, and Ala Baksh. The three declarations were not sworn to before any officer of a Court. The District Magistrate called upon the Honorary Magistrates for an explanation which was submitted on the 26th of June 1912. On the 29th of June 1912, an order for the transfer of the three cases to the Court of the City Magistrate was made. On the 1st of July 1912, the opposite party, namely, *Musammat* Rupiya and Gauri Shanker, objected to the order of the transfer on the ground that no notice of the applications for transfer had been given to them. The District Magistrate cancelled his order of 29th June 1912 and fixed the 6th of July 1912 for the hearing and disposal of the transfer applications. On that date, some oral evidence was recorded by the District Magistrate and an order of transfer was made on the 15th of July 1912. Pandit Kundan Lal and Nawab Khakaun Husian, the Honorary Magistrates, addressed a letter to the District Magistrate denying the allegations contained in the three declarations of Ram Prasad, Puttan Lal, and Ala Baksh, and submitting their own affidavits contradicting the said declarations. After hearing the parties concerned, the learned District Magistrate sanctioned the prosecution of Ram Prasad, Puttan Lal, and Ala Baksh under section 199, Indian Penal Code. It is against this order that the applicant, Ram Prasad, has filed the present application. It is contended, by his learned Counsel that the order of the learned District Magistrate is *ultra vires*, that no valid ground for granting the sanction has been made out, and that no offence under section 199, Indian Penal Code, has been committed by the applicant. I shall take up the last objection first. It is admitted by the applicant, for the purposes of this application, that a declaration was filed by him in the Court of the District Magistrate with his application for transfer. It is, however, argued that the declaration was not one which the District Magistrate was bound or authorised by law to receive in evidence and to act upon it; and indeed he did not consider it evidence for he examined some witnesses on the basis of whose statements an order of transfer was made. Therefore, if the declaration in question contained any false statement, no offence under section 199, Indian Penal Code, has been committed. In

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support of this contention, thefollowing cases have been cited, *In the matter of the petition of Iswar Chander Guho* (1); *Abdul Majid* v. *Krishna Lal Nag*(2), *Chandi Pershad* v. *Abdur Rahman* (3). I think that the contention for the applicant must prevail. A declaration, before it can be made the foundation of a prosecution under section 199, Indian Penal Code, must be one which is admissible in evidence, and which the Court, before which it is filed, is bound or authorised by law to receive in evidence. The suggestion that there is no prohibition against the reception of such declaration in evidence does not render it admissible or the declarant amenable to the provisions of section 199, Indian Ponal Code. It is not pointed out for the opposite party that the declaration filed by Ram Prasad was one which, under the Criminal Procedure Code or any other law, the Court, before which the proceedings were pending, was bound or authorised to receive in evidence. I, therefore, hold that the sanction granted by the learned District Magistrate for the prosecution of the applicant under section 199, Indian Penal Code, cannot be upheld. It is unnecessary to discuss the other objections taken on behalf of the applicant. I, therefore, set aside the order of the learned District Magistrate, dated the 30th of July 1912, as against Ram Prasad.

Order set aside.

(1) 14 C. 653.
(2) 20 C. 724.
(3) 22 C. 131.

MADRAS HIGH COURT.

CRIMINAL REVISION CASE NO. 408 OF 1912.
CRIMINAL REVISION PETITION NO. 323 OF 1912.

August 16, 1912.

Present:—Sir Ralph Benson, KT., Offg. Chief Justice, and Mr. Justice Napier.

In re REDDY VENKAYYA—COMPLAINANT—PETITIONER.

Criminal Procedure Code (Act V of 1898), *s.* 197—*Lower Subordinate of Public Works Department, charge against, of bribery—Whether sanction to prosecute necessary.*

Inasmuch as a lower Subordinate in the Public Works Department can be appointed and transferred by a Superintending Engineer, without reference to the Local Government, sanction to entertain a complaint of bribery against such lower Subordinate is not necessary.

Petition, under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the order of the Code of the Joint Magistrate of Bikkavole, dated 21st June 1912.

FACTS.—The petitioner filed a complaint before the second class Magistrate at Bikkavole in the Godavari District alleging that when he went to the residence of the 1st counter-petitioner, a Sub-Overseer of the Public Works Department, to execute an agreement with reference to the construction of a culvert, as desired by the Public Works Authorities, the 1st counter-petitioner demanded a bribe and that, on the petitioner refusing to pay it, he was assaulted by the 1st and 2nd counter-petitioners.

The second class Magistrate returned the complaint for presentation before the first class Magistrate, saying that a perusal of the petition showed that an offence under section 161, Indian Penal Code, was also alluded to.

The Deputy Magistrate to whom the complaint was then presented took it on his file holding that he had no authority to proceed under section 161, Indian Penal Code, without the previous sanction of the official superior of the accused, and that such sanction had neither been applied for, nor was there an intention of applying for it. He accordingly transferred it to the file of the Sub-Magistrate for trial for the other offences.

The complainant applied to the High Court to revise this order of the Deputy Magistrate.

Mr. *T. Prakasam*, for the Petitioner.

JUDGMENT.—The Public Prosecutor states that the accused is a Sub-Overseer of the Public Works Department and belongs to the class of lower Subordinates and under rules 54, 293 (*s*) and 423 of the rules of the Public Works Department, 9th Edition, he can be appointed or removed by the Superintending Eugineer without reference to the Local Government. This being so, the Deputy Magistrate was wrong in refusing to entertain the complaint for want of sanction, under section 197 of the Code of Criminal Procedure.

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We set aside his order and direct him to re-take the complaint on his file and deal with it according to law.

Order set aside.

SIND JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REPORT NO. 23 OF 1912.

March 23, 1912.

Present:—Mr. Pratt, J. C., and Mr. Crouch, A. J. C.

EMPEROR—PROSECUTOR

versus

TIRITHDAS KEWALRAM—OPPONENT.

Criminal Procedure Code (Act V of 1898), ss. 260, 439—Summary trial—Case involving question of title and documentary evidence—Revision—Power of High Court to set aside order of acquittal.

In the exercise of its revisional powers, the High Court has power to reverse an order of acquittal and to direct that further inquiry be made or that the accused be re-tried or committed for trial.

Queen-Empress v. *Basant Lall*, 27 C. 320; 4 C. W. N. 311, followed.

But this revisional jurisdiction will be exercised sparingly and generally in those cases only where there is an error of law and procedure patent on the face of the judgment.

A case involving the decision of a question of title and the production of documentary evidence should not be tried summarily.

Mr. *Dipchand T. Ojha*, for the Opponent.

The *Public Prosecutor*, for the Crown.

JUDGMENT.—This is a Reference by the Sessions Judge, Sukkur, as to an order of acquittal made by the City Magistrate, Shikarpur, in a case in which the opponent was acquitted of offences under sections 96 and 122 of the Bombay District Municipal Act.

It is first objected that the application for revision of an order of acquittal will not lie as the procedure contemplated by the Code would be an appeal by the Local Government.

The powers conferred on the High Court in revision are those specified in section 439 of the Criminal Procedure Code, and these include the powers of a Court of Appeal under section 423—subject only to the proviso (4) that a finding of acquittal should not be converted into one of conviction.

Subject to this proviso, therefore, the High Court may exercise all the powers defined in section 423 (*a*), *i.e.*, it may reverse the order of acquittal and direct that further inquiry be made, or that the accused be re-tried or committed for trial.

This power has been exercised by the Calcutta High Court in *Queen-Empress* v. *Basant Lall* (1) and recently by this Court in the case of *Emperor* v. *Allahrakhio Bakhshan* (2).

No doubt, this revisional jurisdiction will only be exercised sparingly and generally only in cases where there is an error of law and procedure patent on the face of the judgment.

The present case is, however, a case which does call for the exercise of this power. The case involved the decision of a question of title and the production of documentary evidence. Both parties asked for the case to be tried regularly, but the Magistrate, nevertheless, proceeded to dispose of the case by summary trial. We think the Magistrate erred in adopting a summary procedure which was ill adopted to the complicated nature of the case and which further had the effect of practically preventing either party from prosecuting the case in appeal.

Again, the issue that lay at the root of the whole case was whether the street was public or not. On this, the Magistrate has given no definite finding for, in his concluding remarks, he refers to a ruling that the issue is rather one for a Civil than for a Criminal Court. The reference to this ruling makes it uncertain whether the Magistrate has considered and decided the issue himself.

We, therefore, reverse the order of acquittal and direct that the accused be re-tried by the regular and not by summary procedure.

Re-trial ordered.

(1) 27 C. 320; 4 C. W. N. 311.

(2) 6 S. L. R. 101; 17 Ind. Cas. 412, *Infra*.

GANGA SINGH *v.* EMPEROR.

ALLAHABAD HIGH COURT.

CRIMINAL REVISION PETITION No. 630 OF 1912.

September 10, 1912.

Present:—Mr. Justice Rafique.

GANGA SINGH AND ANOTHER—APPLICANTS

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 110—Witnesses for prosecution examined after defence witnesses—Illegal procedure—Prosecution witnesses as good as defence witnesses, effect of.

In a proceeding under section 110 of the Criminal Procedure Code, the Sub-Divisional Magistrate examined some of the prosecution witnesses after the case for the defence had been closed, without recording any reason for doing so:

Held, that the procedure was erroneous and unauthorised.

In a case under section 110 of the Code of Criminal Procedure, if the defence evidence is as good as that of the prosecution, the accused is entitled to an acquittal.

Criminal revision against an order of the District Magistrate of Etawah.

Mr. *Dillon*, for the Applicants.

The *Assistant Government Advocate*, for the Crown.

ORDER.—This is an application in revision. The applicants seek to set aside the order of the District Magistrate of Etawah, confirming that of the Sub-Divisional Magistrate, directing the two applicants to furnish personal bonds of Rs. 500 each and two sureties each of the like amount to be of good behaviour for one year or in default to undergo one year's rigorous imprisonment. The learned Counsel for the applicants has argued the case at some length. In order to appreciate his contention some facts should first be recited. The two applicants, Sardar Singh and Ganga Singh *alias* Laloo Singh, are brothers. They are land-holders and carry on a paying business at Auraiya. They live in Rahatpur.

The Sub-Inspector of Auraiya, who has been there since September 1911, laid information against the applicants to the effect that they protected and harboured thieves, associated with notorious bad characters, and received stolen property.

On the basis of that information, a notice under section 112, Criminal Procedure Code, was drawn up against the applicants. They repelled the charges brought against them. The hearing of the case was fixed for 23rd March 1912. On 22nd March 1912, the Police filed a petition to the effect that the prosecution witnesses had been won over by the defence and some others will be produced later. The case was taken up on 26th March 1912, when nine witnesses were examined for the Police and the case was presumably closed for the prosecution. The applicants were called upon to enter on their defence. They denied the charges contained in the Police information and examined twenty witnesses in support of their character and reputation in the neighbourhood. After the close of the evidence for the defence, seven more witnesses were examined by the Sub-Divisional Magistrate for the prosecution. The Sub-Divisional Magistrate accepted the evidence for the Police and his order was upheld by the District Magistrate. Now, it is contended on behalf of the applicants that the procedure of the Sub-Divisional Magistrate as to the recording of evidence was distinctly erroneous and injurious to the defence. Under paragraph 2, of section 117 of the Code of Criminal Procedure, the case against the applicants was to be conducted as if it were a warrant-case and the procedure to be observed in the trial of warrant-cases is laid down in sections 251 to 256, Criminal Procedure Code. According to the said sections, an accused cannot be called upon to enter on his defence until the prosecution closes its case. No further evidence can be admitted against the accused except under section 540, for which there must be valid reasons and which reasons must be recorded. In the present case, the witnesses for the prosecution examined after the close of the defence evidence were not examined under section 540, Criminal Procedure Code, and no order appears on the record to show why was additional evidence for the prosecution allowed, after the close of the defence. Such a procedure has obviously placed the applicants at a disadvantage. Further, it is argued that the evidence for the Police relates to general rumour or suspicion, or the statements or conduct of third persons who justified their conduct by reference to the applicants. The Police witnesses with the exception of two men came from distant places and not from the village where the applicants reside or the village where they carry on their business,

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For the applicants, exception is also taken to the reasons given by the learned District Magistrate for upholding the order of the Sub-Divisional Magistrate. It is said that no reflections were cast on the Sub-Inspector or the Sub-Divisional Magistrate, when it was urged for the applicants that unfortunately for the latter, their enemies had put into circulation reports which found credence with the said officers. It is true that it is difficult to get evidence against well-to-do men and the Police would think twice before laying a charge against such persons, but the latter have more enemies than a poor man, and have a right to the consideration of evidence against them on the same principles as would be applied in the consideration of evidence against a poor man. It is also urged that the absence of any report by former Police officers cannot be ignored on the assumption that they were lazy and did not discharge their duties with diligence. The last argument advanced is that the evidence for the defence is just as good as, if not better than, the evidence for the Police. I think that the procedure adopted by the Sub-Divisional Magistrate in admitting the evidence for the prosecution after the close of the defence was erroneous and unauthorised It was also prejudicial to the applicants. But, apart from the defects in the procedure or the criticism of the reasons of the lower Courts, I think that the information laid by the Police has not been established. That evidence is open to several objections. Only two men, *viz.*, Laloo and Kanahya, come from Auriaya and the others come from villages, from two to ten miles of the village of the applicants. Laloo admittedly is an enemy of the applicants. He has given evidence against them before. Kanahya was once convicted of gambling and would like to keep friends with the Police. Another witness, Kalka, has been bound over at the instance of the Police and would, no doubt, be willing to please them, by giving evidence. Many witnesses depose to cases in which the applicants were suspected to have received a share of the stolen property. Such evidence is inadmissible as was held by my learned colleague, Mr. Justice Chamier, in the case of Mulu from Etawah also, *vide* Revision Case No. 344 of 1911.

One witness deposes to having paid money to Lashkaria and another, who levied the black-mail on him representing that they had been sent by the applicants. Lal Man who makes that statement admits that he made no report at the time and gives no reason for the omission. Lashkaria and his comrades have not been examined. It is easy to make such statements as Lal Man has made and difficult to refute them. It is also doubtful whether such evidence is admissible.

The other witnesses state that there is *shohrat-am* that the applicants are bad characters. The learned Counsel for the applicants contends that the words *shohrat-am* mean general rumour and not general repute. I do not think so. I think that the words mean general repute also. The witnesses further say that the applicants associate with Lashkaria and a few others, who are notorious *badmashes*. This evidence of association, when examined, clearly amounts to this that once or twice the applicants had been seen in the company of Lashkaria and others. The applicants, it is said, are men of business. They receive all sorts of men. Besides, they might have allowed the notorious men in question to talk or walk with them for fear. The allegation that thieves and bad characters are settled by the applicants on their land is not borne out by any reliable evidence. Some of the witnesses say that they have heard so.

The only evidence then against the applicants is of some witnesses, who do not live in the villages where the applicants live or carry on business or in the immediate neighbourhood of the said villages, who say that the applicants by general repute are known to be bad characters. But, even if the whole of the evidence for the Police were to be taken as admissible, it is, I think, sufficiently rebutted by the evidence for the defence. There is a large volume of evidence for the applicants, and that evidence is of men of the villages where the applicants reside and carry on their business or of the immediate neighbourhood. No valid reasons have been given by the lower Courts or by the Assistant Government Advocate for disbelieving the evidence for the defence.

I think that it is just as good as, if not better than, that for the prosecution.

And in a case under section 110, Criminal Procedure Code, where the evidence for the defence is equally good with that for the prosecution, the accused are entitled to an acquittal, vide *Rajendra Prasad Sahi* v. *King-Emprer* (1). I, therefore, accept this application and set aside the order of the lower Courts calling upon the applicants to furnish personal bonds and sureties to be of good behaviour for one year.

Application accepted.

(1) 1 A. L. J. 611; 1 Cr. L. J. 984.

CALCUTTA HIGH COURT.
CRIMINAL REVISION PETITION No. 857 OF 1912.
August 2, 1912.
Present:—Mr. Justice Carnduff and Mr. Justice Imam.
JOGENDRA NATH MUKHERJI—COMPLAINANT—PETITIONER
versus
MOTI LAL CHAKRAVARTI—ACCUSED—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 213, sub-s. (2)—"Witnesses for defence," whether expression covers evidence extracted by cross-examination from prosecution witnesses—Charge against accused framed before cross-examination of prosecution witnesses—Subsequent cross-examination—Cancellation of charge, if legal.

A Magistrate, having drawn up a charge against an accused person with a view to his commitment to the Court of Session, can thereafter allow the accused to cross-examine the witnesses for the prosecution, and, as a result, cancel the charge.

The words "witnesses for the defence" in section 213 sub-section(2) of the Criminal Procedure Code are wide enough to cover evidence extracted by cross-examination from witnesses for the prosecution.

In the matter of Surjya Narain Singh, 5 C. W. N. 110 at p. 112; relied upon.

Rule granted against the order of the Sub-Divisional Magistrate of Basirhat, dated April 18th, 1912, acquitting the accused, opposite party, of an offence under section 408, Indian Penal Code, and cancelling the charge under section 477A against him.

Babu *Sarat Chandra Roy Chowdhury*, for the Petitioner.

Babus *Hara Prosad Chatterji* and *Sajani Kanto Sinha*, for the Opposite Party.

JUDGMENT.—We think that this Rule must be discharged.

The short point raised by it is whether a Magistrate, having drawn up a charge against an accused person with a view to his commitment to the Court of Session, can thereafter allow the accused to cross-examine the witnesses for the prosecution and, as the result, cancel the charge. We are of opinion that it is open to him to take this course.

Section 213, sub-section(2), of the Code of Criminal Procedure, 1898, provides that, if a Magistrate, after having drawn up a charge, hears witnesses for the defence and is then satisfied that there are not, after all, sufficient grounds for committing the accused, he may cancel the charge and discharge the accused. No doubt, the sub-section refers to "witnesses for the defence"; but in our view, those words are wide enough to cover evidence extracted by cross-examination from witnesses for the prosecution. The course taken by the Magistrate seems to us to be clearly within the spirit of the provision, and we consider that it is not unduly straining the words used to put this construction upon them. We find, moreover, that our view is in accordance with that expressed by this Court in *In the matter of Surjya Narain Singh* (1).

Rule discharged.

(1) 5 C. W. N. 110 at p. 112.

PUNJAB CHIEF COURT.
CRIMINAL REVISION PETITION No. 515 OF 1912.
May 31, 1912.
Present:—Mr. Justice Robertson.
PRABHU DIAL—PETITIONER
versus
EMPEROR—RESPONDENT.

Revision—Criminal cases—Concurrent findings of facts—Material error as to facts.

Where a lower Appellate Court has fallen into a material error as to facts, the Chief Court will interfere in revision.

Petition for revision, under section 439 of the Criminal Procedure Code, of the order of the Sessions Judge, Delhi, dated the 11th March 1912, affirming the sentence passed by the first Court.

Mr. *Gokal Chand Naurang*, for Lala *Dwarka Das*, for the Petitioner.

Lala *Balwant Rai*, for the Respondent.

PRABHU DIAL v. EMPEROR.

JUDGMENT.—In this case, one Pirbhu Dyal, *munim* of a firm in Delhi, was convicted under section 439 of having embezzled a sum of rupees eighty three and some odd annas from the firm of Nadha Mal-Niadar Mal by which he was employed.

On the 29th September 1910, certain iron goods had been received by the firm from another firm of Prem Sukh Das-Jawahar Lal. It is alleged that on the 5th October 1910, the accused asked Dhian Chand, cashier of the firm, who is a relation of the partners, for Rs. 83 9-0 said to be due to the firm of Prem Sukh Das-Jawahar Lal, which he (Pirbhu Dyal) said had been demanded by them. Dhian Chand, upon whose evidence alone the conviction is based, says that he gave this money to Pirbhu Dyal, accused, after looking at the original *parcha* which had accompanied the goods but without taking any *parcha* from Pirbhu Dyal, on account of the firm said to be asking for their money, or any signature from Pirbhu Dyal for the money. It is clear from the evidence of the principal of the firm, Miri Mal, that in all cases where money was paid in this manner, the signature of the person to whom it was paid should have been taken, but it is stated that the *munim* in this connection did not always carry out their orders.

There is no doubt, and it is admitted fully by the accused, that on the 8th November 1910, a claim was submitted by the firm of Prem Sukh Das-Jawahar Lal through Pirbhu Dyal and that the money was paid to him by Nihal Chand, who had succeeded Dhian Chand as cashier. This *parcha* was duly taken from Pirbhu Dyal though it does not appear in that case to have been correctly entered in the *parcha bahi* or bill book which was kept by the firm and in which there was no entry at all on the 5th October. On the 5th October, no doubt, an entry was made by the said Dhian Chand in the *rokar bahi* and also in a *bahi* called the *jama bahi*. Dhian Chand stated in his evidence that the payment on the 5th October to Pirbhu Dyal had been made in the presence of one Ram Saran but when Ram Saran was examined, he denied all knowledge of the occurence and it must be remembered that, however much a Court may be convinced that the witness is lying or has been suborned, no such impression or belief can take the form of the affirmative evidence which is necessay before an accused person can be properly convicted. The case against Pirbhu Dyal is reduced to this. It is alleged that he saw his way to get the money re-paid a second time when he discovered that the cashier had been changed after the previous payment. This is a theory which would not hold water for a moment, as it is quite clear that if the prosecution story is true that he embezzled the money on the 5th October, he must then have been perfectly well aware that some time or other a proper bill would be submitted, the money would be paid to the firm of Prem Sukh, and the previous payment would be discovered. The evidence, therefore, against Pirbhu Dyal reduced itself to this. The statement of Dhian Chand is that he paid the money to Pirbhu Dyal without taking from him any *parcha* or any signature and the entry in the books was made by Dhian Chand himself.

The firm of Prem Sukh stated that it was never their habit to draw money except upon *parchas* and it is difficult to believe that it was a custom of the accused's firm to pay out the money for the discharge of a bill due to a third party without taking any signature either of the *munim* himself or any *parcha* on behalf of the firm supposed to be claiming the money. Indeed, the evidence of Miri Mal shows that, however the orders may be neglected, the standing orders of the firm were to take such signature or *parcha*.

It appears to me, without saying for a moment that Dhian Chand is the culprit, though this is a possibility which we are bound to remember in considering whether or not the crime can be brought home to the accused, that it is impossible upon such evidence properly to base a conviction. No doubt, this is only an application for revision and not an appeal, and in such cases I very rarely interfere on the facts; nor should I do so even in this case, were it not that the Appellate Court has fallen into an error as to the facts in its judgment which is of very material importance. He says:—

Some iron goods were supplied by another firm on 29th September 1910, and on October 5th, 1910, the appellant is said to have *presented the cashier with a bill for the amount due to this firm* which sum, Rs. 83-9-0,

was duly paid him by the cashier, Dhiani Mal. "It is precisely in the absence of any such bill or any receipt on behalf either of Pirbhu Dyal or of the firm that I think that the conviction cannot be sustained. Had there been a bill supported by the signature of Pirbhu Dyal, the case would have been clear and this is what we should naturally expect to find in a case of such payments being made and we do find in the case a second payment which is fully admitted by the accused.

In my opinion, it must be held that the statement of Dhian Chand alone, unsupported by any other evidence except the entries in the books made with his own hands, is insufficient to justify the maintenance of the conviction. I accordingly accept the application for revision, set aside the conviction and sentence, and direct that Pirbhu Dyal be set at liberty forthwith.

Application accepted.

SIND JUDICIAL COMMISSIONER'S COURT.

CRIMINAL APPEAL No. 10 of 1912.

March 4, 1912.

Present:—Mr. Pratt, J. C.

IMPERATOR—PROSECUTOR

versus

KHAMISO *valad* JUMO—APPELLANT.

Penal Code (Act XLV of 1860), *s.* 149—*Unlawful assembly—Offence in pursuance of common object—Knowledge of individual members.*

The word "*knew*" in section 149 of the Penal Code indicates a state of mind at the time of the commission of the offence and not knowledge acquired in the light of subsequent events.

The offence, for which members of an unlawful assembly can be convicted as being in pursuance of the common object of the assembly, must so probably flow from the prosecution of the common object that each member might *antecedently* expect it to happen.

Mr. *L. P. Ferro*, for the Appellant.

The *Public Prosecutor*, for the Crown.

JUDGMENT.—The accused has been, I think, satisfactorily identified by the soldier Sumner. This soldier could hardly have helped recognizing the accused for he had headed a party of coolies, who tried to intercept the soldiers in their flight and actually struck a blow at Sumner. The accused is described to be an unusually tall man and I am disposed to believe also in the identification of him by Viie, although the Magistrate does not rely on this witness. As a member of the unlawful assembly (the object of which was to beat Hilton and the other soldiers), the accused is guilty of the offence of grievous hurt for that was committed in prosecution of the common object. But the Magistrate has also convicted the accused of the theft from Hilton though he admits that the theft was no part of the common object. The Magistrate relies on the second part of section 149 and considers that the members of the unlawful assembly must have known that theft was likely to be committed. This, however, is mere speculation. As said by the Calcutta High Court in the old case of *Queen* v. *Sabed Ali* (1), the offence "must so probably flow from the prosecution of the common object that each member might *antecedently* expect it to happen". I lay stress on the word antecedently, for the section uses the word "knew", which indicates a state of mind at the time of the commission of the offence and not knowledge acquired in the light of subsequent events. Here the probability is that no member of the unlawful assembly, except those that actually beat Sumner, had any idea that he was even carrying a purse. Apart from this, however, theft is not a probable consequence or concomitant of beating, which is the only common object alleged in the charge.

I, therefore, confirm the conviction and sentence under sections 147, 325, but reverse the conviction and sentence under section 379.

Conviction partly confirmed.

(1) 20 W. R. Cr. 5; 11 B. L. R. (F. B.) 347.

MADRAS HIGH COURT.

CRIMINAL REVISION CASE No. 267 OF 1911.

September 15, 1911.

Present:—Mr. Justice Spencer.

In re MAHOMED ISMAIL ROWTHER—ACCUSED—PETITIONER.

Arms Act (XI of 1878), *s.* 19 (*c*)—*Offence when complete—Particular intention if necessary.*

Under section 19 (*c*) of the Arms Act, the offence of possessing arms unlawfully by a person entering British India is complete the moment he enters with

SARDHA PRASAD v. PITAMBER LAL.

the arms in his possession. No particular intention in the mind of the offender is requisite.

M. landed in India from Penang: between the landing stage and the Customs Shed, he was detected in the act of handing a parcel to a third person: on inspection, the parcel was found to contain a revolver and 36 cartridges:

Held, that, technically, *M.* had committed an offence under section 19 (*c*) of the Arms Act.

Petition, under sections 435 and 439 of the Criminal Procedure Code, praying the High Court to revise the judgment of the first class Sub-Divisional Magistrate of Negapatam, in Calendar Case No. 37 of 1911, dated the 8th day of April 1911.

Mr. *K. R. Subramania Sastri* for Mr. *V. Ryru Nambiar*, for the Petitioner.

The *Public Prosecutor*, on behalf of the Government.

ORDER.—Technically, the petitioner committed an affence under section 19 (*c*) of the Arms Act as soon as he landed in British India with a revolver which he was not lawfully entitled to possess in this country. It is not necessary that there should be any particular intention in the mind of an offender to complete the offence punishable under this section. In this case, the facts, as found and admitted, are that between the landing stage and the Customs Shed, the petitioner was detected by the Customs Officer in the act of handing to a third person a parcel rolled in cloth which, when opened, was found to contain a revolver and 36 cartridges. The conduct of a traveller, who honestly intended to comply with the rules, would have been to leave the weapon in the bag where it was, till the luggage had been conveyed to the Customs Officer and then, before the examination of luggage, to make a declaration about the fire arm and at once to deposit it with the Customs officials. When the petitioner acted as he did, it cannot be said for certain that he would not have smuggled the revolver, though unnoticed, if the Customs Officer had not chanced to come up at the critical moment.

He has been fairly treated and I decline to interfere with the conviction or sentence.

Petition dismissed.

ALLAHABAD HIGH COURT.

CRIMINAL REVISION PETITION No. 709 OF 1912.

October 2, 1912.

Present:—Mr. Justice Rafique.

SARDHA PRASAD AND ANOTHER—APPLICANTS

versus

PITAMBER LAL—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 145, proceedings under—Magistrate ordering his subordinate officer to make inquiry—Magistrate's order in accordance with subordinate's report without hearing evidence himself, illegal.

A Magistrate, acting under section 145 of the Criminal Procedure Code, referred the issues raised between the parties to a Tahsildar for inquiry. On submission of the report by the Tahsildar, the Magistrate accepted the report, and, without hearing the entire evidence himself, passed an order accordingly:

Held, that the order was illegal, and must be set aside.

In re Baikunt Kumar, 3 C. L. R. 134, followed.

Application for revision against an order of the Joint Magistrate of Allahabad.

Mr. *Satya Chandra Mukerji*, for the Appellant.

The *Assistant Government Advocate*, for the Opposite Party.

JUDGMENT.—This is an application in revision contesting an order of the learned Joint Magistrate of Allahabad, which purports to have been passed under section 145, Criminal Procedure Code. The relevant facts of the case are as follows:—One Shah Haji Jan and some others are the owners of a *Mandi* in the town of Allahabad known as *Khalifa Ki Mandi*. The applicant, Pitamber Lal, was the lessee of that *Mandi*, and his lease, which is said to have been given in 1902, was to expire on the 21st of June 1912. Prior to the expiry of his lease, another lease was given to Sardha Prasad and Bhola Ram as long ago as 1908, which was to take effect on the expiry of the lease of Pitamber Lal, *i. e.*, after the 21st of June 1912. On the 26th of June 1912, the Police submitted a report that there was a likelihood of the breach of the peace between the two lessees over the collection of the *Mandi* dues. The Magistrate acted on that report and issued notices to the applicant and the opposite parties on the 27th of June 1912 to show cause. On the 9th of July 1912, the learned Magistrate made an order referring two issues to the Tahsildar for a report. The

order of the Magistrate must be quoted here in order to appreciate the contention of the applicant. The order is as follows: "Parties appear before me to-day and put in their written statements. The matter is obviously one for local inquiry such as is provided for in section 148, Criminal Procedure Code. The Tahsildar will conduct this local inquiry and make a full report to me on the result. The papers forming the record of this case, including the written statements of the parties, will be sent to him to aid him in his inquiry. The main facts at which he must strive to arrive are;—(1) Were any, and if so, which, of the parties in possession of the share of the *Mandi* at the time when this trouble first arose, *i.e.*, the 26th and 27th of June? (2) Had any party within two months next before that date been forcibly and wrongfully dispossessed? The Tahsildar will have no concern with the merits of the claims of the parties to possess the share of the *Mandi*. He must devote his attention to the points I have mentioned above, and there will be no need for him to go into a long discussion about title-deeds and the like. His report should be submitted within ten days' time. Case to be put up after ten days". The Tahsildar submitted his report on the two issues. No evidence was recorded by the Magistrate on behalf of Sardha Prasad and Bhola Ram. Some evidence was recorded on behalf of Pitamber Lal. On the 9th of August 1912, the learned Magistrate accepted the report and the conclusions of the Tahsildar and passed an order in favour of Sardha Prasad and Bhola Ram. Pitamber Lal is dissatisfied with that order and has come up in revision to this Court. He has taken three legal objections to the proceedings in the lower Court. He says that the learned Magistrate did not write an order stating the reasons which made him believe that there was a likelihood of the breach of the peace between Pitamber Lal and his opposite parties. Further, it is said that no copy of such an order was served on the applicant. The last and the most important objection is that the order of the lower Court proceeds practically upon the report of the Tahsildar. The learned Magistrate could not under the law, it is said, refer the inquiry into the issues raised in the case to the Tahsildar. I think that this last objection is sound and must prevail. A perusal of the order of the learned Magistrate dated the 9th July 1912, shows that the issues involved in the case were remitted by him to the Tahsildar, for inquiry and trial. The learned Magistrate did not hear all the evidence himself in the case, and his order clearly shows that he accepted the report of the Tahsildar in its entirety. According to the admitted facts in the case, Pitambar Lal was in possession up to the 21st of June 1912. He could not have given up possession willingly and then turned round in five days, *i.e.*, on 26th June 1912 (the date on which the Police made a report) and contested the possession of Sardha Prasad and Bhola Ram. The learned Magistrate, it is said, would have come to a different conclusion had he taken all the evidence himself without expressing any opinion as to the merits of the case. I think that the proceedings of the lower Court are open to objection. The order of 9th July 1912 purports to have been made under section 145, Criminal Procedure Code, which does not enable a Court to have the trial of the issues raised in a case determined by a Court subordinate to itself. The case of *In re Baikunt Kumar*(1) is in point. I, therefore, think that the proceedings of the lower Court were not held according to law. I, therefore, set aside the order of the learned Magistrate, dated the 9th of August 1912.

Application allowed.

(1) 3 C. L. R. 134.

MADRAS HIGH COURT.

CRIMINAL MISCELLANEOUS PETITION No. 305 OF 1912.

September 18, 1912.

Present:—Sir Ralph Benson, Kt., Offg. Chief Justice, and Mr. Justice Sankaran Nair.

THE SESSIONS JUDGE OF COIMBATORE —PETITIONER

versus

IMMUDI KUMARA KANGAYA AND OTHERS—ACCUSED.

Criminal Procedure Code (Act V of 1898), *ss.* 208, 210, 212, 213, 347—*Magistrate's discretion to summon and examine witnesses for defence before or after framing charge—"Stop further proceedings", meaning of,*

SESSIONS JUDGE OF COIMBATORE *v.* IMMUDI KUMARA KANGAYA.

Section 210, in requiring "the evidence referred to in section 208 sub-sections (1) and (2)" to be recorded before a charge is drawn up, does not require a Magistrate to record the evidence of witnesses whom, in the exercise of the discretion given by sub-section (3), he has deemed it unnecessary to summon. Therefore, the accused is not entitled to delay asking the Magistrate to summon his witnesses until the last moment before the charge is drawn up and then require him to summon and examine his witnesses, as such a procedure would lead to undue delay in the commitment of cases and the evils which such delay would entail.

Though it is left to the discretion of a Magistrate (section 212) to examine witnesses for the defence after the charge is drawn up and then to cancel the charge and discharge the accused (section 213), the Criminal Procedure Code does not compel a Magistrate to summon and examine witnesses for the defence after a charge has been drawn up or even before the charge has been drawn up if, for reasons to be recorded, the Magistrate deems it unnecessary to do so.

Queen-Empress v. *Ahmadi*, 20 A. 264, and *Emperor* v. *Muhammad Hadi*, 26 A. 177, A. W. N. (1903) 215, cited.

Obiter.—The expression "stop further proceedings," in section 347 of the Criminal Procedure Code, means, to stop proceeding with the case *as a trial* and instead to commit the case to the Sessions for trial by that Court.

Phanindranath Mitra v. *Emperor*, 36 C. 48, 12 C. W. N. 1014, 1 Ind. Cas. 469; 8 Cr. L. J. 221, dissented from.

Reference, under section 438 of the Criminal Procedure Code, praying that, in the circumstances stated therein, the High Court will be pleased to quash the commitment of the accused in Sessions Case No. 60 of 1912 and Register Case No. 8 of 1912 on the file of the Sub-Magistrate of Kangayam.

Mr. *B. N. Sarma*, for the Public Prosecutor, for the Crown.

Mr. *M. O. Parthasarathi Aiyangar*, for the Accused.

ORDER.—In this case, the Sessions Judge moves us to quash a commitment made to his Court on the ground that the Committing Magistrate refused to summon certain witnesses whom the accused desired to be examined by the Magistrate under section 208 of the Criminal Procedure Code prior to his making the commitment. It appears that examination and cross-examination of the witnesses for the prosecution was closed on the 5th June last, and accused were examined on the same day and stated that their Vakil would file written statements on their behalf. The case was, therefore, adjourned to the 8th June when the written statements were put in and the Vakil of the accused argued that there was no sufficient evidence for the prosecution to justify a commitment. Owing to the absence of one of the accused (who was on bail), the case was adjourned to the 11th June, and then again to the 20th June, and then the present application was, for the first time, made to summon and examine some sixteen witnesses for the defence. The Magistrate refused to do so, as he held that the application was made too late, and he drew up a charge and committed the accused to the Sessions on the same day. For the accused, it is argued that sections 208, 209, 210 of the Criminal Procedure Code rendered it compulsory on the Magistrate to issue the summonses and examine the witnesses as requested by the accused, and reliance is placed on two unreported decisions of this Court and on the decisions of *Queen Empress* v. *Ahmadi* (1), and *Emperor* v. *Muhammad Hadi* (2). We do not think that the contention of the accused can be supported. Section 208 (1) of the Criminal Procedure Code, no doubt, requires the Magistrate to record "all such evidence as may be produced in support of the prosecution or on behalf of the accused or as may be called for by the Magistrate," and sub-section (3) of the same section enacts that "If the complainant, or the officer conducting the prosecution, or the accused, applies to the Magistrate to issue process to compel the attendance of any witness * * * * * the Magistrate shall issue such process unless, for reasons to be recorded, he deems it unnecessary to do so." It will be observed that sub section (1) contemplates the production of evidence by the prosecution or by the accused, without the aid of the Magistrate: sub-section 3 contemplates the intervention of the Magistrate to secure the attendance of witnesses and in regard to this evidence, the Magistrate has a discretion, for reasons to be recorded by him, to refuse to issue process, if he deems it unnecessary to do so. When, therefore, section 210 requires "the evidence referred to in section 208 sub-sections (1) and (3)" to be recorded before a charge is drawn up, it does not require the Magistrate to record the evidence of witnesses whom, in the exercise of the discretion given by sub-

(1) 20 A. 264.
(2) 26 A. 177; A. W. N. (1903) 215.

section (3), he has deemed it unnecessary to summon. This procedure appears to be convenient and reasonable, whereas the procedure contended for by the accused, *viz.*, that he may delay asking the Magistrate to summon his witnesses until the last minute before the charge is drawn up and then require him to summon and examine his witnesses, would lead to undue delay in the commitment of cases and the evils which such delay would entail. The proceeding before the Magistrate is only an inquiry preliminary to the trial and, while the law in order to avoid unnecessary commitments, is careful to require the Magistrate to examine any witness produced before him by the accused, and provides for the Magistrate also summoning and examining witnesses for the defence before a charge is drawn up and even gives the Magistrate a discretion (section 212) to examine witnesses for the defence after the charge is drawn up and to then cancel the charge and discharge the accused (section 213), it does not compel a Magistrate to summon and examine witnesses for the defence after a charge had been drawn up or even before the charge had been drawn up, if the Magistrate, for reasons to be recorded, deems it unnecessary to do so.

This distinction between the duty of a Magistrate in regard to evidence *produced* before him by the accused and evidence not produced before him, but which the accused desires him to obtain by the issue of process, has not always, we think, been borne in mind by the Courts and the omission seems to have led the learned Chief Justice of the Allahabad High Court, *Emperor* v. *Muhamad Hadi* (2), to state the rule in terms wider than those of the Code and wider also than those used in *Queen-Empress* v. *Ahmadi* (1), which he refers to in support of his statement of the rule. (See also the unreported decision of this Court, Criminal Miscellaneous Petition No. 298 of 1911). Mr. Sarma for the Public Prosecutor has drawn our attention to the case of *Phanindranath Mitra* v. *Emperor* (3), in which it is held that section 347 of the Criminal Procedure Code lays down that when a Magistrete has made up his mind to commit an accused for trial, 'he shall stop further proceedings' and commit the accused for trial, and that this section is not to be read as subject to the provisions in sections 203 to 210, to which we have referred. We are unable to accept this view or to rely on section 347 in support of the Magistrate's action.

Having regard to the subject-matter of section 346 and section 347 and to the corresponding section in the Code of 1872 [see section 221 of that Code and *Empress* v. *Ilahi Baksh* (4)], we think that the directions in section 347 to "stop further proceedings" does not justify a Magistrate in disregarding the directions in sections 208 to 210, but only requires him to stop proceeding with the case *as a trial* and instead to commit the case to the Sessions for trial by that Court "under the provisions hereinbefore contained" *i. e.*, under the provisions of sections 208 to 210 and the other provisions in Chapter XVIII of the Code. In the present case, we agree with the Magistrate that the applition by the accused to summon and examine their witnesses was so long delayed that the Magistrate was justified in refusing to accede to it at that stage. We, therefore, see no reason to quash the commitment.

(3) 36 C. 48; 12 C. W. N. 1014; 1 Ind. Cas. 469; 8 Cr. L. J. 221.

(4) 2 A. 910.

SIND JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REPORT No. 170 OF 1911.

February 22, 1912.

Present:—Mr. Crouch, A. J. C., and Mr. Hayward, A. J. C.

EMPEROR—PROSECUTOR

versus

ALLAHRAKHIO AND ANOTHER—ACCUSED.

Criminal Procedure Code (Act V of 1898), s. 260—Practice—Summary trial—Cattle-lifting.

Cattle-lifting is a serious offence and should not be tried summarily.

Report made by the District Magistrate, Sukkur, under the provisions of section 438, Criminal Procedure Code, for enhancement of sentence in a case of theft of cattle summarily tried by the Resident Magistrate, Rohri.

The *Public Prosecutor*, for the Crown.

JUDGMENT.—The facts alleged in this case go to show that this offence, if proved

was a serious one. We consider that the Magistrate exercised a wrong discretion in trying a case of cattle-lifting summarily. We set aside the conviction and order a re-trial.

Re trial ordered.

MADRAS HIGH COURT.

CRIMINAL REVISION CASE No. 355 OF 1904
CRIMINAL MISCELLANEOUS PETITION No. 264 OF 1904.

November 14, 1904.

Present:—Mr. Justice Benson, and Mr. Justice Boddam.

In re KORA RANGAN AND OTHERS—ACCUSED—PETITIONERS.

Criminal Procedure Code (Act V of 1898), *s.* 110—*Meaning and object of section—Security demanded from person not "resident" within jurisdiction.*

The expression "any person within the local limits" in section 110 of the Criminal Procedure Code, means any person who is within the local limits at the time the Magistrate takes action under the section.

The object of the section is to prevent crime and that object would be defeated if its scope were restricted to persons *residing* within the jurisdiction of the Magistrate.

Ketaboi v. *Queen-Empress*, 27 C. 993, dissented from.

Consequently, a Magistrate has jurisdiction to take security from a person who resides outside the jurisdiction of the Magistrate but is found within the local limits of his jurisdiction.

Petition, under sections 435 and 439 of the Criminal Procedure Code, praying the High Court to revise the judgment of the Sessions Judge of Chingleput, in Criminal Miscellaneous Case No. 12 of 1904, referred under section 123 (2), Criminal Procedure Code, by the Joint Magistrate of Chingleput, Criminal Miscellaneous Case No. 30 of 1904, on the file of the Joint Magistrate of Chingleput.

Messrs. *E. R. Osborne*, Counsel, and *K. Kuppusami Aiyar*, for the Petitioners.

The *Public Prosecutor*, *Contra.*

ORDER.—It is urged by Counsel for the petitioners that some of the persons, who have been required to give security for good behaviour, reside outside the jurisdiction of the Magistrate who took action under section 110, Criminal Procedure Code, and our attention is drawn to the case of *Ketaboi* v. *Queen-Empress* (1).

(1) 27 C. 993.

In that case, it was held that, according to the true construction of section 110, the Magistrate would have no jurisdiction to deal with the case unless the person proceeded against was "residing within the local jurisdiction of the Magistrate".

With all respect to the learned Judges who decided that case, we are not prepared to follow their decision. The words of the section are,—"Whenever.....a Magistrate receives information that any person within the local limits of his jurisdiction.....is by habit a robber" and so forth, he may proceed under the section. Had the Legislature intended to restrict the jurisdiction of the Magistrate to persons residing within the local jurisdiction, nothing would have been easier than to have said so; but the Legislature has refrained from imposing this limitation, and we are not justified in importing it into law. The law simply says "any person within the local limits", and this we understand to mean any person who is within the local limits at the time when the Magistrate takes action under the section. The object of the section is the prevention of crime, and its object would, in our opinion, be liable to be defeated if its scope were restricted to persons residing within the Magistrate's jurisdiction. As the Sessions Judge points out, if that were so, we should have this absurdity that the Magistrates in British India would have no power to proceed under the section against bad characters, no matter how desperate and dangerous they might be, who reside in French or other Foreign Territory, though they might infest in villages in British India and be well known to the authorities as habitual thieves; nor would any Magistrate have power to proceed against those gangs of criminals who have no residence anywhere but wander from district to district throughout the year.

We dismiss the petition.

Petition dismissed.

ILTAF HUSAIN v. EMPEROR.

ALLAHABAD HIGH COURT.
CRIMINAL REVISION PETITION No. 621 OF 1912.
September 7, 1912.
Present:—Mr. Justice Rafique.
Syed ILTAF HUSAIN—APPLICANT
versus
EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), *s.* 528—*Order of transfer made by Sub-Divisional Magistrate—Appeal to District magistrate not maintainable—Jurisdiction.*

A District Magistrate cannot set aside an order of transfer passed by a Sub-Divisional Magistrate.

Raghunatha Pandaram v. *Emperor*, 26 M. 130 relied upon.

Application for revision against an order of the District Magistrate of Badaun.

Mr. *G. W. Dillon*, for the Applicant.

The *Assistant Government Advocate*, for the Crown.

JUDGMENT.—This is an application on revision, contesting the order of the learned District Magistrate of Badaun, dated the 1st of July 1912. That order was made under the following circumstances:—Azhar Husain filed a complaint against Iltfat Husain *alias* Altaf Husain, under section 323, Indian Penal Code, in the Court of the Tahsildar of Sahsawan. Azhar Husain and the person accused by him live in Sahsawan. Altaf Husain filed a counter-complaint against Azhar Husain and others in the Court of Munshi Sharafat Ullah Khan, Deputy Magistrate. The Tahsildar recorded the evidence for Azhar Husain and framed a charge sheet against Altaf Husain. No evidence has yet been recorded in connection with the counter-complaint of the latter. Altaf Husain moved the Sub-Divisional Officer to transfer the case pending in the Court of the Tahsildar to the Court of Munshi Sharfat Ullah Khan. The Sub-Divisional Magistrate, without calling upon Azhar Husain to show cause, granted the application of Altaf Husain and transferred the case to the Court of Munshi Sharafat Ullah Khan. Thereupon, Azhar Husain filed a petition before the District Magistrate objecting to the transfer of his case from the Court of the Tahsildar. The learned District Magistrate cancelled the order of the Sub-Divisional Magistrate and transferred both the cases from the Court of Munshi Sharafat Ullah Khan to that of the Tahsildar. Altaf Husain has come up to this Court in revision. It is contended on his

THEKKUMTHATATHIL KELUKUTTI v. EMPEROR.

behalf that the District Magistrate and the Sub-Divisional Magistrate have co-ordinate powers of transfer under section 523, Criminal Procedure Code, and that the District Magistrate could not sit in appeal on an order of transfer passed by the Sub-Divisional Magistrate. This contention is supported by *Raghunatha Pandaram* v. *Emperor* (1). The order of the District Magistrate, dated the 1st of July 1912, was, no doubt, illegal. But the effect of the setting aside of that order would be that the case, which was instituted in the Court of the Tahsildar, would remain on the file of Munshi Sharafat Ullah Khan and the other case which was instituted in the Court of the latter would remain on the file of the Tahsildar. For the order of the learned District Magistrate, which related to the transfer of the case which was originally instituted in the Court of Munshi Sharafat Ullah Khan, cannot be questioned on any ground. However, as the order of the learned District Magistrate is illegal, it cannot be upheld and it is set aside. But I think that the two cases should be tried in one Court and as the Court of the Tahsildar is situate in Sahsawan where the parties reside, I direct that both the cases be transferred to his Court for disposal.

Revision allowed.

(1) 26 M. 130.

MADRAS HIGH COURT.
CRIMINAL APPEAL No. 420 OF 1912.
September 17, 1912.
Present:—Mr. Justice Ayling and Mr. Justice Napier.
THEKKUMTHATATHIL KELUKUTTI—APPELLANT
versus
EMPEROR—RESPONDENT.

Penal Code (Act XLV of 1860), *s.* 300, *Exception* 2—*Culpable homicide—Firing at person mistaken for thief—Fatal injury—Offence.*

The accused fired at a person a gun loaded with a slug, one inch long, in the mistaken belief that he was a thief: the shot was fired in order to protect certain fruit from being stolen. The shot resulted in the death of the person fired at. It was found that the accused had no reason to apprehend anything more serious than the theft of certain fruit, and that he must have known that the shot was likely to cause death:

MEAJAN v. SHARAFATULLAH KHAN.

Held, that the accused was not entitled to the benefit of the second exception to section 300 of the Penal Code.

Appeal against the order of the Court of Session of South Malabar, in Case No. 24 of the Calendar for 1912.

Mr. *L. A. Govindaragava Iyer*, Acting Public Prosecutor, for the Crown.

JUDGMENT.—The evidence leaves no doubt that the accused fired at the deceased, who was one of his own watchmen, mistaking him for a thief and inflicted a fatal wound in the chest, from which deceased died almost immediately. The real question is, whether the accused may be given the benefit of exception 2 to section 300, Indian Penal Code; and, after careful consideration, we must agree with the Sessions Judge in holding that he cannot.

From the evidence of prosecution 2nd witness, it is clear that the accused had no reason to apprehend any thing more serious than the advent of thief or thieves intending to steal his cocoanuts or jack fruit; and it cannot be contended that it was necessary to shoot such a thief in order to defend his property, especially as accused had assembled no less than five men to help him in guarding his *tope*. That accused in firing at deceased must have known himself to be likely to cause the man's death, admits of no doubt; the gun is a handy, serviceable weapon, and it was loaded not with a small shot, but with a slug, an inch long. There was moonlight and deceased was struck full in the chest from a distance of about 25 yards. It is possible that the learned Sessions Judge puts it somewhat too strongly in saying that the object of the shot was expressly to kill the thief, but it seems clear that accused fired, knowing that he was likely to cause a fatal wound and not caring whether he did so or not.

The concluding words of exception 2 to section 300, Indian Penal Code, prevent his being given the benefit of that provision of law.

We must, therefore, confirm the conviction and sentence and dismiss the appeal.

Appeal dismissed.

CALCUTTA HIGH COURT.

CRIMINAL REVISION PETITION No. 634 OF 1912.

May 30, 1912.

Present:—Mr. Justice Holmwood and Mr. Justice Imam.

MEAJAN AND OTHERS—ACCUSED—PETITIONERS

versus

SHARAFATULLAH KHAN—COMPLAINANT—OPPOSITE PARTY.

Trespass—Civil and criminal trespass—Intention to annoy—Placing haystacks and manure on another man's land—Annoyance in law—Penal Code (Act XLV of 1860), s. 441.

The placing of haystacks and manure on another man's land need not necessarily amount to annoyance. It is not annoyance in law. It may be annoyance in fact. To convict an accused of criminal trespass, it must be clearly found that he intended to cause annoyance.

The distinction between civil and criminal trespass should not be lost sight of.

Rule against the order of the Sub-Divisional Magistrate of Feni, convicting the petitioners under section 447 of the Indian Penal Code, of criminal trespass, and sentencing them to a fine of Rs. 100 each.

Babus *Ramdoyal Dey* and *Pramatha Lal Dutta*, for the Petitioners.

JUDGMENT.—This Rule must be made absolute on the ground on which it was issued. The explanation of the Magistrate admits that there is no finding that the accused's claim was in the nature of a sham or pretext. It may have been or it may not have been so, the only finding is that the land was in the possession of the complainant. The placing of haystacks and manure in another man's land need not necessarily be annoyance. It is not annoyance in law. It may be annoyance in fact. If it is annoyance in fact, then it must be clearly found in the judgment not only that it is annoyance but that it was intended by the accused to be annoyance. There is no such finding in this judgment and there is no other possible ground upon which a purely civil trespass can be treated as criminal trespass. The distinction between civil trespass and criminal trespass is one which is lost sight of by too many of the Subordinate Magistrates.

The conviction and sentence are set aside and the fine, if paid, wil be refunded.

Rule made absolute.

CALCUTTA HIGH COURT.
CRIMINAL REVISION PETITION No. 1071 OF 1912.
August 28, 1912.
Present:—Mr. Justice Carnduff, and
Mr. Justice Imam.
DEPUTY LEGAL REMEMBRANCER
—PETITIONER
versus
KADIR MIRZA—OPPOSITE PARTY.

Security—Good behaviour—Habitual offender—Notice to show cause—"By habit" a thief—Notice stating, "by general repute" a thief, whether bad—Person not misled or prejudiced by terms of order—Criminal Procedure Code (Act V of 1898), ss. 110, 112, 117, 118.

In an order drawn up under section 112 of the Criminal Procedure Code, it was stated that as it appeared to the Magistrate that the opposite party was "by general repute" (instead of "by habit" as required by section 110) a thief, he was called upon to show cause why he should not give security. The evidence was directed mainly to show that he was a habitual thief and his cross-examination was directed to refute the evidence to that effect:

Held, that the inquiry provided for by sections 117 and 118 of the Criminal Procedure Code was not strictly limited by the precise terms of the order drawn up under section 112, and that as the opposite party was not misled or prejudiced by the terms of the order, no ground existed for granting him any relief.

Rule against the order of the Sessions Judge of Midnapore, dated March 19th, 1912, setting aside, under section 123 of the Criminal Procedure Code, that of the Sub-Divisional Magistrate of Tamluk, dated February 10th, 1912, by which he bound down the Opposite Party under section 110 of the Criminal Procedure Code.

Babu *Srish Chandra Chowdhury*, Junior Government Pleader, for the Petitioner.

Babu *Khirod Lal Sen*, for the Opposite Party.

JUDGMENT.—One Kadir Mirza was ordered by the Sub-Divisional Magistrate of Tamluk, under section 118 of the Criminal Procedure Code, to give security for his good behaviour for a period of two years. The case was referred in due course, under section 123 of the Code, to the Sessions Judge who, while holding that there was good evidence for binding the man down, set aside the order on the ground that, "unfortunately the proceedings were very defective." The defect in them seems to consist of this, that it is stated in the order drawn up under section 112 of the Code that, as it appeared to the Magistrate that Kadir was "by general repute" a thief and burglar, he was called upon as such to show cause why he should not give security. The point is that he ought to have been called upon to show cause as being "by habit" a thief and burglar, and that, as he was not so addressed, he could not be bound down under that description.

We find that the evidence was directed mainly to show that Kadir Mirza was a habitual thief and burglar, and that his cross-examination was directed to refute the evidence to that effect. Moreover, we are not prepared to hold that the inquiry provided for by sections 117 and 118 of the Code is strictly limited by the precise terms of the order drawn up under section 112. Section 117 provides that after an order under section 112 has been read or explained to the person concerned, "the Magistrate shall proceed to inquire into the truth of the information upon which he has acted, and to take such further evidence as may appear necessary;" and section 118 provides in general terms that "if, upon such inquiry, it is proved that it is necessary for maintaining good behaviour that the person, in respect of whom the inquiry is made, should execute a bond, with or without sureties, the Magistrate shall make an order accordingly." No doubt, if the person eventually bound down could show that he was misled or prejudiced by the terms of the order drawn up under section 112, there would be a clear case for granting him relief, but as we have already shown, there can be no question here of the petitioner having been misled or in any way prejudiced.

The Rule is, therefore, made absolute; and we direct that the order of the Sub-Divisional Magistrate be restored, that Kadir Mirza be required to execute a bond for rupees two hundred for his good behaviour for a term of two years, with two sureties each in the sum of rupees one hundred, and that in default he be committed to Jail.

Rule made absolute.

SEETHARAMA CHETTY v. SESHIAH CHETTY.

MADRAS HIGH COURT.

CITY CIVIL COURT APPEAL No. 1 OF 1911.

September 26, 1912.

Present:—Sir Ralph Benson, Kt., Offg. Chief Justice, and Mr. Justice Sankaran Nair.

T. SEETHARAMA CHETTY—PLAINTIFF—APPELLANT

versus

P. SESHIAH CHETTY AND OTHERS—DEFENDANTS—RESPONDENTS.

Transfer of Property Act (IV of 1882), s. 130—Pro-note executed by managing member of Hindu family—Endorsee of such pro-note, whether can sue members other than maker of pro-note—Endorsement whether assignment of actionable claim.

The endorsee of a pro-note executed by the managing member of an undivided Hindu family, cannot sue the other members of the family: he can only sue the maker of the note or, his legal representatives, after his death, inasmuch as the mere endorsement is not anassignment of an actionable claim under section 130 of the Transfer of Property Act.

Appeal against the decree of the City Civil Court, Madras, in O. S. No. 2 of 1910.

FACTS.—The plaintiff brought this suit as endorsee of a promissory-note executed by one P. Ponniah Chetty, deceased, the brother of defendants Nos. 1 and 2 and the husband of the third defendant, payable to M. Ethirajammal and M. Seethammal or order. The plaintiff alleged that Ponniah Chetty, the maker of the note, and defendants Nos. 1 and 2 were members of an undivided family and the debt in question having been borrowed for a family trade was binding on them. The plaint also prayed in the alternative that a decree might be passed as against the assets of the deceased in the hands of the defendants.

The following issue was raised in the case: "Is plaintiff, as endorsee, entitled to sue the 1st and 2nd defendants" assuming the pro-note was executed on behalf of the family? Under this issue, the question for consideration was, "whether the plaintiff by the endorsement of the pro-note in his favour has not only become the holder of the note but also the assignee of the actionable claim which the person from whom he obtained the note had against Ponniah Chetty and his undivided brothers, the 1st and 2nd defendants." The City Judge answered this question in the negative and held that, as far as defendants Nos. 1 and 2, impleaded as undeceased co-parceners, were concerned, he suit, in so far as it was based on the pro-note itself as the cause of action, could not be maintained and that it could only be maintained on the independent cause of action founded on the debt alleged to be contracted by Ponniah Chetty for a family purpose. The City Civil Judge held that only by an assignment in the manner prescribed by section 130, Transfer of Property Act, could such right to proceed against defendants Nos. 1 and 2 be acquired and that the endorsement could not operate both as a negotiation of the note in so far as the maker of the note was concerned, entitling the endorsee to enforce it according to its tenor against the maker as well as the endorser and even conferring a better title on him than the endorser had, and also as a mere assignment of the debt subject to all liabilities and equities which the transferor of the debt was subject to, so far as the maker's undivided brothers were concerned against whom it could not be enforced according to the tenor of the note. In the result, the Judge gave a decree to the plaintiffs for the plaint amount against the assets of the deceased in the hands of his widow the 3rd defendant and the properties belonging to the deceased exclusively and taken possession of by defendants Nos. 1 and 2. It was also ordered that Nos. 1 and 2 defendants were not liable either personally or to the extent of their joint property.

The plaintiff preferred this appeal to the High Court.

JUDGMENT.—There is no transfer to the plaintiff of the claims of Ethirajammal and Seethammal against the members of the family under section 130 of the Transfer of Property Act. The endorsement of the promissory-note entitles the plaintiff to sue only Ponniah and after his death his legal representatives. The appeal is dismissed with costs.

Appeal dismissed.

SHAHAB DIN *v.* SIRAJ-UD-DIN.

PUNJAB CHIEF COURT.

CIVIL REVISION PETITION No. 43 OF 1912.

November 20, 1912.

Present:—Sir Arthur Reid, KT, Chief Judge.

Malik SHAHAB DIN—PLAINTIFF—PETITIONER

versus

SIRAJ-UD-DIN AND ANOTHER, ADULTS AND KAMAL-UD-DIN, MINOR, THROUGH SIRAJ-UD-DIN, SONS OF CHANAN DIN—DECEASED—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), *s.* 152—*Amendment of decree—Costs assessed on wrong principle—Proper remedy—Review—Appeal—Revision.*

A decree can only be amended if one of the reasons specified in the Civil Procedure Code as justifying amendment is established.

The revisional powers of the High Court cannot be exercised *ultra vires* and without authority.

An application was made to have an arbitration award, made out of Court filed, but it was dismissed with costs on 18th June 1904. A decree was drawn up in which Pleader's fee was assessed *ad valorem* on the value of the suit for purposes of jurisdiction. On the 12th August 1911, an application was made to amend the decree by substituting a smaller sum as Pleader's fee:

Held, (1) that there was no reason for amendment as the decree was not at variance with the judgment and there was no clerical or arithmetical error nor any error arising from any accidental slip or omission,

(2) that the applicant's proper remedy was by review or by appeal on the ground that a matter of principle was involved and that costs had been assessed on an erroneous principle;

(3) that the applicant could not ask for amendment several years after his proper remedy had been barred by limitation.

Petition, under section 70 (*a*) (*b*) of Act XVIII of 1884, as amended by Act XXV of 1899, for revision of the order of the District Judge, Lahore, dated 25th October 1911, rejecting petitioner's application for amendment of the decree passed by the District Judge, Lahore, dated 18th June 1904.

Lala *Nihal Chand*, for the Petitioner

Mr *Brij Lal*, for the Respondents.

JUDGMENT.—This is an application for revision, under section 70 (1) (*a*) of the Courts Act, of an order refusing to amend a decree under section 206 of the Code of late Civil Procedure, as amended, *i.e.*, under section 152 of the Code now in force. The applicant applied to the Court below on the 9th February 1904 that an award made out of Court be filed in Court and that a decree with costs be passed in his favour in terms of the award. The application was registered as Suit No. 13 of 1904 and it was recorded that the plaint was presented on the 9th February 1904. The suit was valued at Rs. 20,000 by the applicant. On the 18th June 1906, the Court delivered judgment that "the plaintiff's application, therefore, that a decree be passed in accordance with the terms of the award will stand dismissed with costs," and a decree assessing Pleader's fee at Rs. 550, the *ad volorem* fee on Rs. 20,000, was framed.

On the 12th August 1911, the applicant filed a "petition under section 206, Civil Procedure Code as amended by Act V of 1908," for amendment of the decree by substituting Rs. 10 or Rs. 11 as Pleader's fee on the ground that no Pleader's fee was fixed in the judgment and it was "further prayed that the value of the suit for purposes of jurisdiction is Rs. 20,000," etc.

The Court below rejected this application on the ground that it did not see any good reason for amendment.

This order cannot, in my opinion, be reversed under section 206 of the late, or section 152 of the present, Code. Assuming that the assessment of Pleader's fee was opposed to Chapter I, No. 12, Rule X of Rules and Orders of this Court, at page 84 of Volume III, Edition of 1911, and of this I am by no means satisfied—the decree was not at variance with the judgment and there was no clerical or arithmetical error in the decree, and no error arising from any accidental slip or omission.

The Court below obviously treated the application under section 525 as a suit, valued at Rs. 20,000 and assessed the Pleader's fee on that valuation and the applicant, subsequently, applied for transfer of execution proceedings from the Subordinate Judge's Court on the ground that the value of the suit was Rs. 20,000. The applicant's remedy was by application for review or by appeal, on the ground that a matter of principle was involved and that costs had been assessed on an erroneous principle.

Having failed to adopt either of these remedies, the applicant was not entitled to come into Court several years after both remedies had become barred by limitation, and the order rejecting the application for amendment of decree was fully justified.

Khoda Bakhsh v. *Mowla Bakhsh* (1), *Kalu* v. *Litu* (2) and *Muhammad Sulaiman Khan* v. *Muhammad Yar Khan* (3), cited for the applicant, do not help him.

The revisional powers of this Court cannot be exercised *ultra vires* and without authority, merely because the fee allowed may seem excessive, and a decree cannot be amended unless one of the reasons specified in the Code as justifying amendment has been established. No refusal to exercise jurisdiction and no material irregularity has been established in this case. There has been a strict compliance with the provisions of the Code. For these reasons, the application is dismissed with costs.

Counsel's fee thirty-two rupees.

Petition dismissed.

(1) 14 W. R. 255.
(2) 21 C. 259.
(3) 11 A. 267.

MADRAS HIGH COURT.
CITY CIVIL APPEAL No. 22 OF 1910.
September 30, 1912.

Present:—Sir Ralph Benson, Kt., Offg. Chief Justice, and Mr. Justice Sankaran Nair.

THE MADRAS AND SOUTHERN MARHATTA RAILWAY CO., LTD., MADRAS—DEFENDANTS—APPELLANTS

versus

BHIMAPPA AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Limitation—Suit against Railway Company for compensation for loss of goods—Limitation Act (IX of 1908), Sch. I, Arts. 30, 31—Burden of proof of time of loss—Sufficiency of notice of claim—Railways Act (IX of 1890), s. 75—Modes prescribed by rules.

In a suit for compensation for the loss of goods against a Railway Company, the burden of proving when the goods were lost is on the Company.

Where it is not proved that the goods were lost more than one year before the institution of the suit, neither Article 30 nor Article 31 bars such a suit if it is brought within one year from the date of refusal to deliver.

The modes of service of notice prescribed by the Railways Act are not exhaustive.

Where a mode of service of notice of a claim for compensation is prescribed by the rules of a Railway Company, and such rules are complied with, the Company cannot plead insufficiency of notice. Notice to the Traffic Manager is good notice when allowed by the rules of the Railway Company.

Section 75 of the Railways Act does not apply where the value of a package entrusted to a Railway Company is not more than Rs. 100.

Appeal from the decree of the City Civil Court at Madras, in O. S. No. 148 of 1909.

Mr. *D. Chamier*, instructed by Messrs. *David* and *Brightwell*, for the Appellants.

Messrs. *K. Narain Rau* and *K. Balakrishna Rau*, for the Respondents.

JUDGMENT.—We agree with the Judge that the plaintiffs' claim is not barred by limitation. The burden of proving when the goods were lost is on the Railway Company and they have not proved when they were lost. There is nothing in the evidence to show that they were lost more than one year before the institution of the suit. Article 30 of the Limitation Act does not, therefore, bar the suit; nor is the suit barred by Article 31. No time has been fixed for the delivery of the goods and the correspondence between the parties shows that the matter was being inquired into and the suit was brought within one year from the date of refusal to deliver. We are unable to say that the plaintiffs delayed more than one year from the expiry of a reasonable time within which, in the circumstances of the case, the goods should have been delivered.

The next question is whether the notice of the plaintiffs' claim for compensation was given within the period of six months allowed by the Railways Act. It is conceded that notice of such claim was given to the Traffic Manager. But it is contended that such notice is insufficient and that notice should have been given to the Agent or, at any rate, the notice, though given only to the Traffic Manager, should have reached the Agent within six months of the delivery of the goods to the Railway Company. We have held that the modes of service prescribed by the Railways Act are not exhaustive and we see no reason to differ from that judgment: *Periannan Chetti* v. *South Indian Railway Co.* (1). In the case before us, a rule has been made by the Company that all applications for loss should be made to the nearest Station Master and Traffic Manager, Dharwar. This rule has been complied with in this case. Mr. Chamier argues that this rule is confined to specific property lost. But looking to the rules that precede it, we see no reason to restrict the rule to such cases. If a mode of service is prescribed and such rule is complied with, it

(1) 22 M. 137.

is not open to the Company to plead that the notice is insufficient.

It is also argued before us that the packages contained trinkets of the value of more than one hundred rupees. A few of the articles are apparently trinkets but their value is not more than one hundred rupees. Therefore, section 75 of the Railways Act does not apply. Lastly, it is contended that there is no reliable evidence of the value of goods despatched. The evidence is, no doubt, meagre and there are some suspicious circumstances. But we are unable to say that the Judge who heard the witnesses was wrong in believing that evidence.

We dismiss the appeal with costs.

Appeal dismissed.

OUDH JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION APPLICATION No. 9 OF 1912.

July 22, 1912.

Present:—Mr. Stuart, J. C.

Saiyad RAJAB ALI SHAH—DENENDANT —APPLICANT

versus

UPPER INDIA COUPER (PAPER) MILLS Co. LD —PLAINTIFFS—RESPONOENTS.

Ex parte *decree, setting aside of—Executing process for enforcing judgment, meaning of—Attachment of debt due to judgment-debtor—Notice—Limitation Act (XV of* 1877), *Sch. II, Art.* 164—*Civil Procedure Code (Act XIV of* 1882), *s.* 268.

Where a decree-holder, who had obtained a decree *ex parte*, applied for execution of the decree by attachment of certain money held in deposit by the decree-holder on behalf of the judgment-debtor and the money in question was attached, though no notice had been issued to the judgment-debtor according to the provisions of section 268 of Act XIV of 1882:

Held, (1) that the attachment was an execution of process for enforcing the judgment which set time running under Article 164 of Act XV of 1877;

(2) that the money attached being moveable property not in possession of the judgment-debtor, it was only necessary to give notice to the person in possession of the same.

Application for revision against an order of the District Judge, Lucknow, dated 7th August 1911, upholding that of the Subordinate Judge, Lucknow, dated 8th May 1911.

Mr. *Shahid Husain*, for the Applicant.

JUDGMENT.—This is an application for revision of an order of the District Judge of Lucknow, upholding an order of Pandit Sitla Prasad, Subordinate Judge, refusing to admit an application to set aside an *ex parte* decree on the ground that it was time-barred. The facts are simple. An *ex parte* decree was passed against the applicant on the 31st May 1907, and on the 6th August 1907, the decree-holder applied for execution of the decree by attachment of certain money held in deposit by the decree-holder on behalf of the judgment-debtor. The money in question was attached on the 6th August 1907. Limitation was then governed by Article 164 of Act XV of 1877 and the time, in which an application could be filed for an order to set aside the *ex parte* judgment, was 30 days from the date of executing a process for enforcing the judgment. The attachment of the money in question was an execution of a process for enforcing a judgment. It is argued by the learned Counsel for the applicant that the attachment was of a debt not secured by a negotiable instrument and that as the money in question was owed by the decree-holder to the judgment-debtor and that as no notice had been issued to the judgment-debtor according to the provisions of section 268 of Act XIV of 1882, there has been no legal execution of a process for enforcing the judgment. I find against the applicant on this point. In my opinion, the money attached was moveable property not in possession of the judgment-debtor, and thus it was only necessary to give notice to the person in possession of the same. As the decree-holder was in possession of the money, no notice was necessary. For the above reasons, I find that this application was time-barred in 1907 and that, therefore, the Courts below were right in rejecting it. I dismiss this application accordingly.

Application dismissed.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 187 OF 1911.

October 2, 1912.

Present:—Mr. Justice Abdur Rahim and Mr. Justice Sadasiva Aiyar.

GOVINDAPPA—APPELLANT

versus

HANUMANTHAPPA—RESPONDENT.

Civil Procedure Code (Act XIV of 1882), *s.* 583—*Assignment of decree—Assignee realising amount from*

GOVINDAPPA v. HANUMANTHAPPA.

judgment-debtor—Restitution—Lis pendens—Party—Pleadings—Practice—Party not allowed to set up procedure successfully objected by him.

Where the assignee of a decree has realised the decretal amount from the judgment-debtor in execution, the judgment-debtor, in the event of the decree being reversed on appeal, is entitled to recover back the money, even though the assignee was not brought on the record on appeal.

Tangi Joghi v. *Hall*, 23 M. 203, followed.

Latta Prasad v. *Sadiq Hussain*, 24 A. 288, dissented from.

A judgment-debtor wishing to appeal against the decree is not bound to make the assignee of the decree a party to his appeal. In the absence of fraud, the assignee of the decree is bound by the order of the Appellate Court.

The doctrine of *lis pendens* applies to an intermediate assignment of the original decree. The fact that the assignment was made before the appeal was filed cannot make any difference in this respect nor the fact that the judgment-debtor had knowledge of the assignment before he lodged his appeal.

A party cannot be heard to say that a procedure, to which he himself successfully objected in a former proceeding between himself and his adversary, was the proper procedure to be adopted by the latter.

Second appeal from the decree of the Court of the Subordinate Judge of Bellary, in A. S. No. 73 of 1908, presented against that of the Court of the District Munsif of Hospet, in O. S. No. 32 of 1908.

Mr. *T. V. Muthukrishna Aiyar*, for the Appellant.

Mr. *L. A. Govindaraghava Aiyar*, for the Respondent.

JUDGMENT.

ABDUR RAHIM, J.—This second appeal raises the question whether a judgment-debtor, from whom the assignee of a money-decree has realized the decretal amount in execution, is entitled to recover it back from him when the decree is afterwards reversed in appeal, if the assignee of the original decree was not brought on record in the appeal. I may mention that it is not necessary to consider the question whether the plaintiff could and should have sought his remedy for restitution by an application made to the Court which executed the decree, for he did make such application and it was on the objection of the defendant that he was driven to institute the present suit and the defendant cannot now be heard to say that the procedure to which he himself successfully objected was the proper procedure.

Upon the merits, what is urged in support of the judgment of the Subordinate Judge, who has decided against the plaintiff's claim, is that he not having impleaded the present defendant, who had obtained an assignment of the decree of the first Court, as a respondent in the appeal against the decree, the decree of the Appellate Court cannot bind him because it might be that the decision of the Appellate Court was the result of collusion between the present appellant and the original decree-holder, the assignor of the defendant. Now, no such fraud was ever pleaded and it is possible that if it was pleaded and proved that would be a sufficient answer to the suit. But, in the absence of fraud, it is difficult to see why the decree of the Appellate Court should not bind a person who has chosen to obtain an assignment of the decree of the first Court. It is not contended that a judgment-debtor wishing to appeal against the decree is bound to make the assignee of the decree a party to his appeal though it might be open to him to apply for an order to that effect. The judgment-debtor's right of appeal is in no way affected by any intermediate assignment of the first Court's decree. The assignee himself might apply to be brought on record in the appeal, and if he chose to leave the conduct of the appeal to the decree-holder, it does not stand to reason that it should be open to him to question the decree that may be passed by the Appellate Tribunal. It is the decree of the latter Court that is the final decree in the case being in substitution of the original decree and the doctrine of *lis pendens* clearly applies to an intermediate assignment of the original decree. The fact that the assignment was made before the appeal was filed cannot make any difference in this respect; [See *Settappa Goundan* v. *Muthai Goundan* (1)], nor, for reasons already stated, the fact that the judgment-debtor had knowledge of the assignment before he lodged his appeal.

On behalf of the respondent, much reliance is placed on *Latta Prasad* v. *Sadiq Hussain* (2), which is certainly a decision directly in his favour. On the other hand, the appellant cites, in support of his contention, the authority of *Tangi Joghi* v. *Hall* (3). With all respect to the learned Judges who decided the former case, we are unable to accept their

(1) 31 M. 268; 4 M. L. T. 77.
(2) 24 A. 288.
(3) 23 M. 203.

view of the law. The main reasoning on which that ruling is based seems to be that, because in case the judgment-creditor himself had executed the decree of the first Court and made over the money realized to a third person, the judgment-debtor who succeeded in appeal could not follow the money in the hands of the third person, it must be held that where the assignee of the decree himself realized the decree in execution, the judgment-debtor would have no cause of action against him, when the original decree is reversed in appeal. In my opinion, the two cases are not based on the same legal considerations. Money is not ear-marked property and, therefore, in the first case, there is no principle of law according to which it can be followed in the hands of a third person. But the other case is quite different. Here, one person by a compulsory process of Court obtained money from another and it is afterwards declared by a superior tribunal that the original process was not justified. It seems to me that money so obtained under an invalid process of Court must be treated as money had and received to the use of the person from whom it was received. That is the principle, on which the doctrine of restitution, which underlies section 583 of the Civil Procedure Code of 1882, rests. The decision in *Tangi Joghi* v. *Hall* (3), in my opinion, supports the distinction which we have drawn between a case where the act complained of and in respect of which restitution is sought was done by the agency of the Court and a case where such act was independent of any process of Court. There is no doubt that the property of which restitution was sought in the Madras case was immoveable property but the principle of the decision is, to my mind, equally applicable in a case like the present. That principle is well expressed in the observations of an American Court cited by the learned Judges in *Doraisami Ayyar* v. *Annasami Ayyar* (4):—"But the cases have no application where the party seeking to be restored to the possession has been wrongfully dispossessed by the agency of the Court. He does not stand in the position of the actor in a suit who seeks the aid of a Court to re-gain any possession lost by his own negligence or misfortune. On the contrary, he is out of possession only because the Court has wrongfully made room for him to get in .....". The plaintiff, in my opinion, is entitled to restitution. The decree of the lower Court must, therefore, be reversed and that of the District Munsif restored with costs in this Court and in the lower Appellate Court.

SADASIVA AIYAR, J.—I concur with my learned brother and I cannot usefully add anything to what he has said.

Decree reversed.

(4) 23 M. 306 at p. 312.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 973 OF 1911.

October 8, 1912.

Present:—Mr. Justice Sundara Aiyar and Mr. Justice Sadasiva Aiyar.

GUDDATI REDDI OBALA—PLAINTIFF—APPELLANT

versus

GANAPATI KANDANNA—DEFENDANT—RESPONDENT.

Hindu Law—Adoption—Dancing girl—Prostitute—Invalid adoption.

The adoption of a girl by a Hindu married woman is invalid, even though that woman was once a dancing girl. A dancing girl when married and leading a family life cannot be treated as a dancing girl.

Per *Sadasiva Aiyar, J.*—It is illegal for a prostitute to adopt a minor girl, and the illegality is, if possible, enhanced very much by a woman of the prostitute class, who has followed the practices of a moral family Hindu woman, trying to follow the practices of a prostitute herself and adopt a girl for herself. Such an adoption is a criminal act and on this ground also is illegal.

Prostitution is as repugnant to the Hindu religion as it is to the Christian or Muhammadan religion or laws.

Second appeal from the decree of the District Court of Kurnool, in A. S. No. 60 of 1908 presented against that of the Court of the District Munsif, Nandyal, in O. S. No. 465 of 1906.

Mr. *S. Swaminadhan*, for the Appellant.

Mr. *V. C. Seshachariar*, for the Respondent.

JUDGMENT.

SUNDARA AIYAR, J.—The argument in second appeal is that the 2nd defendant was adopted by Chinna Rangamma and that the adoption is valid as one made by a dancing girl. But the finding is that Chinna Rangamma was a married woman. It is not explained

how she can be treated as a dancing girl. It is stated that as she belonged to the Bogum caste she could adopt a girl, whether she was a married woman or not. But no such custom is found to be established by either of the two Courts. I dismiss the second appeal with costs. I am not to be understood as conceding that an adoption made by a woman of the prostitute class would be valid at all.

SADASIVA AIYAR, J.—I should like to add that I dissent with the greatest respect from the case in *Vengu* v. *Mahalinga* (1). I approve of the decision of the Bombay High Court in *Mathura Naiken* v. *Esu Naicken* (2). I am also clearly of opinion that it is not only illegal to adopt girls by prostitutes but the illegality is, if posible, very much enhanced by a woman of the prostitute class, who has followed the practices of a moral family Hindu woman, trying to follow the practices of a prostitute herself and adopt a girl for herself. The adoption in the case of *Vengu* v. *Mahalinga* (1), seems to have taken place before the Indian Penal Code was enacted in 1860. The validity of the adoption in that case might be, therefore, supported on that ground as it was sought to be so supported in *Kamalakshi* v. *Ramaswami Chetti* (3); but I wish to dissent from *Vengu* v. *Mahalinga* (1) on the broad ground that an adoption of a minor girl by a prostitute belonging to a caste, which notoriously follows prostitution as a profession after the Penal Code came into force, is a criminal act and is on that ground also clearly illegal. I am also clearly of opinion that the authority of *Vengu* v. *Mahalinga* (1) has been reduced to a minimum by observations of the Privy Council in the case in *Ghasiti* v. *Umrao Jan* (4). Lord Hobhouse at page 156 of the report clearly expresses his approval of the case of *Mathura Naicken* v. *Esu Naicken* (2), though, of course, it might be said that His Lordship does not express any definite opinion as it was unnecessary to do so for the purposes of that case which related to Muhammadan prostitutes. His Lordship says 'that whatever may be the case as regards Hindus, as regards Muhammadans, prostitution is not looked upon by their religion or their laws with any more favourable eye than by the Christian religion and laws." As a Hindu, I wish to express respectfully but emphatically my opinion that prostitution is not looked on by the Hindu religion or its laws with any more favourable eye than by the Christian or Muhammadan religion or the Christian or Muhammadan Laws. When I was a Judicial Officer in Madura, I have had occasion to take evidence of old dancing girl witnesses in connection with dancing offices in temples and such witnesses have admitted that the so-called adopted girls are usually called '*Sirais*' or captives, and that many such girls of different castes were purchased by old dancing girls during the famine of 1876. Prostitutes are, by the nature of their calling, frequently sterile and it is the countenance given to adoption by the Courts which has been recruiting the ranks of the caste of prostitutes instead of letting the caste gradually die a natural death.

Even if a prostitute belonging to the so-called dancing girl caste be allowed to adopt a girl on the ground that the caste custom allows it even as against the Shastras, it seems to me to go too far to allow plurality of adoptions as has been allowed by some decisions. Again, it is clear that in some castes, such as a section of the Kaikkalar castes and in the Bogum caste, a girl can be married as a Hindu and lead a family life though born a prostitute. In the present case, the 2nd defendant's foster-mother was so married and led a family life. The ordinary Hindu Law ought to be applied to such persons and not the law applying to the prostitutes. She and her husband were, therefore, clearly not legally entitled to adopt a girl and they ought to have adopted only a boy according to the ordinary Hindu Law. It is not alleged that 2nd defendant's foster-mother was a prostitute when she made the alleged adoption. Rather, it is alleged that both she and her husband adopted the 2nd defendant while they were leading a family life. Even if the foster-mother turned a prostitute (during her husband's life-time or after his death), she could not be allowed to adopt a girl having once adopted the ordinary Hindu Law. In some cases, ingenious theories have been pro-

(1) 11 M. 393 at p. 398.
(2) 4 B. 545 at p. 549.
(3) 19 M. 127.
(4) 21 C. 149; 20 I. A. 193.

pounded that the adoption by a prostitute must be considered to have been intended for her own spiritual benefit and not to continue the line of the prostitute profession. Why Courts should have been astute to bolster up evil customs thus by fancying or presuming the existence of high spiritual motive has been somewhat of a surprise to me. As far as I know, no spiritual benefit can accrue to a prostitute mother by the spiritual ministrations of her prostitute adopted daughter and even adopted sons are very poor substitutes for legitimate sons according to Hindu Law. With these observations, I agree in holding that this second appeal must be dismissed with costs.

Appeal dismissed.

OUDH JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION APPLICATION No. 24 OF 1912.
July 22, 1912.

Present:—Mr. Stuart, J. C.

Musammat MAHADEI—PLAINTIFF—APPLICANT

versus

BHIKHAN AND ANOTHER—DEFENDANTS—RESPONDENTS.

Mortgagor and mortgagee—Lease by mortgagee in favour of mortgagor for the mortgaged property—Suit for rent of mortgaged property, maintainability of—Landlord and tenant.

If a mortgagee chooses to put the mortgagor in possession of the mortgaged premises on payment of rent, the mortgagee is at perfect liberty to recover the arrears of such rent as arrears of rent, and it is not necessary for the mortgagee to include these sums in a suit upon the deed of mortgage.

Mahmud-un-nissa v. *Fakhr-ud-din Ahmad*, 6 O. C. 26, followed.

Application against an order of the Judge of Small Causes Court, Lucknow, dated 16th January 1912.

Babus *J. K. Banerji* and *Pran Dhan Banerji*, for the Applicant.

Mr. *J. P. C. Bhattacharji* and Babu *Aditya Prasad* for Pandit *Gokaran Nath Misra*, for the Opposite Party.

JUDGMENT.—The facts of this case are as follows:—The defendant *Musammat* Bhikhan and Khairat Ali mortgaged by a registered deed of mortgage, dated 17th May 1908, in lieu of Rs. 4,000, two houses situated in Lucknow City to *Musammat* Mahadei. The mortgage-deed bore interest at 9 per cent. that is Rs. 360 a year. On the same date, *Musammat* Mahadei gave to *Musammat* Bhikhan and Khairat Ali possession of the two houses for Rs. 30 a month, that is to say, for Rs. 360 a year, an amount equivalent to the amount reserved for the interest on the deed of mortgage. *Musammat* Mahadei has instituted the suit in question for arrears of rent of the said houses against *Musammat* Bhikhan and Khairat Ali in the Small Cause Court, Lucknow. The learned Judge of the Small Cause Court considers that the suit does not lie within his jurisdiction as he is of opinion that the amount secured by way of rent is really a portion of the interest due on the mortgage and that the suit must be brought upon the deed of mortgage. I express no opinion at the present stage on the merits of the case. I do not wish to come to a finding as to the interpretation of the terms of the deed of mortgage, as to the validity of the alleged deed of mortgage, as to the possibility of *Musammat* Mahadei being able to prove her claim for arrears of rent apart from the deed of lease set up. But, upon the general principle that a mortgagee can give a lease of mortgaged property to the mortgagor and can sue for the rent of such mortgaged property in the Court that would ordinarily hear suits for arrears of rent, I do not arrive at the same conclusion as the learned Judge of the Small Cause Court. In *Mahmud-un-nisa* v. *Fakhr-ud-din Ahmad* (1), Mr. Chamier has decided these points very clearly. After considering all the previous rulings on the subject, he came to the following conclusions:—"I know of no case in which a Court has held that a mortgagee cannot sue upon such a lease. It appears to me quite clear that a mortgagee can sue upon such a lease and I do not understand the argument that because the two persons stand in relation of mortgagor and mortgagee, they cannot at the same time occupy the position of lessee and lessor. Usually, an arrangement such as the parties made in this case is intended to provide the mortgagee with an alternative remedy for the non-payment of the interest due on the mortgage, and I can see no reason why the intention of the parties should not be given effect to.....I have no doubt that

(1) 6 O. C. 26.

the proper view to take of transactions of this nature is that the relation of landlord and tenant is created for the benefit of the mortgagee, that the latter is not bound to avail himself of the remedies which accrue to him therefrom and that if he does not choose to avail himself of them, he may still recover all that he is entitled to in a suit upon the mortgage." The principle, which commended itself to Mr. Chamier, and which commends itself to me, is that if the mortgagee chooses to put the mortgagor in possession of the mortgaged premises on payment of rent, the mortgagee is at perfect liberty to recover the arrears of such rent as arrears of rent through the Court from which such arrears are ordinarily recoverable and that it is not necessary for the mortgagee to include these sums in a suit upon the deed of mortgage. I accordingly allow this application and direct that the plaint be returned to the learned Judge of the Small Cause Court with directions to re-admit it under its original number and to hear the suit upon its merits. Costs will follow the result.

Application dismissed.

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 686 OF 1910.

September 9, 1912.

Present:—Mr. Justice Sundara Aiyar and Mr. Justice Sadasiva Aiyar.

SANKARAMA AIYAR—DEFENDANT—PETITIONER

versus

R. PADMANABHA AIYAR—PLAINTIFF—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 24 (4)—Provincial Small Cause Courts Act (IX of 1887), s. 33—Court invested with Small Cause Court powers, whether a Small Cause Court—Transfer from such Court to Court not invested with Small Cause Court powers—Further transfer to another similar Court—Decree of latter, whether appealable—Direction by transferring Court to try as original suit, effect of.

In section 24 (4), Civil Procedure Code, the expression "a Court of Small Causes" means not only a Court constituted as a Small Cause Court under Act IX of 1887 but also a Court invested with Small Cause jurisdiction. The mere investiture of a Court with Small Cause powers makes it a Small Cause Court for the purposes of the section. Therefore, as soon as a case is transferred from a Court invested with Small Cause Court powers to a Court not so invested, the latter becomes a Small Cause Court for the purposes of the suit, and if the suit is further transfered to another Court, this third Court also is a Small Cause Court for the purposes of the suit and no appeal would lie against its decree in the suit.

Per *Sundara Aiyar, J.*—If a District Court in transferring a Small Cause suit from a Court invested with Small Cause Court powers, to a Court not so invested, directs the latter to try the suit as an original suit, the direction is invalid, though it does not affect the validity of the order of transfer itself.

Petition, under section 115 of Act V of 1908, praying the High Court to revise the decree of the Court of the Subordinate Judge of Tuticorin, in A. S. No. 156 of 1908, preferred against that of the Court of the Additional District Munsif of Tinnevelly, in O. S. No. 132 of 1907.

Mr. *Krishna Aiyer*, for the Petitioner.

Mr. *S. Srinivasa Aiyar*, for the Respondent.

JUDGMENT.

SUNDARA AIYAR, J.—The question for decision in this civil revision petition is whether an appeal lay to the District Court of Tinnevelly from the judgment of the Additional District Munsif of Tinnevelly in Original Suit No. 132 of 1907. The Subordinate Judge, to whom the appeal was transferred for disposal, states that the suit was originally in the Subordinate Judge's Court of Tuticorin as Small Cause No. 1484 of 1906; from that Court it, was transferred to the District Munsif's Court of Srivaikuntam. The order of transfer contained a direction that the suit should be tried as an original suit along with another suit. It was again transferred from the latter Court to the Additional District Munsif's Court of Tinnevelly. The Additional District Munsif dismissed the suit and the plaintiff preferred an appeal to the District Court. A preliminary objection was taken before the Subordinate Judge that the appeal did not lie, as the decision of the Additional District Munsif must be taken to have been that of a Small Cause Court. The Subordinate Judge overruled this objection. Now, section 24 clause (4) of the Civil Procedure Code lays down:—"The Court trying any suit transferred or withdrawn under this section from a Court of Small Causes shall, for the purposes of such suit, be deemed to be a Court of Small Causes. The first clause of the section authorises the District Court to transfer the suit to any Court subordinate

to it and competent to try or dispose of the same. That the District Munsif's Court of Srivaikuntam and the Additional Munsif's Court of Tinnevelly were both Courts competent to dispose of the suit cannot be doubted. The argument of the appellant is that by virtue of clause (4) of the section, the decision of the Tinnevelly Additional Munsif was the decision of a Court of Small Causes, and, consequently, under section 27 of the Small Cause Courts Act, no appeal lay from his decision. It is first argued for the respondent that the transfer to the Tinnevelly Additional District Munsif's Court was from the Srivaikuntam Court and that that Court was not a Court of Small Causes within the meaning of section 24 of the Civil Procedure Code and that the Tinnevelly Additional Munsif's Court could not, therefore, be said to have tried a suit transferred from a Court of Small Causes. It is, no doubt, the fact that the Srivaikuntam Munsif had not been invested with jurisdiction to try Small Cause suits of the value of this suit. But there are two answers to the respondent's argument. One is, that under clause 4 of section 24 of the Civil Procedure Code, the Srivaikuntam Court was a Small Cause Court with respect to this suit when it was transferred to it from the Subordinate Judge's Court of Tuticorin. The argument that it would become a Small Cause Court only at, and for the purpose of, the trial cannot be upheld. If this contention be sound, in what capacity could the Srivaikuntam Court pass orders in the suit before the trial? It cannot be said that it could do so except as the Court trying the suit. The other answer is that the clause does not say that the transfer should be immediately from a Court of Small Causes and the suit while pending in the Additional Munsif's Court of Tinnevelly may be said to have been one transferred from the Subordinate Judge's Court of Tuticorin. The construction contended for for the respondent would hardly be in accordance with the object of clause (4), which is to provide for the trial as a Small Cause Court of suits which are transferred from Courts of Small Causes. All this is, of course, on the assumption that the Subordinate Court of Tinnevelly which was invested with the powers of a Small Cause Court was a Court of Small Causes within the meaning of section 24 of the Civil Procedure Code. The most important contention of the respondent is that the Subordinate Judge's Court of Tinnevelly cannot be regarded as a Court of Small Causes. It is, of course, not disputed that the Court was not a Small Cause Court constituted under the provisions of Act IX of 1887 by the authority competent to constitute Small Cause Courts under that Act. It was invested with Small Cause jurisdiction by the Government of Madras under section 28 of the Madras Civil Courts Act. The respondent argues that clause (4) directs to be deemed as Courts of Small Causes only Courts trying suits transferred from what are strictly Small Cause Courts and not from Courts invested with Small Cause jurisdiction. The point for decision is, can the Subordinate Judge's Court of Tuticorin be regarded as a Small Cause Court within the meaning of section 24 of the Civil Procedure Code? Mr. S. Srinivasa Aiyar, who has argued the case ably and very fully for the respondent, has drawn our attention to section 7 of the Civil Procedure Code and to Order L where the Code speaks specifically of Courts invested with Small Cause jurisdiction along with Small Cause Courts and he argues that, therefore, section 24, when it speaks of Small Cause Courts, cannot be taken to include Courts invested with Small Cause jurisdiction but not constituted as Small Cause Courts. Now, there can be no doubt that one object of providing in section 24, clause (4), that a Court trying a suit transferred from a Small Cause Court shall be deemed a Small Cause Court is to make the decision of the Court final in the same manner as the decision of the Court from which the suit was transferred would be. The finality of the decision of a Small Cause Court is enacted by section 27 of the Provincial Small Cause Courts Act. Section 24, Civil Procedure Code, must clearly be read with the provisions of the Provincial Small Cause Courts Act. Now, turning to the latter Act, section 32 extends to Courts invested with Small Cause jurisdiction various provisions applicable to Small Causes, *viz.*, the class of suits over which jurisdiction is to be exercised, the exclusion of the jurisdiction of other Courts in those suits, the practice and procedure applicable to Small

Cause Courts and the finality of the decrees and orders passed by those Courts, etc. Section 35 of the Provincial Small Cause Courts Act, like section 7 of the Civil Procedure Code, refers to cases where a Court of Small Causes or a Court invested with the jurisdiction of a Court of Small Causes, has, from any cause ceased to have jurisdiction with respect to a case, and it makes provision as to which Court is to have jurisdiction in such cases. If the matter had stood here, there would be very much force in the respondent's objection that the mere investiture of a Court with Small Cause powers would not make it a Small Cause Court. But section 33 provides that "a Court invested with the jurisdiction of a Court, of Small Causes with respect to the exercise of that jurisdiction and the same Court with respect to it he exercise of its jurisdiction in suits of a civil nature which are not cognizable by a Court of Small Causes, shall, for the purposes of this Act, and the Code of Civil Procedure be deemed to be different Courts." It is difficult to give a proper meaning to this section except by interpreting it as laying down that a Court invested with Small Cause jurisdiction becomes for the purpose of its cognizance of suits, which it is competent to try as Small Cause suits, a Small Cause Court. This is clear from the expression "for the purposes of this Act and the Code of Civil Procedure." What can be the meaning for saying that a Court invested with Small Cause jurisdiction is different from itself trying regular suits for the purposes of the Small Cause Courts Act except that it is to be regarded as a Small Cause Court? The Civil Procedure Code makes certain sections of the Code not applicable to Small Cause Courts. The reference to the Civil Procedure Code is evidently to make the excepted sections of the Civil Procedure Code applicable to Courts invested with Small Cause jurisdiction. The respondent's Vakil was invited to mention any object that this section could have in view if it was not to make Courts invested with Small Cause jurisdiction, Small Cause Courts. He was not able to make any suggestion that we could accept. It is true that section 32 would, strictly speaking, be unnecessary on this interpretation of section 33 and that the reference to Courts invested with Small Cause jurisdiction in section 35 might also be said to be unnecessary. But apparently the Legislature considered it better to mention specifically Courts invested with Small Cause jurisdiction in section 35 and to provide expressly in section 32 for the rules of procedure and finality of decisions and the other provisions of that section applying to Courts invested with Small Cause jurisdiction. At any rate, it seems to be impossible to give due effect to section 33, unless it is regarded as making Courts invested with Small Cause jurisdiction Small Cause Courts. On this construction of section 33, there can be no doubt that the Subordinate Judge's Court of Tuticorin in exercising Small Cause jurisdiction must be regarded as a Small Cause Court. So far as the reason for the rule laid down in section 24 is concerned, there is no ground for distinction between a transfer from a Court of Small Causes and a Court invested with Small Cause jurisdiction. The decisions of both classes of Courts are final. The object of clause 4 of section 24 is to give finality also to the decision of the Court to which the suit is transferred. Section 24 admittedly has the effect of giving the finality of a Small Cause Court's judgment to decisions of Courts not constituted Small Cause Courts. If this could be done with respect to suits transferred from Small Cause Courts, it is difficult to see why it should not be done also with respect to those transferred from Courts invested with Small Cause powers. It may be, as pointed out in *Dulal Chandra Deb* v. *Ram Narain Deb* (1), a grave thing to take away the right of appeal where the Legislature has not considered the desirability of investing any particular Court with Small Cause jurisdiction, but the gravity applies equally to cases where the transfer is from Small Cause Courts. Rightly or wrongly, the Legislature has thought it proper to give finality to the decisions not only of Small Cause jurisdiction but to the decisions of a third class of Courts, *viz.*, of Courts to which a suit of Small Cause nature is transferred in certain cases. The exact scope of such cases is immaterial in considering the gravity of what is done by the Legislature. The case of *Dulal Chandra Deb* v. *Ram Narain Deb* (1), no doubt, contains a strong *dictum* in respondent's favour. The

(1) 31 C. 1057.

exact point in the case was whether when a Munsif having Small Cause jurisdiction was succeeded by one having no jurisdiction, an appeal would lie from the decision of the latter who tried the suit on the regular side. There can be no doubt that section 24 would have application to such a case and an appeal would lie. *Ramchandra* v. *Ganesh* (2), undoubtedly, is in respondent's favour. But, although sections 32 and 35 are commented on in that judgment, no reference is made to section 33. It may be observed that *Dulal Chandra Deb* v. *Ram Narain Deb* (1) also makes no reference to that section. *Mangal Sen* v. *Rup Chand* (3), which followed an earlier Allahabad decision, is, on the other hand, in appellant's favour. These are really the only decisions in point. In *Bhagvan Dayalji* v. *Balu* (4), Mr. Justice West observed that a Court exercising Small Cause jurisdiction by special investiture of powers and the same Court exercising its ordinary original jurisdiction may be regarded as two different Courts. *Akshay Kumar Shaha* v. *Hira Ram Dosad* (5), cited for the appellant, is not really in point as the learned Judges there decided the case on a consideration of section 32 of the Act. The view adopted by the Allahabad High Court appears to be the right one.

Another question arises for decision in consequence of the District Court transferring the suit from the Subordinate Judge's Court of Tuticorin to the Srivaikuntam Court, directing the latter Court to try it as an original suit.

Having regard to section 24 of the Civil Procedure Code, it had apparently no power to do so. It was suggested during the arguments that the order of transfer should, therefore, be regarded as wholly void. But this does not appear to be the correct view to be taken. The District Judge in making the direction must be taken to have acted in excess of jurisdiction. He had power to transfer the suit, but he had no jurisdiction in doing so to order that the suit should be tried on the regular side contrary to the provision in section 24 of the Civil Procedure Code that the Court trying a suit transferred from the Small Cause Court shall be deemed to be a Small Cause Court. The direction to try it as a regular suit must be regarded as invalid but it does not affect the order of transfer itself. See Bayley on Jurisdiction, Vol. I, section 29. The decision of the Munsif was, therefore, that of a Small Cause Court under section 24 of the Civil Procedure Code and no appeal lay to the Subordinate Judge's Court. The decree of the Subordinate Judge, therefore, must be reversed and that of the District Munsif restored with costs here and in the Appellate Court.

SADASIVA AIYAR, J.—Mr. Srinivasa Aiyar, who argued the respondent's case with great learning, acuteness and fairness, has brought forward, all the available arguments and the two propositions enunciated by him are:—(*a*) that a Court trying a suit transferred not from a Court of Small Causes in the technical sense but from a Subordinate Judge's Court merely invested with Small Cause powers is not itself a Small Cause Court whose decision is not subject to appeal; (*b*) that even if the District Munsif's Court of Srivaikuntam, to which the suit was transferred, be a Small Cause Court, the Tinnevelly District Munsif's Court, to which there was a further transfer and which actually tried the suit, was not a Court of Small Causes. I am clear, after hearing the whole matter elaborately discussed, that the Legislature intended to take care that a suit originally and properly instituted as a Small Cause suit should not lose that nature even if it be tried by another Court afterwards by reason of transfer of proceedings. When section 33 of the Provincial Small Cause Courts Act says that a Court invested with Small Cause jurisdiction shall be a different Court from itself when it is exercising its ordinary Civil jurisdiction it could only mean that such Court shall be deemed to be a Small Cause Court different from an ordinary Civil Court. The observations in *Dulal Chandra Deb* v. *Ram Narain Deb* (1) and the case in *Ramchandra* v. *Ganesh* (2) ignored this section 33 and the effect of these decisions is rather to criticise the policy of the Legislature found in section 24, clause (4), Civil Procedure Code, than to follow its plain provisions as is done in *Mangal Sen* v. *Rupchand* (3). As regards

(2) 23 B. 382.
(3) 13 A. 324.
(4) 8 B. 230.
(5) 35 C. 677; 7 C. L. J. 407.

the argument that the trying Court did not get its jurisdiction by an immediate transfer from the Court in which the suit was originally instituted as a Small Cause suit, section 24, clause (4), does not say that the Court trying any suit transferred or withdrawn from a Court of Small Causes and which shall be deemed, therefore, to be a Small Cause Court should also be a Court to which the transfer had been immediately from the Small Cause Court in which the suit was originally instituted. This contention, therefore, also fails. The appeal was, therefore, heard by the Subordinate Judge without jurisdiction and his decree must be reversed and that of the District Munsif restored with costs.

Decree reversed.

MADRAS HIGH COURT.

CIVIL REVISION PETITION NOS. 525 AND 521 OF 1912.

CIVIL MISCELLANEOUS PETITION NO. 1491 OF 1911.

October 11, 1912.

Present:—Mr. Justice Sankaran Nair.

PANIKKARCHATT UKKAJITHAN-THAVITA PUTHIA PURAJIL ABDULLA AND OTHERS—PETITIONERS

versus

PANIKKARATH UKKAYITHAM-TAVITA PUTHIA PURAJIL MIRTHUR—RESPONDENT.

*Succession (Property Protection) Act (XIX of 1841), ss. 3, 4—Malabar Law and Usage—*Tarwad *property—Self-acquisition of* karnavan*—Survivorship—Notice—Order to make inventory—Jurisdictinn—Direction of deceased.*

The provisions of Act XIX of 1841 do not apply to cases where property lapses by survivorship, as in the case of the property held by the *karnavan* of a Malabar *tarwad*, whether the property is the *tarwad* property or the self-acquisition of the *karnavan*.

Before issuing any notice under the Act, the Judge must be satisfied that there are strong reasons for believing that the party in possession has no lawful title. The Judge cannot, without making an inquiry and without having such strong ground of belief, appoint an officer to make an inventory of the property.

Obiter dictum:—The Act pre-supposes a case of succession; if there are directions as to the disposal of the property, the Judge should give effect to them in this summary proceeding without considering their validity.

Petitions, under section 115 of Act V of 1908, to revise the orders of the District Court of North Malabar, in O. P. No. 435 of 1912 and I. P. No. 437 of 1912 and O. P. No. 435 of 1912 respectively.

Mr. *C. Madhavan Nair*, for the Petitioners.

Mr. *C. V. Anantakrishna Aiyar*, for the Respondent.

JUDGMENT.—One Aramullan, who was the *karnavan* of his *tarwad*, died on the 18th July 1912. He is alleged to have died in the house of his wife and children.

On the 27th July, Modieen, who became the *karnavan* of the *tarwad* on the death of Aramullan, applied to the District Judge under Act XIX of 1841 for the appointment of a Commissioner to take an inventory of the properties which were in the possession of the late Aramullan and for the delivery of the same to him.

On the same day, without any inquiry the Judge appointed a Commissioner to take an inventory.

A Commissioner was accordingly appointed; upon this Abdulla with two others objected to the order. The Judge confirmed the first order. The first ground of objection was that there is no question of succession at all and, therefore, the Act, does not apply. With reference to this objection, the Judge holds that it has not been finally settled that the *tarwad* takes by survivorship from a deceased *karnavan*. I do not think there ever was any doubt on this point. The present *karnavan*, the petitioner Moideen, does not admit that the properties were the separate or self-acquired properties of the deceased *karnavan*. His case, as I understand it, is that they were *tarwad* properties in the possession of the deceased. He does not set up the right of the *tarwad* to take them by succession. The interest of the deceased, therefore, lapsed by survivorship to the *tarwad*.

Assuming, however, that is not the petitioner's, Moideen's case, if it was the separate property of the deceased, I think it must now be taken to be finally settled by the Full Bench decision that Mr. Justice Holloway correctly laid down the law when he decided that self-acquisitions lapse to the *tarwad* and they do not descend to his own heirs who would take if he was not a member of any *tarwad*. I am, therefore, of opinion that the Act does not apply.

MUHAMMAD HUSAIN v. LALTU.

It is also contended that the Judge was wrong in issuing any order without holding any inquiry. It has now been settled by a series of decisions that the Judge must be satisfied that there are strong reasons for believing that the party in possession has no lawful title before issuing any notice. *Abdul Rahiman* v. *Kutti Ahmed* (1), *Papamma* v. *The Collector of Godavari* (2), *Krishnaswami Pannikonder* v. *Muthukrishna Panikondar* (3). This is not denied by Mr. Anantakrishna Aiyar but he contends that under the proviso to section 4, the Judge may even, without any inquiry, direct an inventory to be taken and he is not precluded from doing so by the decisions above cited.

I cannot accept this contention. Section (3) is imperative that the Judge "shall in the first place inquire," whether there are strong reasons for believing that the party in possession has no title. Then section 4 prescribes the issue of a notice after the Judge is satisfied of the existence of "such strong ground of belief." The proviso that is relied upon by Mr. Anantakrishna Aiyar is a proviso to this section and not to section 3 which requires the Judge to commence the inquiry therein referred to at once. In the course of that inquiry, if it is necessary for citing the party complained against, the Judge may direct the inventory to be taken though he may not have concluded the inquiry. In this case, the order was not issued in the course of the inquiry which the Judge should have commenced on receiving the petition.

It is also contended that the deceased Arumallan left the property to the petitioners before this Court and that the Judge was, therefore, wrong in passing his second order confirming the first order. The Judge, as I understand him, disagrees with the opinion of the learned Judges in *Papamma* v. *The Collector of Godavari* (2), that he is bound to give effect to any lawful directions that may have been given by the deceased. He is of opinion that those directions must be legal and as apparently he acts on the assumption that the properties belong to the *tarwad* and cannot be disposed of by Will, he holds the directions are not legal. The Act pre-supposes cases of succession and if there are directions as to the disposal of the property, the Judge should give effect to them in this summary proceeding without considering their validity. Mr. Anantakrishna Aiyar, however, urges, on the stregth of the case above cited, that this is a matter to be gone into at the final inquiry and not at this stage. But the section seems to imply that when the person complained against offers to prove that there are directions given by the deceased, he should inquire into such allegation before any further order. I do not, however, rest my order on this ground.

I reverse the order of the lower Courts and dismiss the application with costs throughout.

Applications dismissed.

(1) 10 M. 68.
(2) 12 M. 341.
(3) 24 M. 364.

OUDH JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION APPLICATION No. 175 OF 1911.
July 22, 1912.

Present:—Mr. Stuart, J. C.

MUHAMMAD HUSAIN—PLAINTIFF—APPLICANT.

versus

LALTU AND ANOTHER—DEFENDANTS—OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908), Sch. II, cl. 10—Award—Notice of filing to parties essential.

The provisions of rule 10, Schedule II of Act V of 1908 are mandatory and the Court must give notice of the filing of the award to the parties.

Application against an order of the Munsif of Hardoi, dated 9th November 1911, exercising Small Cause Court powers.

Mr. *M. A. Khan*, for the Applicant.

Pandit *Makhan Lal Misra*, for the Opposite Party.

JUDGMENT.—Applications Nos. 175 and 176 may be taken together. Both of these arise out of suits decided by the Munsif of Hardoi on arbitration awards. In both cases, the learned Munsif failed to give notice to the applicant, who was plaintiff in the suit, of the filing of the award as provided in rule 10, Schedule II of Act V of 1908. The provisions of that rule are mandatory. Notice of the filing of the award has to be given to the parties and the Court has no discretion in the matter. My decision to this effect is supported by the rulings in *Ranga*

SURAPPARAJU v. NARAYANARAJU.

Sami v. *Muttusami* (1) and *Chaturbhuj Das* v. *Ganesh Ram* (2). I direct the learned Munsif to restore the suits to the pending file and, after considering the objections, which have been filed by the applicant, to pass such orders as appear to be just. Costs will abide and follow the result.

(1) 11 M. 144.
(2) 20 A. 474.

MADRAS HIGH COURT.
CIVIL REVISION PETITION No. 668 OF 1912.
APPEAL No 49 OF 1909.
October 17, 1912.
Present:—Sir Ralph Benson, KT, Offg, Chief Justice, and Mr. Justice Napier.
RUDDARAJU SOORAPARAJU—PETITIONER
versus
RUDDARAJU NARAYANARAJU AND OTHERS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), *Sch. II, para.* 16—*Limitation Act (IX of* 1908), *Sch. I, Art.* 158—*Passing decree in terms of award before expiry of* 10 *days from date of submission of award—Material irregularity—Appeal—Revision—Civil Procedure Code (Act V of* 1908), *s.* 115.

A decree passed in terms of an award immediately the award is submitted, without waiting for the expiry of the ten days within which an application, under Schedule II, paragraph 16 of the Code of Civil Procedure, to set aside the award may be made, is invalid.

It is doubtful whether there is an appeal in such a case, but as the decree has been passed notwithstanding the express provision of Schedule II, paragraph 16 of the Code, the Court acts without jurisdiction or with material irregularity in the exercise of its jurisdiction, so as to call for interference by the High Court under section 115 of the Code.

Mouji Premji Sett v. *Maliyakel Koyassan Koya Haji*, 3 M. 59; *Najm-ud-din Ahmed* v. *Albert Puech*, 29 A. 584; 4 A. L. J. 450; A. W. N. (1907) 184; *Gulam Jilani* v. *Muhammad Hussain*, 29 C. 167; 12 M. L. J. 77; 6 C. W. N. 226; 4 Bom. L. R. 161; 29 I. A. 51, (P. C.); 25 P. R. 1902, referred to.

Even if an appeal is preferred against such a decree, the High Court can treat it as a revision petition.

Petition, under section 115 of Act V of 1908, praying the High Court to revise the decree of the Subordinate Judge of Ellore, in O. S. No. 23 of 1906.

This was filed as Appeal No. 49 of 1909 and was afterwards treated as a Civil Revision Petition No. 668 of 1912 under section 115, Civil Procedure Code.

Mr. *P. Narayanamurti*, for the Appellant.

Messrs. *V. Ramesam*, *J. Ramachandra Rau* and *B. Sitarama Rau*, for the Respondents.

JUDGMENT.—It is conceded that, in this case, the Subordinate Judge passed his decree on the same day on which the award of the arbitrators was submitted to him. But, under Article 158 of the Schedule to the Limitation Act IX of 1908, the parties had ten days from that day within which to make applications under rule 16 of Schedule II of the Code of Civil Procedure (section 522 of the old Code of Civil Procedure, 1882) to set aside the award.

The appellant appeals against the decree on the ground that the Subordinate Judge had no jurisdiction to make a decree before the expiry of the ten days allowed for making an application to set aside the award.

The respondents contend that no appeal lies, and refer to the case reported in *Mouji Premji Sett* v. *Maliyakel Koyassan Koya Haji* (1). The contrary view, however, has been taken in the case reported as *Najm-ud-din Ahmed* v. *Albert Puech* (2). In view of these conflicting decisions and of the decision of the Punjab Chief Court reported as *Ghulam Jilani* v. *Muhammad Hussain* (3), it may be doubted whether an appeal lies, but, if no appeal lies, it is clear from the remarks of the Privy Council at pages 185 and 186 of that case that the present case is one in which the High Court may interfere under section 115 of the Code of Civil Procedure (old section 622). We have no doubt that the Subordinate Judge, in passing his judgment and decree before the expiry of the time allowed by law for application to set aside the award, notwithstanding the express provision of rule 16 of Schedule II of the Code of Civil Procedure that the judgment and decree are to be passed after the time for such application has expired, acted without jurisdiction or with material irregularity in the exercise of his jurisdiction so as to call for our interference under section 622 (now section 115) of the Code of Civil Procedure.

(1) 3 M. 59.
(2) 29 A. 584; 4 A. L. J. 450; A. W. N. (1907) 184.
(3) 29 C. 167; 12 M. L. J. 77; 6 C. W. N. 226; 4 Bom. L. R. 161; 29 I. A. 51 (P. C.); 25 P. R. 1902.

SHANANDA CHANDRA PAL *v.* SRI NATH ROY CHOWDHURY.

We set aside the judgment and decree of the Subordinate Judge and remand the suit to him in order that he may give the parties an opportunity of filing applications to set aside the award within ten days of the receipt of our order.

Costs will abide the result.

Order set aside.

CALCUTTA HIGH COURT.
SECOND CIVIL APPEAL No. 1850 OF 1910.
November 25, 1912.
Present:—Mr. Justice Holmwood and Mr. Justice Chapman.
SHANANDA CHANDRA PAL AND OTHERS —DEFENDANTS—APPELLANTS
versus
SRI NATH ROY CHOWDHURY AND OTHERS—PLAINTIFFS—RESPONDENTS.

Transfer of Property Act (IV of 1882), *s.* 85—*Civil Procedure Code (Act V of* 1908), *O. XXXIV, r.* 1—*Mortgage suit—Joinder of party—Person having right to redeem, whether necessary party under section* 85—*Creditor of mortgagor attaching mortgaged property in execution of money-decree, whether to be joined as party in mortgage suit.*

Order XXXIV, rule 1, of the new Civil Procedure Code, requires that not only a person having an interest in the mortgage security, but also a person having an interest in the right of redemption shall be joined as a party to any suit relating to the mortgage. But section 85 of the Transfer of Property Act, which is repealed by Order XXXIV, rule 1, required that a person having an interest in the mortgage security only should be made a party to such a a suit.

A creditor of the mortgagor who attaches the mortgaged property in execution of a money decree, does not obtain by his attachment any charge or lien upon the attached property; he only has the right to redeem. He is, therefore, not a necessary party in a suit upon the mortgage brought before the new Civil Procedure Code came into operation, although he would be a necessary party after the Code was passed.

Ghulam Husain v. *Dina Nath*, 23 A. 467 at p. 470, not followed.

Frederick Peacock v. *Madan Gopal*, 29 C. 428; 6 C. W. N. 577, followed.

Appeal from the decree of the District Judge of Dacca, dated March 7th 1910, reversing that of the Sub-Judge of that District, dated July 30th, 1909.

Babus *Jogesh Chandra Roy* and *Akshay Kumar Banerjee*, for the Appellants.

Babu *Dwarka Nath Chakravarti*, Dr. *Sarat Chandra Basak* and Babu *Basanta Kumar Bose*, for the Respondents.

JUDGMENT.—Two points arise or have been taken in this second appeal, the first point arises out of the contention that the attaching creditor in a money suit, the attachment taking place on the 13th May 1895, was a necessary party to the mortgage suit which was instituted on the 16th July 1896. That he had the right to redeem as long as he was the attaching creditor is clear from section 91 of the Transfer of Property Act, and that he would be a necessary party under the new Code of Civil Procedure is clear from Order XXXIV, rule 1. But that is not sufficient to decide the case.

The learned Vakil for the appellants has urged, on the authority of the judgment of Mr. Justice Banerjee in the case of *Ghulam Husain* v. *Dina Nath* (1), that the benefit of the charge acquired by the attachment enures in favour of the person who purchased the property at a Court sale under a money-decree. Mr. Justice Banerjee says that in a case of ordinary mortgage, this is beyond doubt and in his Court no suggestion was made why the same rule should not be applied in the case of a charge of this description. Mr. Justice Aikman, who was sitting with him, did not support this view, but preferred to base his decision on the short ground that the respondent in that appeal had transgressed the law, had rushed the mortgage through and had not given the attaching creditor an opportunity to redeem, to which he was entitled while he was an attaching creditor. Now, in this case, there can be no doubt that had the attaching creditor offered to redeem while he was an attaching creditor, he could have done so. But the authority of this Court in the case of *Frederick Peacock* v. *Madan Gopal* (2), decided by a Full Bench and following the Judicial Committee in the case of *Moti Lal* v. *Karrab-ul din* (3), is perfectly clear that the attachment only prevents alienation; it does not confer any title. The Full Bench, therefore, held that it must be taken that the attaching creditor did not obtain by his attachment any charge or lien upon the

(1) 23 A. 467 at p. 470.
(2) 29 C. 428; 6 C. W. N. 577.
(3) 25 C. 179; 24 I. A. 170; 1 C. W. N. 639.

attached property, and, therefore, *a fortiori* he cannot hand on any such charge to the purchaser at auction. This distinction does not appear to have been put before the learned Judges of the Allahabad Court, and we are bound to follow the decision of the Full Bench and it entirely accords with our own view of what the law was prior to the passing of the new Code of Civil Procedure. We, therefore, think that this ground of appeal fails. We may further point out that the respondents in the appeal purchased only one of the mortgaged properties and the appellant wants to redeem this one piecemeal having never offered to redeem the whole.

The second point that was argued was, that certain shares were sold without defining the amounts of the shares. The first Court, therefore, gave a decree for joint possession on the ground that these shares were unascertainable; but the lower Appellate Court held that there was sufficient evidence of what these shares were and, therefore, gave a specific decree for a particular share. This is obviously a question of fact, and it is concluded by the findings of the lower Appellate Court. If the first Court thought the evidence was not sufficient and the Appellate Court thought it was, the finding of fact of the lower Appellate Court must prevail. This is not a point which can be taken in second appeal.

The result is, that the appeal fails on all the grounds taken and must be dismissed with costs.

Appeal dismissed.

MADRAS HIGH COURT.

LETTERS PATENT APPEAL No. 96 OF 1910.

October 22, 1912.

Present:—Mr. Justice Sundara Aiyar and Mr. Justice Sadasiva Aiyar.

A. THUPRAN *alias* KUMARAN—APPELLANT

versus

Haji ESA SAIT'S SON, MAMAD KASIM SAIT, AND ANOTHER—RESPONDETS.

Malabar Compensation for Tenants Improvements Act (Mad. Act I of 1900), s. 5—Compensation to tenant—Improvements effected by third party.

In order to entitle a tenant to compensation under section 5 of the Malabar Compensation for Tenants Improvements Act, it is not necessary that the improvements should be effected by the tenant himself. It is quite sufficient that, at the time of ejectment, the improvements are on the land, even if they were made by some previous occupant.

Appeal, under section 15 of the Letters Patent, against the order of the Hon'ble Mr. Justice Krishnaswamy Aiyar, in S. A. No 1015 of 1910.

Mr. *K. P. M. Menon*, for the Appellant.

Mr. *A. Sundram*, for the Respondents.

JUDGMENT.—We agree with the learned Judge that the question whether the alienation by Tulsu was for family necessity was not raised in the lower Courts. We must, however, hold that he was wrong in not allowing to 2nd defendant compensation for the improvements on the lands in 2nd defendant's possession. According to section 5 of the Malabar Compensation for Tenants Improvements Act, "every tenant shall, on ejectment, be entitled to compensation for improvements which have been made by him, his predecessor-in-interest, or by any person not in occupation at the time of the ejectment who derived title from either of them, and for which compensation has not already been paid." Both the lower Courts have found that the 2nd defendant was in possession under the lease, Exhibit B. It is immaterial whether the improvements were made by the 2nd defendant himself or by any other person in possession before him. It is quite sufficient that the improvements are on the land even if they were made by some previous occupant, and it was not the case of either party that any body except the 2nd defendant was in occupation at the time of the suit. Exhibit B shows that the lands were waste at the time of the lease, so that it is clear that the improvements came into existence after the plaintiff gave the lease to the 1st defendant. We must, therefore, modify the order of the learned Judge and the decrees of the Courts below by awarding to the 2nd defendant Rs. 458-15-6, the amount which the Commissioner found to be the value of the improvements. The decree for ejectment will be conditional on the payment of this amount.

The parties will bear their own costs throughout.

Order modified.

GOPALASAMI VASTAD *v.* GOVINDASAMI VASTAD.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 107 OF 1909.

July 17, 1912.

Present:—Mr. Justice Abdur Rahim and Mr. Justice Sundara Aiyar.

GOPALASAMI VASTAD—PLAINTIFF—APPELLANT

versus

GOVINDASAMI VASTAD AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908*)*, *ss.* 11, 66, *O. II, r.* 2—Res judicata—*Compromise decree—Parties different.*

Section 13 of the Code of Civil Procedure which deals with the rule of *res judicata* is not strictly applicable to compromise suits. Its provisions apply in terms to what has been heard and finally decided by a Court.

Section 43 of the Civil Procedure Code of 1882 (Order II, rule 2 of the Code of 1908) has no application where the parties to the two suits are not the same.

Section 317 of the Civil Procedure Code, 1882,(section 66 of the Code of 1908), has no application to cases where the manager of a Hindu family or a tenant-in-common makes a purchase with funds belonging to himself and the other members of the family or other tenants-in-common.

Second appeal against the decree of the Court of the Subordinate Judge of Kumbakonam, in Appeals Suits Nos. 457 and 489 of 1908, presented against that of the Court of the District Munsif of Mannargudy, in Original Suit No. 229 of 1906.

Mr. *T. R. Ramachandra Iyer*, for the Appellant.

Mr. *K. Srinivasa Iyengar*, for the Respondents.

JUDGMENT.—This second appeal arises out of a suit for partition instituted by the plaintiff against his brother, the 1st defendant, for a partition of the properties alleged to belong jointly to both. The 2nd defendant is the son of the 1st defendant, and the other defendants are tenants and alienees of some of the properties claiming under the 1st defendant, the 6th defendant being the purchaser of items Nos. 4 to 8 in Schedule A-I, attached to the plaint, and the 14th defendant being the purchaser of a house in Schedule B-II.

The appeal relates only to three sets of items out of the properties claimed in the suit, namely, item No. 1 in A-I Schedule, items Nos. 4 to 8 in the same Schedule and the house in B-II Schedule.

The plaintiff had previously instituted a suit (Original Suit No. 35 of 1893) in the Subordinate Court of Tanjore, for a partition of the family properties, while he was a minor, through his mother as his next friend. The suit ended in a compromise (Exhibit I), dated the 20th July 1894, which was duly presented to the Court and sanctioned by it by its order—Exhibit XIII. The Court directed a decree to be drawn up in terms of the compromise. But, as a matter of fact, no decree was actually drawn up. It was stated to us at the hearing that, subsequent to the passing of the decree of the lower Appellate Court in this case, such a decree has been passed in accordance with the terms of the compromise, and the case has proceeded in this Court on the footing that the compromise between the parties has passed into a decree. Of the items which form the subject-matter of this second appeal, items Nos. 4 to 8 in Schedule A-I were not included in Original Suit No. 35. They had been sold to the 6th defendant by the 1st defendant previous to the suit, and the sale was not questioned by the next friend. The house in Schedule B-II was not then in existence but was purchased by the 1st defendant, subsequently, under circumstances which will be referred to hereafter.

Item No. 1 in Schedule A-I, was included in the suit. But, although both parties intended to divide all the immoveable properties into equal shares between them, it was omitted in the compromise by inadvertence and the Court disposed of the suit without taking notice of the omission.

In this suit, the 1st defendant tried to show that the omission was not due to inadvertence, and that it was intended that the item should go to him exclusively.

Both Courts have found against this contention.

We accept that finding and have no hesitation in holding that the 1st defendant's plea is a dishonest one as shown by his own admission contained in Exhibit B.

The plaintiff in his plaint entirely ignored the previous suit and the compromise,

treating it apparently as absolutely void as against him.

The defendants contended that the compromise was binding on the plaintiff and that this suit was barred by it.

The Munsif held, on various grounds, that the *razee* was void as against the plaintiff, but the Subordinate Judge disagreed with the Munsif and found that none of the grounds, on which the Munsif held it to be void, could be sustained. He was of opinion that the compromise was fairly and honestly entered into in the interests of the minor and that there was no fraud on the part of the 1st defendant in bringing it about. This finding of the Subordinate Judge has not been impeached before us.

We now proceed to deal separately with the three sets of items which form the subject-matter of the appeal.

Item No. 1 *in Schedule A*-I.

The District Munsif allowed the plaintiff's claim with respect to this item. The Subordinate Judge disallowed it on the ground that the claim was barred by the rule of *res judicata* under section 13 of the Civil Procedure Code. Mr. T. R. Ramachandra Aiyar for the appellant contends that the Subordinate Judge's view is wrong, on the grounds that the Court in the previous suit did not pass any adjudication with respect to this item; that it could not, in the circumstances, be taken to have refused the plaintiff's claim with respect to it, and that his client is entitled to re-open the compromise on the ground of mutual mistake of the parties in omitting this item. He relies strongly on the decision of Mookerjee and Casperz, JJ., in *Jogendra Nath Rai* v. *Baldeo Das* (1), in support of his contention that, there having been no adjudication by the Court with respect to the item and the coparcenary rights of the parties not having been put an end to with respect to it, the plaintiff is entitled to enforce partition.

Mr. K. Srinivasa Aiyangar for the respondents contends that Explanation IV to section 13 of the repealed Code of Civil Procedure (section 11 of the present Code) is conclusive in his favour, that the plaintiff's claim to item No. 1 must be taken to have been refused in the previous suit, as it lays down that "any relief claimed in the plaint which is not expressly granted by the decree, shall, for the purposes of this section, be deemed to have been refused." The Calcutta case, apparently, does support the appellant's contention, although Explanation IV was not referred to in the judgment.

We do not, however, consider it necessary to pronounce any opinion as to the soundness of that decision, as it is not, in our opinion, applicable in the circumstances of the present case, inasmuch as the judgment there did not proceed upon a compromise between the parties. It was held, in *Kumara Venkata Perumal Raja* v. *Thatha Ramasami Chetty* (2), by this Court that section 13 of the Code of Civil Procedure, which deals with the rule of *res judicata*, is not strictly applicable to compromise decrees, as it applies in terms only to what has been heard and finally decided by a Court. The same opinion was expressed by Scott, J., in *Minalal Shadiram* v. *Kharsetji* (3). We agree with the view held in those cases, and we do not think that the principle of Explanation IV, which is an extension of the doctrine of *res judicata*, though embodied in the Civil Procedure Code by way of explanation in the section dealing with that doctrine, is applicable to a judgment which merely carries out and enforces an agreement between the parties. There is no reason why, when parties omit to include a certain item of their common properties in an agreement of division, one of them who may happen to be in actual possession of it should afterwards be entitled to refuse to the other his lawful share of it.

On this ground, we hold that the plaintiff's claim to a half share of item 1 in Schedule A-I is not barred by the compromise, and award to him one-half of the item. In the view we have taken, it is unnecessary to deal with the appellant's further contention that a compromise decree may be re-opened on the ground of mistake, in support of which a dictum of Garth, C. J., in *Bibee Solomon* v. *Abdool Azeez*, (4) has been relied upon.

(1) 35 C. 961; 6 C. L. J. 735; 12 C. W. N. 127.

(2) (1911) 1 M. W. N. 290; 9 M. L. T. 437; 21 M. L. J. 709; 35 M. 75; 9 Ind. Cas. 875.

(3) 30 B. 395 at p. 408; 8 Bom. L. R. 296.

(4) 6 C. 687 at p. 706; 8 C. L. R. 169.

GOPALASAWMI VASTAD v. GOVINDASAWMY VASTAD.

Items Nos. 4 to 8 of Schedule A-I.

These items, as already stated, had been sold to the 6th defendant prior to the institution of Original Suit No. 35, and were not included in that suit. But the proceeds of the sale were taken into account in the compromise which has been found to be binding on the plaintiff and the plaintiff obtained his share in them. The money realised by the sale was then in the hands of two maternal relations of the plaintiff. It was provided that the 1st defendant should realise the sum from those relations and give the plaintiff his share of it. The 1st defendant afterwards instituted a suit, Original Suit No. 336 of 1897, for the recovery of the money and in execution of the decree purchased certain properties at Court-sale.

The plaintiff claims a share in those properties and has actually entered into a compromise with respect to one of them with the 19th defendant to whom it was subsequently sold by the 1st defendant; see paragraph 9 of the District Munsif's final judgment. In these circumstances, the plaintiff's claim to these items cannot be sustained. It is unnecessary to consider whether the Subordinate Judge's finding regarding the propriety of the sale of these items to the 6th defendant is correct or not. We may observe that we do not agree with his view that the claim to this item is barred by section 43 of the Civil Procedure Code (Order II, rule 2 of the present Code). The present suit to recover them is substantially against the alienee, the 6th defendant. The 1st defendant has no subsisting right to these items. The section has no application where the parties to the two suits are not the same: See *Iburamsa Rowthan* v. *Thiruvenkatasami Naik* (5).

The house in Schedule B-II.

This was one of the items purchased by the 1st defendant in execution of the decree in Original Suit No. 336 of 1897, against the plaintiff's maternal relations who were in possession of the money realised by the sale of items Nos. 4 to 8. The Subordinate Judge has dismissed the plaintiff's claim on the ground that the 1st defendant is not proved to have purchased the item as manager of the family. He says: "The first defendant's liability to account to the plaintiff for his share of the family debt collected by him did not make him the manager of the family or co-owner of the property. There is nothing to show that the 1st defendant purchased the property for himself and plaintiff." He was also of opinion that the claim was barred by section 317 of the Civil Procedure Code (section 66 of the new Code) which prevents a person from suing to recover property sold at Court-sale, on the ground that the purchase was made by him on behalf of some other person. But the section has no application to cases where the manager of a Hindu family or a tenant-in-common makes the purchase with funds belonging to himself and to the other members of his family or the other tenants-in-common: See *Minakshi Ammal* v. *Kalianrama Rayer* (6) and *Krishna Aiyan* v. *Raghava Aiyan* (7). It is admitted that no money was actually paid by the 1st defendant for this item, and that the consideration for the purchase came out of the decree debt in Original Suit No. 336 which belonged to him and the plaintiff jointly. The plaintiff is, then, entitled to the benefit of the purchase.

The question, then, is, what relief the plaintiff is entitled to with respect to this item? Mr. Srinivasa Aiyangar contends that the plaintiff is not entitled to a half share, as the purchase-money came out of a joint debt belonging in common to the plaintiff and the 1st defendant, and the plaintiff had not, under Exhibit I, the compromise in Original Suit No. 35, a right to one-half of the debt.

This contention appears to us to be sound. According to Exhibit I, out of Rs. 1,143 which was the total amount of the debt, the plaintiff was to be debited with Rs. 305 for certain reasons and the remainder was to be equally divided between him and the 1st defendant. The plaintiff was entitled, roughly speaking, to $\frac{3}{8}$ths of the total amount. He and the 1st defendant were joint owners of the amount in the proportion of 3 to 5, and we, therefore, hold that the plaintiff is entitled to recover $\frac{3}{8}$ths of this item.

The decree of the lower Appellate Court

(5) (1910) 1 M. W. N. 380; 20 M. L. J. 743 (F. B.); 7 Ind. Cas. 559; 8 M. L. T. 269; 34 M. 269.

(6) 20 M. 349.

(7) 9 M. L. J. 298.

will be modified in the manner indicated above. The 1st defendant will pay half the plaintiff's costs in all the Courts on item No. 1 in Schedule A-I and the house in Schedule B-II. He must pay the 6th defendant's costs in this Court. The Subordinate Judge is requested to hold an inquiry as to the amount of mesne profits from the date of Exhibit I up to this date of item No. 1 Schedule A-I and submit his finding to this Court within 2 months. Seven days will be allowed for filing objections.

[In compliance with the order contained in the above judgment, the Subordinate Judge of Kumbakonam submitted the following

FINDING:—This Court "is requested to hold an inquiry as to the amount of mesne profits from the date of Exhibit I up to this date, of item 1, Schedule A-1."

The gross income from date of Exhibit I (20th July 1894) at 90 *kalams* a year till date of order of the High Court (2nd August 1911) is 1,330 *kalams*. The money value thereof is Rs. 1,772. The *kist* is about Rs. 27 per annum [*vide* Schedule A-1, Rs. 92-7-0 for about 16 acres *nunja*] and amounts to Rs. 359 for the period in question. The net income is Rs. 1,413. Plaintiff's share thereof is Rs. 706 8 0. But defendant is content to have Rs. 406 4 0 for 13 years—*vide* paragraph 25, page 38 of the printed pleadings, and memo. of second appeal. Defendant's figure for 17 years comes to Rs. 531-4 0. I see no reason to assess mesne profits at a higher figure. The figures arrived at above are only estimates and not actuals and do not allow for bad seasons. They show that the defendant's figures are reasonable. I, therefore, find that the mesne profits on item I Schedule A-1 of the plaint from Exhibit I to date of the order of the High Court amount to Rs. 531-4-0.

JUDGMENT.—We accept the finding arrived at by the present Subordinate Judge on the question of mesne profits due for item No. 1 in Schedule A-I. It is agreed between the parties that the plaintiff should have interest at 6 per cent. on Rs. 406 4-0 from the date of the plaint till the 2nd August 1911 and on the total amount of Rs. 531-4-0 from the latter date to the date of realisation.

Decree modified.

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 68 OF 1911.

September 24, 1912.

Present:—Mr. Justice Ayling and Mr. Justice Napier.

MOHIDEEN IBRAHIM—DEFENDANT—PETITIONER

versus

MAHAMED MEERA LEVVAI, THROUGH HIS AGENT, MAHAMED MIRA SAHEB—PLAINTIFF—RESPONDENT.

Civil Procedure Code (Act XIV of 1882), *s.* 315—*Auction-purchaser's right to recover purchase money—Substantive right—Civil Procedure Code(Act V of* 1908) *O. XXI, r.* 93, *effect of—Limitation Act (IX of* 1908) *Sch. I, Arts.* 62 *and* 120.

Per *Ayling, J.*- Under section 315 of the Code of Civil Procedure, 1882, a suit lies by an auction-purchaser to recover the sale price from the decree-holder when it is found on a third party's suit that the judgment-debtor had no title whatever to the property sold by the Court.

Gurshidawa v. *Gangaya*, 22 B. 783; *Munna Singh* v. *Gajadar Singh*, 5 A. 577; *Pachayappan* v. *Narayana*, 11 M. 269; *Nilakanta* v. *Imamsahib*, 16 M. 361, referred to.

There is nothing in the present Code (Act V of 1908) which would have the effect of taking away the right of suit which had accrued before it came into force.

Quære:—Whether a similar right of suit exists under the present Code.

Per *Napier, J.*—Section 315 of the Code of Civil Procedure, 1882, gave a substantive right to recover money paid to a judgment-creditor and that right could be exercised either by suit or by petition in execution proceedings.

Dorab Ally Khan v. *The Executors of Khajaji Moheeood-deen*, 3 C. 806; *Chapman* v. *Spiller*, 14 Q. B. 621; 19 L. J. Q. B. 239; 14 Jur. 652; *Sowdamini Chowdrain* v. *Krishen Kishore Poddar*, 12 W. R. (F. B.) 8; 4 B. L. R. (F.B.) 11; *Pachayappan* v. *Narayana*, 11 M. 269; *Nilakanta* v. *Imamsahib*, 16 M. 361; *Ram Kumar Shaha* v. *Ram Gour Shaha*, 37 C. 67; 2 Ind. Cas. 559; 13 C. W. N. 1080; 10 C. L. J. 558, referred to.

Under the present Code (Act V of 1908), the right is no longer a substantive right entitling the auction-purchaser to recover his money, but he has a right to get an order in execution proceedings for re-payment if he discovers the absence of interest before the confirmation of the sale.

Per *Ayling* and *Napier, JJ.*—The claim for recovery of sale-money is governed by Article 120 of Schedule I of the Limitation Act and not by Article 62.

Nilakanta v. *Imamsahib*, 16 M. 361, referred to.

Kouuri Basavareddi v. *Tallapragada Naganna*, 35 M 39; 8 Ind. Cas. 1087; 9 M. L. T. 467; (1910) M. W. N. 827, distinguished.

MOHIDEEN IBRAHIM *v.* MAHAMED MEERA LEVVAI.

Ram Kumar Shaha v. *Gour Shaha*, 37 C. 67; 2 Ind. Cas. 559; 13 C. W. N. 1080; 10 C. L. J. 558, explained.

Petition, under section 25 of Act IX of 1887, praying the Hight Court to revise the decree of the Court of the Subordinate Judge of Tanjore in Small Cause Suit No. 156 of 1910.

Mr. *K. Parthasarathi Iyengar*, for the Petitioner.

Mr. *G. S. Ramachandra Iyer*, for the Respondent.

JUDGMENT.

AYLING, J.—The facts of the case are sufficiently set forth in the judgment of the Subordinate Judge: and his decision appears to me to be correct. Two points are argued on behalf of the petitioner, (1) that the present suit is not maintainable, and (2) that it is barred by Article 62 of Schedule I of the Limitation Act.

As regards the first point, the Court auction, under which plaintiff (respondent) purchased the property, the filing of Original Suit No. 341 of 1905 to declare the title of a third person other than the judgment-debtor, and the final decision of that suit, all took place while the old Civil Procedure Code (Act XIV of 1882) was in force. It has been repeatedly held that under section 315 of that Act, a suit by a Court auction-purchaser to recover the sale price from the decree-holder would lie where it was found on a suit brought by a third party that the judgment-debtor had no title whatever to the property sold in Court auction. [Vide *Gurshidawa* v. *Gangaya* (1), following *Munna Sinyh* v. *Gajadar Singh* (2), *Pachayappan* v. *Narayana* (3) and *Nilakanta* v. *Imamsahib* (4)]. Plaintiff's right of suit accrued on 21st January 1907, when the decree in Original Suit No. 341 of 1905 was confirmed on appeal, for it does not appear that he ever obtained possession of the property purchased. Whether a similar right of suit exists under the present Code is a point on which it is unnecessary to express an opinion, though I should be loth to hold that it did not. But I certainly do not find anything in the present Code which would have the effect of taking away the right of suit which had accrued to plaintiff before it came into force. I, therefore, hold the present suit to be maintainable.

As regards the question of limitation; *Nilakanta* v. *Imam Saheb* (4), is authority for holding that Article 120 applies to suits brought under section 315 of the old Code. The petitioner relies on the cases reported in *Ram Kumar Shaha* v. *Ram Gour Shaha* (5) and *Kovvuri Basavareddi.* v. *Tallapragada Naganna* (6). The latter of these was a case of private sale, and, though the Calcutta case was one of Court-sale, the decision followed that in an earlier case of private sale, *Hanuman Kamat* v. *Hanuman Mandur* (7); and the question of whether a suit under section 315 should be distinguished was not considered. I hold that the suit is not time-barred.

The petition must, therefore, be dismissed with costs.

NAPIER, J.—This is a suit to recover from the defendant money paid on the purchase at a Court auction in execution proceedings of certain property. The defendant was the decree-holder in Small Cause Suit No. 219 of 1894. In execution of his decree, he brought certain lands to sale as belonging to his judgment-debtor and the plaintiff purchased them. Subsequently, a third party brought a suit to establish his title to the land making the plaintiff and the defendant in this suit parties and his title was upheld. The plaintiff then applied in execution proceedings for refund of his money, but the Court held that his remedy was by a suit. He accordingly instituted Small Cause Suit No. 156 of 1910 against the judgment-creditor and the Subordinate Judge gave him a decree.

It is contended in this Court that no suit lies. It is admitted that under section 315 of the Civil Procedure Code of 1882, the purchaser would be entitled to receive back his purchase-money; but it is argued that under the present Code, no such right exists and that his rights are governed by this Code.

It is necessary to examine the history of this claim.

It has been laid down by the Privy Council in *Dorab Ally Khan* v. *The Executors of*

(1) 22 B. 783.
(2) 5 A. 577.
(3) 11 M. 269.
(4) 16 M. 361.
(5) 37 C. 67; 13 C. W. N. 1080; 10 C. L. J. 558; 2 Ind. Cas. 559.
(6) 35 M. 39; 8 Ind. Cas. 1087; 9 M.L.T. 467; (1910) M. W. N. 827.
(7) 19 C. 123; 18 I. A. 158.

MOHIDEEN IBRAHIM v. MAHAMED MEERA LEVVAI.

Khajaji Mohecooddeen (8), that as in India moveable and immoveable property are alike capable of being seized and sold under a writ of *fieri facias*, the responsibility of the Sheriff in respect of sales here is governed by the law relating to chattels rather than by that relating to the sale of real property. It is clear that where the property seized was personal estate and it was sold by the Sheriff, no suit lay either against the Sheriff or the judgment-creditor who had received the purchase-money to recover it when the property had been recovered from the purchaser by a person claiming title, the principle being that a sale by the Sheriff was not a sale in market overt, the purchaser acquiring thereby only what the judgment-creditor had a right to sell, namely, the precise interest and no more, which the judgment-debtor possessed in the goods, and that there was no warranty of title implied in a sale by the Sheriff (*Vide* Halsbury's Laws of England, Volume 14, paragraph 113). This is on the authority of *Chapman* v. *Speller* (9), which was a claim for money had and received by the purchaser at a Sheriff's sale against the vendor of the goods. The Court held that the true consideration was not the property sold but the assignment of the right of the judgment-debtor, whatever it was and that, therefore, there had not been a failure of consideration and accordingly the auction-purchaser could not recover. It is clear from the decision of the Privy Council that this law applies in India apart from statute. An attempt was made, in *Sowdamini Chowdrain* v. *Krishna Kishore Poddar* (10), to recover money paid in the like circumstances under the provisions of Regulation VII of 1825, but the Court negatived the right, and in so doing considered also the language of Act VIII of 1859, the first Civil Procedure Code. Section 249 of that Act provided that the proclamation should declare that the sale extended only to the right, title and interest of the defendant in the property. Sections 256 and 257 provided for circumstances under which sales might be set aside on the ground of material irregularity in the conduct of the sale. Section 258 provided that where the sale of immoveable property was set aside, the purchaser should be entitled to receive back his purchase-money and it was argued that this section applied where the property was recovered by a third party. The Full Bench negatived this view and held that it only applied where the sale of the immoveable property was set aside for irregularity under the previous sections. The Court laid down that a purchaser at a sale in execution knows that no one guarantees him that the judgment-debtor had a good title, that he purchases the property with his eyes open and regulates the price which he bids with reference to the risk. The law was materially altered by Act X of 1877, the provisions of which are re-produced in this respect in Act XIV of 1882. The proclamation under section 237 of that Act does not state that all that is sold was the right, title and interest of the judgment-debtor. Further, it purports to give a great deal of information about the property and specifically requires to be stated the encumbrances to which the property is liable and every other thing which the Court considers material for the purchaser to know in order to judge of the nature and value of the property. Section 311 corresponds with section 256 of the Code of 1859 and allows an application to the Court to set aside the sale on the ground of material irregularity. Section 312 corresponds with section 257 and is the procedure section with reference to the above. Then comes an entirely new section 313 entitling the purchaser to apply to the Court to set aside the sale on the ground that the person whose property purported to be sold had no saleable interest therein; and section 315, which embodies section 208 of the Code of 1859, includes among the circumstances, under which the purchaser was entitled to receive back his purchase-money, this new circumstance, "When it is found that the judgment debtor had no saleable interest in the property which purported to be sold and the purchaser is for that reason deprived of it." It is to be noted that the procedure by which the money is to be recovered is not stated in this section and it has accordingly been held that these sections give a substantive right to recover money paid to a judgment-creditor which may be ex-

(8) 3 C. 806.
(9) 14 Q. B. 621; 19 L. J. Q. B. 239; 14 Jur. 652.
(10) 12 W. R. (F.B.) 8; 4 B. L. R. (F.B.) 11.

ercised either by suit or by petition in execution proceedings. This was expressly decided in *Pachayappan* v. *Narayana* (3), where a suit to recover the money was held to be proper procedure, followed in *Nilakanta* v. *Imam Sahib* (4) and has been lately re-affirmed in *Ram Kumar Shaha* v. *Ram Gour Shaha* (5), where the procedure was likewise by a suit.

We now come to the new Civil Procedure Code. Execution is dealt with in Part II of the Code, sections 36 to 74, and in Order XXI. The sections of the Code contain no provision dealing with this question. Order XXI, rule 36, in like manner as section 287 of the Code of 1882 does not contain the provision embodied in section 249 of the Code of 1859 that the proclamation should specifically state that only the right, title and interest of the judgment-debtor shall be sold and is practically in the same terms as section 287 of the Code of 1882. Order XXI, rule 90 embodies section 311 of the old Code but gives the power to apply to the Court to set aside the sale on the ground of fraud in publishing and conducting it as well as on the ground of material irregularity. Rule 91 corresponds with section 313 and empowers the purchaser to apply to the Court to have the sale set aside on the ground that the judgment-debtor had no saleable interest in the property sold and rule 92 provides that where an application is made under rule 91 and is allowed, the Court shall *make an order* setting aside the sale and unless such an application is made and allowed or an application to set aside on the ground of irregularity or fraud, the Court shall make an order confirming the sale and thereupon the sale shall become absolute. Then, rule 93 provides that where the sale is set aside for any of the above reasons, the purchaser shall be entitled to an *order for re-payment* of his purchase-money against any person to whom it has been paid. Now, this language differs very considerably from section 315 of the old Code. Section 315 provided that where the sale was *set aside* under the corresponding sections, the purchaser should be "*entitled to receive back*" his purchase-money and also "where it is found that the judgment-debtor had no saleable interest in the property". This last provision is entirely omitted in Order XXI, rule 93 and the words "the purchaser shall be entitled to receive back his purchase-money" are altered into the words "the purchaser shall be entitled to an order for re-payment of his purchase-money." The omitted words in section 315 were the basis of the decisions in the cases above referred to, that a substantive right to receive back the purchase-money was conferred on the purchaser. This second substituted and limited right must be exercised before the sale is confirmed and where no such application is made, the sale becomes absolute on the order of confirmation. It cannot, of course, be contended that these words can pass to an auction-purchaser property to which the judgment-debtor had no title. It necessarily follows, therefore, that what is confirmed on the sale becoming absolute is only the right, title and interest of the judgment-debtor, even though the notice to that effect is not inserted in the proclamation as it was under the Code of 1859. It is contended that this procedure works with great hardship on an auction-purchaser for he may have knowledge of the want of title in the judgment-debtor and may, therefore, not apply under Order XXI, rule 91, and that the real owner of the property may not bring his suit either for declaration or to recover possession until some time after the confirmation of the sale in which circumstances the auction-purchaser has no remedy. This is so, but the Legislature must be assumed to have had knowledge of the decisions that those words created a substantive right and of the results of the alteration made in the law. The right is no longer a substantive right entitling the auction-purchaser to recover his money, but a right to get an order in execution proceedings for re-payment, if he discovers the absence of interest before the confirmation of the sale.

This being the law on the subject, it remains to ascertain the appellant's position. He purchased the property in August 1905. The suit by the stranger was brought in the same year, decreed on 13th March 1906 and confirmed on appeal on 21st January 1907. The Code of 1882 was in force then and accordingly there and then accrued to the auction-purchaser a right to recover the money by suit. By virtue of section 6, clause (*c*), of the General Clauses Act, X of 1897, the repeal of the Code of 1882 by the new

Code, Act V of 1908, which came into force on January 1st, 1909, did not affect the right acquired under that enactment and it continued in him, though his right to exercise it would in time become barred by limitation. He brought his suit to enforce this right in January in 1910 and it is next contended that this suit is one for money had and received by the defendant for plaintiff's use, in which case limitation begins to run from the date when the money is received, *i.e.*, August 1905, under Article 62 of both the old and the new Limitation Acts, and that, therefore, his suit is barred. Reliance is placed on *Kowuri Basavareddi* v. *Tallapragada* (6) *Ram Kumar Shaha* v. *Ram Gour Shaha* (5). Apart from the cases, there is one answer which must on principle be fatal to this contention which is this, that no Article can apply which would make the right to sue liable to be barred before it has come into existence; and, if this contention were correct, that could easily occur in a suit of this nature. The substantive right comes into existence under section 315 when it is found that the judgment-debtor has no saleable interest. The true owner of the land might conceivably not bring his suit for ten years after the auction-purchase and the cause of action would not arise till then. How could the suit on this cause of action have been barred seven years before it came into existence? A further answer is that this is not a suit at common law for money had and received to the plaintiff's use but a suit on a statutory right. In the case of a suit to recover purchase-money paid for property bought at a private sale, the case of *Hanuman Kamat* v. *Hanuman Mandir* (7), decided by Privy Council is an authority for the proposition that Article 62 or Article 97 would apply according as whether the consideration failed originally or subsequently, that is to say, the starting point is the time at which the cause of action accrued and this case has been followed in *Kowuri Basavareddi* v. *Tallapragada* (6). As pointed out above, the cause of action in the present case did not arise when the money was actually paid as in the case of a sale by private contract, when the title is warranted, but on the date when it was found that the judgment-debtor had no saleable interest. This distinction has not been noted by the learned Judges who decided the case of *Ram Kumar Shaha* v. *Ram Gour Shaha*(5), and I am unable to agree with the view they took. There is clear authority of this Court for the view that Article 62 does not apply in *Nilakanta* v. *Imamsahib* (4), a case on all fours with this. The Court held that Article 120 was the appropriate Article and, undoubtedly, the language is most apt with regard to the starting point—"When the right to sue accrues." I agree with the view of the learned Judges in that case and it follows that this suit is in time and, therefore, the petition must be dismissed with costs.

Petition dismissed.

PRIVY COUNCIL.

APPEAL FROM THE HIGH COURT OF JUDICATURE AT BOMBAY.

May 2, 1912.

Present:—Lord Macnaghten, Lord Atkinson, Lord Shaw, Sir John Edge and Mr. Ameer Ali.

SEVAK KIRPA SHANKAR DAJI AND OTHERS—APPELLANTS

versus

GOPAL RAO MANOHAR TAMBEKAR AND OTHERS—RESPONDENTS.

Religious institution—Hindu temple—Scheme for future management—Practice—Exercise of discretion.

The High Court has a large discretion in the matter of sanctioning a scheme for the management of a temple and of its funds, and unless it can be shown that that discretion has been improperly exercised, or that the High Court has not given due consideration to matters which they were directed by the Privy Council to take into consideration, its decision ought not to be interfered with.

Appeal against a decree of the High Court at Bombay, dated the 12th of September 1906, which partly varied, and partly confirmed, that of the District Court of Ahmedabad, dated the 14th of February 1903.

FACTS.—The question for determination was whether a scheme of management relating to the Temple of Shri Ranchhod Raiji situated at Dakore and the funds thereof, sanctioned by the High Court, was open to the objections taken to it by the appellants.

On the 3rd of May 1880, a suit was brought in the District Court of Ahmedabad by the respondents or their representatives, under section 539 of the Code of Civil

Procedure (Act X of 1877) against the appellants or their representatives known as *shewaks*, or hereditary priests, of the idol in the temple above mentioned. The prayer of the plaint was for an account of all sums of money and moveable and immovaeble property received by the defendants as *shewaks*, and for other consequential relief, and for the settlement of a scheme by the Court for the future management of the temple and its funds.

On the 28th of November 1882, the District Judge dismissed the suit on technical grounds, but on appeal by the plaintiffs, the High Court at Bombay, on the 3rd of May 1887, reversed the decree of the first Court, and directed an account to be taken of the trust property from the year 1872, and a scheme to be prepared for the future management of the temple and its funds and for the disposal of the surplus revenues, if any. For a report of the case, see *Manohar Ganesh Tambekar* v. *Lakhmiram* (1).

The defendants appealed to Her late Majesty in Council, but, on the 28th of April 1899, their appeal was dismissed with costs, see *Chotalal Lakhmiram* v. *Manohar Ganesh Tambekar* (2).

The case then went back to the District Judge for the taking of accounts and the preparation of a scheme, as directed by the said decision of the High Court, dated the 3rd of May 1887. On the 14th of February 1903, the District Judge delivered his judgment, whereby he ordered the sum of Rs. 1,196-9-6 to be recovered from the *shewaks* and sanctioned a scheme of management of the temple. On appeal and cross-appeal, the High Court set aside the scheme sanctioned by the District Judge and sanctioned another in its place. With this variation, the decree of the Court below was confirmed. The appellants thereupon appealed to His Majesty in Council.

Messrs. *De Gruyther, K. C.*, and *J. M. Parikh*, for the Appellants, referred to *Maharaja Jagadindra Nath Roy Bahadur* v. *Rani Hemanta Kumari Debi* (3) and submitted that the scheme ought to be varied.

Sir *Erle Richards, K. C.*, and Mr. *G. E. A. Ross*, for the Respondents, agreed that there should be certain modifications, but submitted that the appeal must be dismissed, as the High Court had properly exercised their discretion.

(1) 12 B. 247.
(2) 26 I. A. 199; 24 B. 50; 4 C. W. N. 23.
(3) 31 I. A. 203; 8 C. W. N. 809; 1 A. L. J. 588; 6 Bom. L. R. 765; 32 C. 129 (P. C.)

JUDGMENT.

LORD MACNAGHTEN.—Subject to the modifications which their Lordships have suggested and which have been assented to by Counsel for the respondents, their Lordships will affirm the scheme. It is very largely a matter of discretion, and the appellants have not satisfied their Lordships that that discretion has been improperly exercised or that the High Court have not given due consideration to matters which they were directed to take into consideration. Their Lordships will, therefore, humbly advise His Majesty that, subject to the modifications referred to, this appeal ought to be dismissed.

With regard to the costs of this appeal, their Lordships think that they should all come out of the temple funds. In the first instance, the appellants must, of course, pay the costs of the respondents, and they will have the right to recoup themselves as regards those costs and their own costs out of the temple funds.

Appeal dismissed.

Solicitors for the Appellants: Messrs. *T. L. Wilson & Co.*

Solicitors for the Respondents: Messrs. *Rankin Ford, Ford & Chester.*

MADRAS HIGH COURT.

CIVIL MISCELLANEOUS APPEAL NO. 233 OF 1911.

September 25, 1912.

Present:—Mr. Justice Sundara Aiyar and Mr. Justice Sadasiva Aiyar.

KODI VENKATAPPA ROW—APPELLANT

versus

BARNALA SURYANARAYANA AND OTHERS—RESPONDENTS.

Court-fee—Redemption suit—Court Fees Act (VII of 1870), s. 7 cl. 9—Amount claimed by mortgagor.

A suit merely to redeem a mortgage without praying for any additional relief against the mortgagee must be held to fall under section 7, clause 9 of the Court Fees Act.

KODI VENKATAPPA ROW *v.* BARNALA SURYANARAYANA.

Where a mortgagor also prays for the payment to him of the amount found due to him on taking accounts, after the discharge of the mortgage debt, he should state the amount so claimed and pay additional Court-fees thereon.

Appeal against the order of the Court of the Temporary Subordinate Judge of Vizagapatam in Appeal Suit No. 530 of 1909, dated the 8th April 1911, preferred against that of the Court of the District Munsif of Parvatipur, in Original Suit No. 225 of 1909.

Mr. *V. Ramesam*, for the Appellant.

Messrs. *P. Narayanamurthi* and *B. Narasimhaswara Sarma*, for the Respondents.

JUDGMENT.

SUNDARA AIYAR, J.—This is an appeal against the order of the Subordinate Judge of Vizagapatam, returning a plaint for presentation to the proper Court. The suit was for recovery of immoveable property held on the mortgage by defendants Nos. 1 to 8. The plaintiff also alleged in his plaint that he believed that the mortgage-debt had been discharged by the usufruct of mortgaged property a few years before the date of the plaint. He stated also what he believed to be the annual income from the property. In the prayer in the plaint, he asks for the recovery of possession and for an account being taken of the income of the property and for payment of whatever might be found to be due on the taking of the account. The plaintiff did not value his prayer for the recovery of money. He apparently proceeded on the view that no extra stamp duty was payable for recovering any surplus that might be found due from the mortgagees. The District Munsif passed a decree for redemption and found that a sum of Rs. 1,207 and odd was due to the mortgagees by the plaintiff. The defendants appealed claiming a much larger amount as due to them on the mortgage. After the appeal was presented, the plaintiff is alleged to have transferred his right in the property to the appellant before us. Subsequent to the date of the transfer, he entered into a compromise with the mortgagees agreeing that a sum of Rs. 4,000 was due on the mortgage. The appellant sought to be made a party to the appeal as transferee of the plaintiff's rights. This application was opposed by both the plaintiff and the mortgagees but it was granted by the Appellate Court. The plaintiff and the mortgagees sought to have a decree passed in terms of the compromise entered into between them. The Subordinate Judge refused to accede to this prayer on the ground that the plaintiff who entered into the compromise was, prior to it, alleged to have parted with his rights in the property. When the appeal came on for hearing, he held that the Munsif had no jurisdiction to try the suit. He proceeded on the allegation in the plaint as to the probable income of the property every year. We do not think he was justified in doing so. The plaintiff did not tie himself down to that allegation and he was, of course, not in a position to state what income was really realised during years when the mortgagees were in possession. He merely asked for an account to be taken and for payment of whatever might be found to be due. If separate Court-fee was payable on any amount which the plaintiff may claim from the defendants, then the proper course for the Subordinate Judge to pursue was to call upon the plaintiff to state what amount he claimed as due. It was, of course, open to the plaintiff to say that he could not determine what the amount would be, and to state what he believed to be an approximate figure. The figure so stated would determine the Court-fee payable and the question of jurisdiction. On the calculation made by the Subordinate Judge, he held that the suit would be beyond the jurisdiction of the District Munsif and followed the somewhat extraordinary course of returning the plaint to the plaintiff when it was alleged that he had no longer any rights in the property. The result is, the plaint is not before us now. In appeal before us, it is argued by Mr. Ramesam that in a suit for redemption, the mortgagor-plaintiff is not bound to pay Court-fees separately on any amount which he might claim as payable to him as the result of the accounts between the parties and he relies on *Husaini Khanam* v. *Husain Khan* (1). This case seems to be in support of his contention. Section 7, clause 9, of the Court Fees Act, according to its language, applies to suits to recover immoveable property mortgaged. Recovery of possession is the only description contained in the clause. It is, therefore, doubtful whether it would be

(1) 29 A. 471; A. W. N. (1907) 133; 4 A. L. J. 375.

right to hold that if there is any prayer for payment of money in addition to recovery of possession, that prayer need not be separately valued and Court-fee paid on the value put. The cases of *Konna Paniker* v. *Karunakara* (2) and *Rama Varma Raja* v. *Kadar* (3), relied on for the respondent, are not directly in point. In those cases, it was held that a *jenmi* in Malabar suing a *Kanomdar* for redemption should pay Court-fees on any rent that he might claim. In the judgments in the cases, it is stated that the plaintiff prayed not only for redemption but also for the recovery of rent. It has been held by the Court that a *kanom* mortgage in Malabar is not purely a mortgage but also a lease. It might, therefore, be said that redemption of a *kanom* mortgage does not include any claim for rent based on the transaction as a lease; while with regard to bare usufructuary mortgages, the plaintiff is entitled in a suit for redemption to have an account taken between him and the mortgagee and the payment by the mortgagee of whatever might be found to be due to him on the taking of accounts. The language of the clause is, perhaps, more in favour of the respondent's contention. It is, however, unnecessary to pronounce a definite opinion on this point. We have asked Mr. Ramesam, who appears for the transferee, to state whether he would claim more than Rs. 1,500 as the approximate amount which will be found due on account being taken. He says "No." The suit may, therefore, be held to be within the jurisdiction of the District Munsif. If the assignment is found to be valid, then Mr. Ramesam's client is prepared to state the amount which he claims from the mortgagees and to pay Court-fees on that amount. If the assignment is found to be not valid, it would be impossible for the plaintiff, after admitting that a sum of Rs. 4,000 was due by him to the mortgagees, to make any claim for money due by the mortgagees to him. We reverse the order of the Subordinate Judge and remand the appeal for disposal according to law. If he finds the assignment valid, he will call upon the appellant before us to state the amount which he claims as due from the defendants and levy Court-fees on that amount in the Court of first instance.

The costs in this Court will abide the result.

(2) 16 M. 328. (3) 16 M. 415.

SADASIVA IYER, J.—So far as section 7, clause 9, of the Court Fees Act is concerned it is worded thus: "In suits against the mortgagee for recovery of the property mortgaged, according to the principal money expressed to be secured by the instrument of the mortgage." It does not use the words "for the recovery *of the possession* of the property mortgaged" but merely "for the recovery of the property mortgaged." The marginal note in the Government of India Edition is "to redeem." In a suit by the mortgagor to redeem a simple mortgage, I think, it might be taken that the expression "recovery of the property mortgaged" means the re-conveyance to the mortgagor of the interest which was vested in the mortgagee. In this view, all suits merely to redeem mortgages, without praying for any additional relief against the mortgagee, must be held to come under section 7, clause 9 of the Court Fees Act. With these observations, I agree with my learned brother in the decree and order proposed by him.

Order reversed.

MADRAS HIGH COURT.

ORIGINAL SIDE APPEAL No. 27 OF 1910.

October 18, 1912.

Present:—Sir Ralph Benson, KT., Offg. Chief Justice, and Mr. Justice Napier.

G. T. GILMORE—PLAINTIFF—APPELLANT

versus

STATE OF TRAVANCORE—DEFENDANT—RESPONDENT.

Civil Procedure Code (Act of 1908), *ss.* 85, 87—*Sovereign Prince or Ruling Chief, suit against—Consent of Governor-General in Council—Private International Law—Suit against Foreign State.*

A suit will not lie against a Sovereign Prince or Ruling Chief without the consent of the Governor-General in Council.

G. sued the Travancore State or its Dewan as representing the State, for damages for wrongful dismissal from service:

Held, that no such suit would lie, as the Civil Procedure Code made no provision for suits against a State apart from its Prince or Chief. Such a suit would also contravene the well established rules of Private International Law.

Beer Chunder Manikya v. *Raj Coomar Nobodeep Chunder Deb Burmono*, 9 C. 535; 12 C. L. R. 465; *Strousberg* v. *Republic Costa Rica*, 44 L. T. (N. S.) 199; 29 W. R. 125, relied upon.

BOMMIDI BAYYAN NAIDU v. BOMMIDI SURYANARAYANA.

Appeal from the order of the Hon'ble Mr. Justice Wallis, dated 10th August 1910, in the Ordinary Original Civil Jurisdiction of this Court in Suit No. 142 of 1910.

Mr. *K. Naraina Rao*, for the Appellant.

Mr. *C. P. Ramasami Aiyar*, for the Respondent.

JUDGMENT.—This is an appeal against the order of Wallis, J., on the original side dismissing the plaintiff's suit under rule 57, of the Original Side Rules, which provides that when the plaint discloses no reasonable cause of action or is vexatious, the Judge may strike out the plaint and dismiss the suit.

The claim is to recover the sum of Rs. 94,000 from the State of Travancore, or Dewan of Travancore, as damages for wrongful dismissal from the service of that State.

His Highness the Maharajah of Travancore is a "Sovereign Prince or Ruling Chief" within the meaning of sections 85 to 87 of the Code of Civil Procedure, and may not be sued in our Courts without the consent of the Governor-General in Council, which admittedly has not been given in this case.

It is contended that the present suit is not against the Maharajah, but against the State of Travancore, or the Dewan as representing the State.

We do not think that any such distinction can be drawn.

The Code of Civil Procedure makes no provision for suits against such a State apart from its Prince or Chief, and we have not been referred to any precedent for such a suit.

We are of opinion that no such suit will lie under the Code of Civil Procedure. Apart from its provisions, it is clear that under the well established rules of International Law, no such suit will lie. It is only necessary to refer to the cases of *Beer Chunder Manikya* v. *Raj Coomar Nobodeep Chunder Deb Burmono* (1) and *Strousberg* v. *Republic Costa Rica* (2).

We dismiss the appeal with costs.

Appeal dismissed.

(1) 9 C. 535; 12 C. L. R. 465.
(2) 44 L. T. (N. S.) 199; 29 W. R. 125.

MADRAS HIGH COURT.
FULL BENCH.

LETTERS PATENT APPEAL No. 32 OF 1911.
September 9, 1912

Present:—Mr. Justice Wallis, Mr. Justice Sundara Aiyar and Mr. Justice Sadasiva Aiyar.

BOMMIDI BAYYAN NAIDU—APPELLANT
versus
BOMMIDI SURYANARAYANA, MINOR, BY GUARDIAN BOMMIDI AMMANNA —RESPONDENT.

Civil Procedure Code (Act V of 1908), *s.* 11—*Landlord and tenant—Suit for rent for a certain* fasli—*Issue as to propriety of* patta *tendered—Adjudication —Subsequent suit for rent for another* fasli—*Issue as to extent of holding*—Res judicata—*Madras Rent Recovery Act (VIII of* 1865).

In a suit by a landlord against a tenant for rent for a certain *fasli* under the Madras Rent Recovery Act, the defendant pleaded that the *patta* tendered was not proper and that the extent of defendant's *jeroyati* land had been very much overstated. The Court found that the terms of the *patta* did not contain any objectionable matter and that the *patta* was a proper one. In a suit for rent by the same plaintiff against the defendant for a subsequent *fasli*, the defendant pleaded that the extent of the land referred to in the *patta* was incorrect:

Held, that the question of the extent of defendant's holding was *res judicata* by reason of the decision in the previous suit as to the propriety of the *patta*, as it was an available ground of attack in the previous suit, and the judgment in the previous suit must be taken to be an adjudication that the terms of the *patta* were correct *in every respect*.

Scope of section 11 of the Civil Procedure Code, 1908, and the doctrine of *res judicata* discussed.

Case-law on the subject commented upon.

Appeal under section 15 of the Letters Patent against the decree of Munro and Sankaran Nair, JJ., in Second Appeal No. 640 of 1909, presented against that of the District Court of Ganjam in Appeal Suit No. 170 of 1901 (Original Suit No. 861 of 1907 on the file of the Court of the District Munsif of Sompeta). See 10 Ind. Cas. 75.

The Hon'ble Mr. *T. V. Seshagiri Aiyar*, for the Appellant.

Dr. *S. Swaminathen*, for the Respondent.

JUDGMENT.

WALLIS, J.—I agree with Munro, J., that the extent of the defendant's holding under the plaintiff is *res judicata* by reason of the decision in Original Suit No. 430 of 1906. In that case, the present plaintiff who held a five years' lease of the village from the registered landholders, sued the present defendant to recover rent for *Faslis* 1314 and 1315, in the shape of *rajabagam* or land-

holder's share of the produce, of certain *jeroyati* lands in the village in the occupation of the defendant. To enable the plaintiff to succeed, it was necessary for him to show, under section 7 of the Rent Recovery Act, 1865, that he had tendered a proper *patta* to the defendant for each *fasli*, or that it had been agreed to dispense with the tender. Under section 4, the *patta* had to contain the local description and extent of the land. The plaintiff pleaded that he has tendered a proper *patta* for each *fasli*. The defendant denied the tenders and pleaded further that the *pattas* alleged to have been tendered were not proper, instancing certain payments claimed. He pleaded further that "the extent of the defendant's *jeroyati* land (that is, of the land in respect of which the plaintiff claimed rent) has been very much overstated." I think that must be taken as referring to the extent in *patta* as well as to the extent in the plaint, which would merely reproduce it, and I think that the District Munsif who tried the case so understood it, as in his careful summary of the written statement he makes no express mention of the plea as to the extent of the land and evidently treats it as part of the plea that the *pattas* tendered were improper, and I think it was also covered by the issue "whether the *pattas* so tendered are proper" and by the terms of the judgment in that issue, which is as follows: "The terms of the *pattas*, Exhibit F, do not contain any objectionable matter." If this view of the pleadings is correct, there is an end of the case, because the question of the extent of the defendant's *jeroyati* holding was directly and substantially in issue in the previous suit and must be taken to have been heard and finally decided in the plaintiff's favour, as such a decision is necessarily involved in the decree passed in the plaintiff's favour, seeing that if the decision had been the other way, it would, under the Rent Recovery Act, have been fatal to his suit which must have been dismissed on the ground that the *patta* was not a proper one.

In his judgment, Sankaran Nair, J., observes that a decree for rent does not necessarily involve the decision that a proper *patta* has been tendered, as the parties may dispense with them, but whereas here tender of a proper *patta* is alleged on the one side and denied on the other and there is no suggestion that tender has been dispensed with, it seems to me that the decree for rent does involve the decision that a proper *patta* has been tendered.

Apart from any question as to the terms of the *patta*, it seems to me that the extent of the defendant's holding of *jeroyati* land in the village was a matter directly and substantially in issue in the suit, as it was in respect of this extent that the plaintiff was claiming *rajabagam*, or landholder's share of the produce, from the defendant; and that it was necessary for him to prove this extent to enable a decree to be given in his favour, even if there had been no plea in the written statement, as there was, that the extent had been over-estimated. In these circumstances, I think the decision on the 6th issue that the plaintiff was entitled to the *rajabagam* claimed in the plaint necessarily involved a decision that the extent of the defendant's *jeroyati* land in the village was as alleged in the plaint, because what he claimed was the *rajabagam* of this extent, and that this point must be taken to have been decided in the plaintiff's favour.

In either view, the question of the extent of the defendant's holding of *jeroyati* land in the village having been directly and substantially in issue and having been, as we must take it, heard and determined because essential to the decision of the suit, cannot be raised again in the present suit for the rent of *Fasli* 1316 by the defendant's setting up that he was all along in occupation of only 5 acres of *jeroyati* land in the village and not of the extent all along claimed by the plaintiff.

But, even assuming that the propriety of the *patta* was not questioned in the former suit on the ground that the extent of the lands was wrongly shown and that the extent was not otherwise questioned by the defendant, I think that these being good grounds of defence to the suit might and ought to have been raised, and must be deemed to have been matters expressly and substantially in issue in the former suit by virtue of Explanation IV to section 11 of the the Civil Proceedure Code. It seems to me that any ground of attack or defence which by virtue of the Explanation

is deemed to have been directly and substantially in issue in a suit must also be deemed to have been heard and finally decided adversely to the party who failed to raise it. The proposition that failure to raise grounds of attack or defence, which might and ought to have been raised, does not make such grounds *res judicata* unless there is an express decision by the Court upon them, appears to me to be wholly untenable. Courts of Justice are not in the habit of deciding points not raised before them; and to say that the Explanation only takes effect when they happen to do so appears to me to defeat the policy of the section and to render the Explanation senseless, as held by the Allahabad High Court in *Sri Gopal* v. *Pirthi Singh* (1), a decision confirmed on appeal in *Sri Gopal* v. *Pirthi Singh* (2) by their Lordships of the Judicial Committee, who thought it sufficient to say that the judgment of the High Court was clearly right and that the appeal on this point was unarguable. I do not, therefore, consider it necessary to refer to the earlier decisions of the Calcutta High Court on which Sankaran Nair, J., relied, and it is the more unnecessary to do so as they are very fully examined in the judgment of Sundara Aiyar, J. The appeal must be allowed, the decrees of this Court and the lower Appellate Court reversed, and the case remanded to the District Judge for disposal according to law. Costs will abide the event.

SUNDARA AIYAR, J.—This is an appeal under section 15 of the Letters Patent arising out of Second Appeal No. 640 of 1909.* The original suit which led to the second appeal was instituted by a landlord for the recovery of rent from the defendants, his *ryots*, for the *Fasli* year 1316. According to the plaintiff's case, the defendants were in possession of about 14 acres of *jeroyati* lands under him liable to pay *waram* or rent in kind. The 1st defendant, the undivided father of the 2nd defendant, contended that he held only 5 acres of *jeroyati* lands and that he held in addition 10 acres of *inam* and 3 acres of cash rent paying lands and denied that any *patta* was tendered to him for the *fasli* in question as alleged by the plaintiff. The correctness of the *patta* alleged to have been tendered was also denied. The 7th issue framed by the Munsif raised the question "whether the alleged tendered *patta* was valid and binding on the defendant." The 8th issue was "whether the whole of the 14 acres of land mentioned in the plaint is defendant's *jeroyati* as alleged by the plaintiff, or only 5 acres *jeroyati* and the rest *inam* and cash rent paying land as alleged by the defendants." At the hearing, a further question was raised whether the question of the propriety of the *patta* tendered was *res judicata* in consequence of the decision of the Court in Original Suit No. 430 of 1906, which related to a suit for rent instituted by the plaintiff against the defendants for *Fasli* 1314. The District Munsif held that the matter was not *res judicata* because the points in dispute were not raised in the previous suit, these points being the inclusion of *inams* and of money rent paying lands as *waram* paying lands, and the erroneous description of the lands for which the plaintiff is entitled to claim rent. On the merits he held that the *patta* tendered was not a proper one. He was of opinion that part of the lands included in the *patta* was *inam* and was wrongly claimed by the plaintiff as *jeroyati*. He did not decide the question whether cash rent and not rent in kind was payable for part of the land. He apparently thought that the *patta* must be held to be incorrect in stating that *waram* was payable while cash rent was received till the end of *Fasli* 1313. The mistake complained of with regard to the description of the land was that the eastern boundary was described as the service *inam* of the defendant, while in the *patta* for *Faslis* 1313, 1314, it was described merely as defendants' *inam*. This was held by the Munsif to be improper although he did not decide the question whether the description of the boundary of the defendants' land as service *inam* was in fact correct or not. He dismissed the plaintiff's suit. His judgment was confirmed on appeal by the District Judge, who upheld the Munsif's view on the question of *res judicata*. The Judge observed on the question of the correctness of the *patta* as follows:—"Appellant does not seriously argue that the *patta* was a proper one." The plaintiff preferred a second appeal to this Court. The question argued in second appeal was that

* 10 Ind. Cas. 75.

(1) 20 A. 110.

(2) 24 A. 429; 4 Bom. L. R. 827; 6 C. W. N. 889; 29 I. A. 118 (P. C.).

the propriety of the *patta* was *res judicata* by the judgment in Original Suit No. 430 of 1906. The appeal came on for hearing before Munro and Sankaran Nair, JJ. The learned Judges differed in their views; Munro, J., being of opinion that the plea of *res judicata* must be upheld, while Sankaran Nair, J., agreed with the opinion of the lower Courts that it should not be maintained. In the result, the second appeal was dismissed in accordance with the provisions of section 98 (2) of the Civil Procedure Code. The present appeal is, therefore, substantially against the judgment of Sankaran Nair, J. In the previous suit, Original Suit No. 430 of 1906, the 1st issue was:—"Whether the plaintiff tendered *pattas* to the 1st defendant for *Faslis* 1314 and 1315 and whether the *pattas* tendered are proper." The tender of *patta* was held to be proved. The finding on the question of its propriety was in these terms:—"The terms of the *pattas*, Exhibits E and F, do not contain any objectionable matter. I accordingly find the 1st issue in the affirmative." In the written statement in that suit, marked as Exhibit C in the present suit, paragraphs 8 and 9 took objections to the correctness of the *patta*. Paragraph 8 stated:—"The *pattas* alleged to have been tendered are not proper. The terms in paragraph 3 of the plaint are not *mamool* terms." The terms referred to related apparently to the giving of firewood, the payment of interest and the amount of road cess payable by the *ryot*. Paragraph 9 stated: "The extent of defendants' *jeroyati* land has been very much over-estimated by the plaintiff." So far as the written statement was concerned the details of the over-statement of the extent of the *jeroyati* land were not stated and no specific objection was taken to the statement that some portion of the lands was wrongly mentioned as liable to pay *waram* instead of cash rent. The objection in the present suit with regard to the description of the eastern boundary may be left out of account as it cannot be held to affect the plaintiff's right to the land in question. It is immaterial whether the defendants' land which forms the eastern boundary was his service *inam* or an *inam* of a different character so far as the relations between the plaintiff and the defendants with regard to the plaint land are concerned. The District Munsif did not find that the description of it as service *inam* was incorrect. It does not appear to what points the evidence let in by the parties in the previous suit related with respect to the correctness of the *patta*, and the Munsif's finding throws no further light as it is expressed in general words: "The terms do not contain any objectionable matter." The appellant's contention is that the defendants, who set up that a proper *patta* had not been tendered were, bound to raise all objections that they could to the propriety of the *patta* and that the judgment in the previous suit must be taken to be an adjudication that the terms of the *patta* were correct in every respect and that, therefore, they cannot raise any objection to the propriety of the *patta* in this suit which they might have failed to urge in the previous suit. Except in the matter of the difference in the description of the eastern boundary which, in my opinion, may be neglected, it is not stated that the terms of the *patta* tendered for *Fasli* 1316 were not similar to the *patta* for *Fasli* 1314, which was held to be a proper one in the previous suit. The District Munsif observes that the *patta* in question was virtually the same as that which was tendered for *Fasli* 1314. The correctness of this statement is not seriously disputed. Munro, J, observes,—"Had the issue in the previous suit relating to the correctness of the *patta* been found in the negative, the plaintiff's suit must have been dismissed. The finding in the previous suit that the *pattas* were proper, *i.e.*, that they were such as the defendants were bound to accept, was a finding that the relationship of landlord and tenant subsisted between the plaintiff and the defendants in respect of the land entered in the *pattas* and I do not think that the defendants can again be allowed to put the plaintiff to proof of his title". Sankaran Nair, J., held, having regard to the general language of the District Munsif's finding in the previous suit, that there was no explicit adjudication there of the questions now raised, *viz.*, whether a portion of the lands was *inam* or *jeroyati* and whether another portion was liable to pay cash rent or *waram*. The learned Judge was further of opinion that as the suit related only to the rent for a particular year (*Fasli* 1316), it did not necessarily require a decision as to the terms of the *patta* or the extent of the land for which rent

was payable, and that these questions are, therefore, not *res judicata*.

The decision of the question depends on the interpretation to be placed on section 11 of the Civil Procedure Code which embodies the rule of *res judicata*. According to the section, the Court is forbidden to try "any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties". The rule applies subject to the other provisions of the section not only to a suit tried before but to an issue decided in a previous suit provided the matter directly and substantially in issue in the latter suit was raised in the previous suit or in a substantial and direct issue in the previous suit. Explanation III lays down,—"The matter above referred to must in the former suit have been alleged by one party and either denied or admitted expressly or impliedly by the other". An implied denial is as effective as an express one. Explanation IV says:—"Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit".

The appellant contends that with respect to any issue in the former suit, the parties were bound to put forward all grounds of attack or defence material for the decision of the issue and will be deemed to have done so even if they failed to do so in fact; that the propriety of the *patta* was directly and substantially in issue in the previous suit, and that both the plaintiff and the defendants were bound to put forward every matter involved in the question of the correctness of the *patta* and that the decision that the *patta* was a proper one must be taken to be a decision that there was no valid objection of any sort to it; and that the defendant cannot now be permitted to raise any matter relating to the propriety of the *patta* which he might have failed to raise before. I am of opinion that these contentions must be upheld. The learned Counsel for the respondent rested himself on the arguments contained in the judgment of Sankaran Nair, J., and did not elucidate the points any further. It becomes, therefore, necessary to examine the arguments contained in the judgment of that learned Judge. He lays down the following propositions, as I understand his judgment:—

(1) The scope of the rule of *res judicata*, as limited by the word 'directly and substantially in issue' is not confined to the relief granted by the former suit or to the property which was the subject-matter therein.

(2) The decision on a matter not essential for the relief finally granted in the former case, or which did not form one of the grounds for the decision itself, cannot be said to have been directly and substantially in issue; but, where the decision on a question was essential to the relief granted or the decree passed, or where it formed the ground-work of the decision, then the matter must be deemed to have been directly and substantially in issue in the suit.

The difference between issues 'collateral' and 'direct' depends upon whether it was possible to pass the decree without any finding upon the particular issue.

(3) With regard to the relief granted in a suit, the decree may render it necessary to imply a decision on a question not expressly decided, but with regard to issues, no implication is necessary, but we ought to have a clear decision to create a bar. (The application of the latter part of the rule would, of course, be to cases where the subject-matter of the two suits is different.)

(4) Explanation IV does not dispense with the necessity of finding upon a matter which might and ought to have been made a ground of defence or attack in the former suit unless that matter must be taken to have been involved in the actual decree passed in the case.

(5) It is not enough to make the matter of an issue *res judicata* that the decision of it in a different manner would be inconsistent with the decree in the previous case as such determination would not affect the actual decree passed in that case for the rent for *Fasli* 1314.

(6) A decree for rent does not necessarily involve the decision that a proper *patta* has been tendered.

If, therefore, as a fact, that question was not decided in the previous suit, we are not bound to imply that it was so decided.

Now, section 11 of the Civil Procedure Code requires that the matter or issue should have been heard and finally decided by such

Court. It does not say that it should have been decided in explicit terms. It cannot be doubted that if an adjudication on a matter is necessarily involved in the decision in a prior suit, the section must be understood to lay down that it must be taken to have been heard and finally decided. Sankaran Nair, J., admits that the principle of an implied decision must be adopted so far as whatever is required by decree in the previous suit is concerned. But he lays down that it is not applicable with regard to issues. He does not say how then the judgment in a suit is to be understood. No such distinction is warranted by the language of the section. The suit and an issue put forward for trial in the second suit are treated on exactly the same footing in the section, and the test of *res judicata* with regard to each is whether the matter directly and substantially in issue in the latter suit was the matter directly and substantially in issue in the suit or in an issue in the earlier suit. The word "issue" in the expression "suit or issue" must be distinguished from the use of the words "in issue" in the expression "the matter directly and substantially in issue." The latter expression, as already stated, is made applicable to both the latter suit and an issue raised in it. "Directly and substantially in issue" obviously means "directly and substantially in question, which would include everything necessarily involved," whether that expression is applied to the suit itself or an issue in it. This has to be borne in mind in interpreting Explanation IV also. It speaks of "any matter which might and ought to have been made ground of defence or attack in the former suit." The phrase "matter directly and substantially in issue" in the principal clause of the section is spoken of with reference to both suit and issue. Clearly, therefore, what ought to have been made ground of defence or attack with respect to any issue in the earlier suit must be taken to have been a matter directly and substantially in issue therein when the question is whether an issue in the earlier suit can be tried again in the latter suit. Again, in deciding whether any matter is *res judicata*, the question is, what is necessarily involved in the actual judgment of the Court in the earlier suit, not what relief was granted by the decree, because it is the matter decided (expressly or by necessary implication) that becomes *res judicata*. It is desirable to illustrate by a concrete example. Suppose a suit is instituted for one of the instalments payable according to the terms of a bond. The defendant denies its genuineness and pleads also absence of consideration, and issues are framed on both points. The Court passes a decree for the instalment but records no explicit finding on either of the issues. A suit is subsequently instituted in the same Court for a second instalment and the defendant raises the same pleas as in the earlier suit. The subject-matter of the two suits is not the same and the dismissal of the second suit would not affect the actual decree passed in the earlier suit. Can it be contended that the issues may be tried again in the second suit? According to the learned Judge, apparently, they should be tried again. The executant of the bond, according to him, though he cannot seek to recover back the amount decreed against him in the earlier suit, may resist the second suit for the later instalment. The difference between issues 'collateral' and 'direct,' according to the learned Judge, depends upon "whether it was possible to pass the decree without any finding upon the particular issue." I am unable to accept his position that though a finding might be necessary to pass the judgment in the previous suit, the issues should not be taken to have been decided (unless explicitly decided) if the result of the second suit would not be to re-open the actual decree in the previous suit. The result of such a position would be that the same issues may be re-opened again and again in the same Court though such re-opening would be inconsistent with the decree and judgment in every one of the previous suits. According to the learned Judge, such inconsistency is immaterial. The decision of the Privy Council in *Amanat Bibi* v. *Imdad Hosain* (3) is referred to in support of this position. There were two earlier proceedings; one a suit to establish a sub-proprietary right as against a *taluqdar*, the other, a proceeding to recover the same property from the *taluqdar* under the

(3) 15 I. A. 106; 15 C. 800.

terms of a certain Revenue Circular on re-paying to the *taluqdar* the arrears of revenue which he had paid to the Government. The third proceeding, in which the plea of *res judicata* was raised, was a suit to redeem a mortgage granted by the person who was plaintiff in the earlier proceeding. The Privy Council held that the third suit was not barred as *res judicata* because the cause of action was different. Their Lordships held that the cause of action to establish a sub-proprietary right was obviously different from that in a suit for redemption, though the property sought to be recovered was the same. The question in issue, said their Lordships, was quite different in the two suits; and they interpreted the provisions in section 7 of Act VIII of 1859, which enacted that "every suit shall include the whole of the claim arising out of the cause of action," as not requiring that "every suit shall include every cause of action or every claim which the party has, but only that every suit should include the whole of the claim arising out of the action on which the suit is brought." It is now a well established proposition that, though the subject-matter of the litigation and the relief claimed may be the same, different suits may be maintained by a plaintiff if the cause of action in each suit be different. There were two stages in the second of the earlier proceedings. The first originated in an application by the plaintiff under a Revenue Circular to recover the property. The Settlement Officer who made the inquiry found that the plaintiff had conveyed the property to the *taluqdar* by a conditional sale which had become absolute in 1853, and that the plaintiff was further not entitled to recover the property as he had not re-paid to the *taluqdar* certain arrears of revenue paid by the latter which he was bound to re-pay before claiming to recover the property. Their Lordships held that this order under the Special Circular could not be treated as judicial proceedings at all. The plaintiff then had recourse to fresh proceedings on the ground that the payment of arrears by the *taluqdar* must be treated as having been made on his account. The Settlement Officer then again decided that the property had been transferred to the *taluqdar* by a conditional sale of the year 1853 which had become absolute. Their Lordships held that the question in those fresh proceedings must be taken to have been merely "whether the plaintiff was entitled to recover the property which had been transferred by the Government to the *taluqdar* on re-paying to the *taluqdar* the arrears of revenue which he had paid to Government," that being, according to their Lordships, the cause of action on which the plaintiff then claimed to recover. The matter in issue in the suit before their Lordships, they said, was "the respondent's right to redemption under the mortgage deed of 1854." Their Lordships then observed: "It may be difficult to reconcile the position of the *taluqdar* as mortgagee in 1854 with his position as absolute owner in 1853 under purchase from the mortgagor. But, if it be established that the respondent was a mortgagor in 1854 with the right of redemption, why should he be barred merely because at an earlier date he may have had no right to the property at all?" This is the passage relied on by the learned Judge for the proposition that the decision of an issue in the earlier suit inconsistent with an issue in the later suit will not make the suit or issue in the later suit *res judicata*. I can find no such proposition laid down by the Privy Council. They did not regard the later suit as inconsistent with the decision in the former suit that there was a conditional mortgage of 1853 which, if it was in operation, had become absolute in 1853. Proceeding on the basis that the conditional mortgage had been established to be true, if the *taluqdar* chose to take a mortgage in 1854 from the plaintiff and his subsequent holding was under that mortgage, their Lordships held that the mortgage of 1854 would furnish the plaintiff with a fresh cause of action, and a plaintiff need not combine in the same suit all his causes of action, though both suits might be for the recovery of the same property. They did not say that in the later suit the execution of the conditional sale of 1853 or its having become absolute could be denied. The observation that it may be difficult to reconcile the position of the *talukdar* as mortgagee in 1854 with his position as absolute owner in 1853 under a purchase from the mortgagor, meant no more than

that it might appear to be improbable that a person who was absolute owner in 1853 would take a mortgage in 1854; but a mortgagee cannot deny the title of his mortgagor, and if the *talukdar* chose to take a mortgage from the plaintiff in 1854, he could not say that the plaintiff did not obtain a fresh cause of action for redemption of that mortgage. On the other hand, in *Pahalwan Singh* v. *Maharaja Maheshur Buksh Singh Bahadur* (4), the Privy Council applied the rule of an implied decision of an issue by a former adjudication although the property in the two suits was different. The learned Judge seems to have been under the impression that in that case the decree in the later suit would re-open the decree in the earlier suit, but that was not the case, as the property in dispute in the two suits was different. It is, of course, necessary that in order that an issue may be *res judicata*, the decision in the former suit must necessarily involve an adjudication in a particular way on the issue raised in the later suit and its adjudication in a contrary way in the later suit must be inconsistent with the adjudication which must be implied in the earlier suit. In one part of his judgment, the learned Judge observes that where the decision on a question was essential to the relief granted, or where it formed the ground-work of the decision, then the matter must be deemed to have been directly and substantially in issue in the suit, but he afterwards restricts the scope of the second test to cases where the question was explicitly decided. For this restriction, I can find no warrant either in principle or in the language of the section.

The statement that a decision on a matter not essential for the relief finally granted cannot be said to have been directly and substantially in issue is unworkable in practice, where a suit is dismissed without any relief being granted. The test should really be whether the matter was essential for the decision in the earlier suit, not for the relief granted. The decision of a Court proceeds on the matters put in contest by the parties and its adjudication cannot be understood without regard to the actual contest. It is impossible to understand it merely with regard to the decree. Suppose a suit for an instalment on a bond is dismissed, the defendant's plea being that the bond is not genuine and that it is not supported by any consideration. The Court does not record any explicit findings on these points, either of which would lead to the dismissal of the suit. Suppose the plaintiff afterwards institutes a suit for another instalment and the defendant raises the same pleas. Can the plaintiff be permitted to say that the points should be tried again and he should be given a decree if both points are found in his favour? Sankaran Nair, J., concedes that the granting of the relief may be taken to involve the decision of whatever point is necessary to support the decree. But what points are to be taken as involved in the decree in the instance just put? How is it possible to decide a question of *res judicata* by a consideration of the relief alone which is granted and without a consideration of the judgment in the case, and how is it possible to understand what the Court decides in the judgment without seeing what the contest between the parties was? The result of doing so would be to confine the doctrine of *res judicata* to the scope of the rule *transit in rem judicatum* (except where a matter directly and substantially in issue has been explicitly decided by the judgment in a former suit). Suppose, in the illustration already put of a defendant denying both the genuineness and consideration of an instalment-bond, the defendant in the second case admits the genuineness of the bond, but denies only the passing of consideration for it. If it is open to the Court in the later suit to proceed on the footing of the genuineness of the bond, the question would arise whether the matter as to consideration is *res judicata* by the former judgment As no explicit findings on the points in contest were recorded in the judgment, the decision might have proceeded either on the ground that the bond was not genuine or that it was not supported by consideration, or on both grounds. It might be proper in such a case to hold that the previous judgment did not necessarily imply a decision on the question of consideration. Certainty is essential for the application of the rule of *res judicata*, and the Court would not prevent the re-agitation of a matter where it is not certain that the previous decision proceed-

(4) 12 B. L. R. 391; 18 W. R. 182 (P. C.).

ed on a particular ground. See *Vythilinga Mudaliar* v. *Ramachendra Naicker* (5). If a suit for an instalment is dismissed for default, no matter would be *res judicata* in a claim for another instalment. If it is decreed *ex parte*, the genuineness of the bond and all questions as to its enforceability, so far as to justify a decree for the instalment, would be *res judicata* in a suit for another instalment. The learned Judge apparently proceeds on the view that for some reason the scope of the rule of *res judicata* with regard to issues should be resticted as far as possible and refers to the opinion of Stuart, C. J., in *Babulal* v. *Ishri Parsad Narain Singh* (6) and *Muhammad Ismail* v. *Chattar Singh* (7), who regretted the application in this country of the principle of *res judicata* to the trial of issues, and not merely to the subject-matter in previous suits. It is necessary to consider whether there are good grounds for such regret. The rule was well established by the decisions of the Privy Council. See *Krishna Behari Roy* v. *Bunwaree Lall Roy* (8); *Pahlwan Singh* v. *Maharaja Muheshur Buksh Singh Bahadur* (4); *Soorjomonee Dayee* v. *Suddanund Mohapatter* (9); *Pittapur Raja* v. *Buchi Sitayya* (10). Section 13 of Act X of 1877 and section 11 of the present Code made the expression "matter directly and substantially in issue" applicable both to 'suit' and 'an issue in a suit.'

The learned Judge holds that the proper terms of the *patta* to be tendered by the landholder to the *ryot* could not be regarded as having necessarily been directly and substantially in issue in a suit for rent. Two decisions of the Privy Council are referred to in support of this position. The first of them is *Misir Raghobardial* v. *Sheo Baksh Singh* (11). In that case the plaintiff had previously instituted a suit for Rs. 1,665, the balance of interest due on a bond for Rs. 12,000 in a Court not competent to try suits exceeding Rs. 5,000 in value. The defendant had pleaded that the bond was supported by consideration only to the extent of Rs. 4,790, and that the amount already paid by him for interest exceeded the interest due on the actual consideration that had passed. The defendant's plea was upheld. The plaintiff, subsequently instituted a suit for the principal and interest due on the bond in a Court competent to try a suit of that value. The question was, whether the decision in the previous suit as to the amount of consideration that had passed for the bond was *res judicata* in the subsequent suit. Their Lordships held that it was not. The point was decided on the ground that the Court that decided the previous suit was incompetent to try the later suit for principal and interest. The rule as to the necessity for the Court trying the previous suit having concurrent jurisdiction to try the later suit had also been laid down by the decisions of the Privy Council under Act VIII of 1859, although the language of section 2 of that Act did not in terms refer to that requisite. Sir Richard Couch, in pointing out that the rule, already applied by the Privy Council while Act VIII of 1859 was in force, was embodied in explicit terms in Act X of 1877, went on to observe that the issue as to consideration "was a 'collateral' rather than a 'direct' issue in the suit." He said:—"The plaintiff might have succeeded without having a finding upon it if he had proved an admission by the defendant that the sum claimed was due for interest, or had shown that the Rs. 2,475, (the sum alleged to have been paid for interest) had been expressly paid on account of the larger sum which he said the defendant owed for interest." This is immediately followed by the sentence:—"If the decision of the Assistant Commissioner is conclusive, he will, although he could not have tried the question in a suit on the bond, have bound the plaintiff as effectually as if he had jurisdiction to try that suit. Their Lordships think that this was not intended and that by Court of competent jurisdiction Act X of 1877, means a Court which has jurisdiction over the matter in the subsequent suit in which the decision is used as conclusive, or, in other words, a Court of concurrent jurisdiction." It is clear to my mind that his Lordship in making the observation contained in the previous sentence was only dealing with the question of the necessity of

(5) 14 M. L. J. 379.
(6) 2 A. 582.
(7) 4 A. 69; A. W. N. (1881) 116.
(8) 2 I. A. 283; 1 C. 144; 25 W. R. 1.
(9) 12 B. L. R. 304; 20 W. R. 377; I. A. Sup. Vol. 212.
(10) 8 M. 219.
(11) 9 C. 439; 12 C. L. R. 520; 9 I. A. 197.

concurrent jurisdiction in the Court which tried the earlier suit, and he used the expression 'collateral' in the sense of 'not referring to the subject-matter of the previous suit' and that he did not mean that it was not necessary for the decision of the suit on the issues raised between the parties on the pleadings in the case. The observation was made with reference to the principle that the judgment of a Court not having jurisdiction to try the later suit would not be *res judicata* on any issue in the earlier suit, but only with respect to the actual subject-matter of the previous suit. In *Run Bahadur Singh* v. *Lucho Koer* (12) the decision in *Misir Raghobardial* v. *Sheo Baksh Singh* (11) was treated as an authority only on the question that the adjudication of a Court not having concurrent jurisdiction with that trying the later suit would not make the decision of an issue *res judicata*. Both *Misir Raghobardial* v. *Sheo Baksh Singh* (11) and *Run Bahadur Singh* v. *Lucho Koer* (12), on the other hand, proceed on the assumption that if there had been concurrence of jurisdiction in the two Courts, the finding on an issue in the earlier suit would have given rise to a successful plea of *res judicata*. It would appear that in the *Duchess of Kingston's* case (13), which was referred to by Sir Richard Couch in the judgment in *Misir Ragho Bardial* v. *Sheobaksh Singh* (11), the expression 'direct issue' as opposed to a 'collateral' one was used in the sense of an issue directly determining the subject-matter of the previous proceedings and not in the sense in which it is obviously used in the Indian statute. There is, in my opinion, no foundation at all for making a distinction between an explicit decision and an implied decision of an issue in the application of the doctrine of *res judicata*, provided the matter raised in the issue was directly and substantially in issue in the earlier suit. If the decision was not sufficiently explicit, that would, no doubt, furnish the party affected by it in the earlier suit a good ground for appeal against the decision just as any other error or imperfection would do, but the defect in the finding is not one that can be collaterally attacked in the later suit. The same observation would apply even if an issue regarding a matter directly and substantially in issue in the former suit was not clearly raised or not raised at all, provided the matter is such that it must be taken to have been decided in the earlier suit, that is, provided the judgment would not be sustainable unless the matter be taken to have been decided. Mr. Justice Sankaran Nair holds that Explanation IV, which states that "any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit," does not qualify the statement in the principal clause that the matter in issue should have been heard and finally decided by such Court. It is, of course, true that the matter should have been decided in contemplation of law but if, as the learned Judge concedes, it is sufficient if the matter must be taken to have been decided by necessary implication so far as the subject-matter of the suit and anything involved in the decree itself are concerned, what reason is there for putting a different construction on the same words as applied to the decision of an issue? And, in so far as what is involved in the decree is concerned, any matter which might and ought to have been made ground of defence or attack must be taken to have been decided, there is, in my opinion, equally no reason for not applying the same principle with respect to a matter directly and substantially in issue in an issue in the previous suit. As I have already observed, the language of Explanation IV is equally applicable both to the previous suit itself and to an issue in the suit. What use is there in enacting that what ought to have been made ground of defence or attack in the former suit shall be deemed to have been a matter directly and substantially in issue in that suit, if the matter is not also to be taken to have been decided in the previous suit? What was not made ground of defence or attack could not have been expressly decided. The Explanation would, therefore, be objectless if a decision also is not to be implied and made the ground of estoppel with respect to what is impliedly to be regarded as having been directly and substantially in issue. At any rate, the logical result of the respondent's position must be to make an explicit decision equally necessary with respect to a ground of attack or defence not having

(12) 11 C. 301; 12 I. A. 23.
(13) 2 Smith's L. C. 778.

been urged with regard to a matter involved in the decree itself in the previous suit. The learned Judge's position is, no doubt, supported by several decisions in the Calcutta High Court [*Kailash Mondul* v. *Baroda Sundari Dasi* (14); *Woomesh Chandra Maitia* v. *Barada Das Maitra* (15)] but, in my opinion, these decisions are absolutely unsupportable and quite inconsistent with the decisions of the Privy Council in *Pahalwan Singh* v. *Maharaja Muheshur Buksh Singh Bahadur* (4) and *Mahomed Ibrahim Hossain Khan* v. *Ambika Prashad Singh* (16), even if the decision of the same tribunal in *Sri Gopal* v. *Pirthi Singh* (2) could be distinguished, as stated by Sankaran Nair, J., on the ground that the implication of a decision on an issue, which ought to have been raised in the previous suit, was justifiable in that case as the decree passed in the earlier suit would itself be affected otherwise. The Calcutta High Court, however, did not consider *Sri Gopal* v. *Pirthi Singh* (2) distinguishable on that ground. Mr. Justice Gurudas Banerjee, who was a party to the decision in *Kailash Mondal* v. *Baroda Sundari Dasi* (14), observed, in *Rajendra Nath Ghose* v. *Tarangini Dasi* (17), that the position adopted by him in the previous case would require to be re-considered in consequence of the decision in *Sri Gopal* v. *Pirthi Singh* (2). The same view was taken by the Calcutta High Court in *Kailash Chandra Mandal* v. *Ram Narain Giri* (18); *Jamadar Singh* v. *Serajuddin Ahmed Chowdhuri* (19) and *Mohim Chandra Sarkar* v. *Anil Bandhu Adhikary* (20), although *Jamadar Singh* v. *Serajuddin Ahmed Chowdhuri* (19) might be explicable if the distinction adopted by Sankaran Nair, J, be correct. This Court also has held that a ground of attack or defence, which a party omitted to bring forward in an earlier suit, must be taken to have been decided in the suit. See *Arunachalam Chetty* v. *Meyyappa Chetty* (21); *Masilamani Pillai* v. *Tiruvengadam Pillai* (22). The point seems to me to be so obviously clear that it does not deserve further consideration.

According to the respondent's argument, although a matter not necessary to sustain the actual decree in an earlier suit will not be *res judicata* in a later suit if the decision on it is only by way of implication, yet it would be *res judicata* if it expressly decided it. That an express decision would constitute an estoppel was regarded by Sankaran Nair, J., as concluded by the decision of the Privy Council in *Pittapur Raja* v. *Buchi Sitayya* (10), to which might be added several other rulings. [See *Gobind Chunder Koondoo* v. *Taruck Chunder Bose* (23); *Soorjomonee Dayee* v. *Sudhanund Mohapatter* (19); *Krishna Behari Roy* v. *Brojeswari Chowdranee* (8)]. But the test laid down in these cases was not whether the decision was explicit but whether the issue was one on which the judgment in the previous suit was based, quite apart from the question whether the decree itself would be affected by the matter being re-opened in the later suit. If the judgment was not based on the issue, then the decision of the issue, whether express or implied, cannot constitute the matter *res judicata* in the later suit.

These are the general principles which, in my opinion, must guide the Court in determining whether the question of the correctness of the *patta* is *res judicata* by the decision in the previous suit for the rent of *Fasli* 1314. The point is, was the question of the propriety of the *patta* directly in issue in the previous suit and was it decided expressly or by implication? In my opinion, the question whether a decree for rent involves a decision that a proper *patta* had been tendered is one which must be decided with reference to the facts of each case. It is perfectly true, as pointed out by Sankaran Nair, J., that the tender of a *patta* is not essential to a landlord to recover rent and that the parties may dispense with it. It may be right to go farther and say that a *ryot* may, if he chose, not insist on the tender of a proper *patta* before he pays rent for any particular year and that this will not affect his right to require a proper *patta* in any subsequent year and resisting a suit for rent on the ground that a proper *patta* has not been tendered. It may be open, therefore, to a defendant to raise no plea at all about the correctness of a *patta* in a suit instituted for the rent of a

(14) 24 C. 711; 1 C. W. N. 565.
(15) 28 C. 17.
(16) 39 C. 527; 11 M.L.T. 265; (1912) 1 M. W. N. 367; 9 A. L. J. 332; 14 Bom. L. R. 280; 16 C. W. N. 505; 15 C. L. J. 411; 22 M. L. J. 468; 14 Ind. Cas. 496.
(17) 1 C. L. J. 248.
(18) 4 C. L. J. 211.
(19) 35 C. 979; 8 C. L. J. 82; 12 C. W. N. 862.
(20) 13 C. W. N. 513; 9 C. L. J. 362; 5 M. L. T. 247; 1 Ind. Cas. 66.
(21) 21 M. 91 at p. 99.
(22) 31 M. 385.
(23) 3 C. 145; 1 C. L. R. 35.

particular year; this may not estop him from resisting a subsequent suit for rent for another year on the ground that the *patta* alleged to be tendered is not correct. This may possibly apply even in cases where the plaintiff alleged in the earlier suit that he tendered a *patta* containing proper terms. But the effect of a decision depends in large measure on the actual contest between the parties. A party may not be bound to raise a particular plea, but if he does raise a plea, which would be an effective answer to the suit, then the same plea cannot be raised again in a later suit between him and his opponent. It may be that the actual decree alone in the previous suit, with respect to its subject-matter would not lead to an implication of the decision of a particular matter, but if the matter, is put in contest and the result of the contest would be that the judgment in the case must depend on the decision of the matter, then it is clear to my mind that the decision would constitute it *res judicata* in a subsequent suit and it is absolutely immaterial whether the decision be express or implied. Of course, it is open to the parties to show that the contest on any matter was subsequently waived or that the Court refused to decide the matter, but if neither of these events took place, a decision by the Court on the matter must necessarily be implied if it was not expressly decided. In the case before us, we have a decree for rent. It is said this did not necessarily require a decision as to the terms of the *patta* or the extent of the land for which the rent was decreed. Is this correct, when the terms of the *patta* or the specification of the extent of the land were impugned? When these questions were raised by the defendant, could the Court pass a judgment for rent in the plaintiff's favour without determining them? The learned Judge seems to proceed on the footing that the question what is necessary to be decided in a suit is to be settled without reference to the pleas raised by the defendant. With all deference, this seems to be an altogether indefensible position.

In *Pahalwan Singh* v. *Maharaja Muheshur Buksh Singh Bahadur* (4), a suit was instituted in the Shahabad Court for recovering certain land as an accretion to the estate of the plaintiff in that suit in the District of Shahabad. The defendant in the suit claimed the land as an accretion to his own estate in the District of Ghazipur. The Courts decided that the land was an accretion to the plaintiff's estate in Shahabad and not to the defendant's estate in Ghazipur. The defendant subsequently instituted a suit in the Ghazipur Court for the land to which the subject of the former suit was found to be an accretion. The Privy Council held that the finding in the earlier suit necessarily decided that the land claimed by the plaintiff in the later suit was in the District of Shahabad and that the Court of Ghazipur had no jurisdiction. It will be noted that the property in the two suits was different. Any plea as to the District, in which the property in the later suit was situated, was not a necessary one, the immediate question in the earlier suit being merely whether the land was an accretion to the property of the plaintiff or of the defendant in the suit; but the parties went to trial on the question whether the land was an accretion to the plaintiff's estate in Shahabad or the defendant's estate in Ghazipur and the issue which arose on their contest was regarded as determining the question in which district the property in dispute in the later suit was situate. Their Lordships observed: "Now, no doubt, it might be possible to suppose cases in which the decision as to the accretion might not necessarily be a decision that the land to which it was accreted was within the local jurisdction of the Court which had dealt with it. But all these questions must be tried with respect to the subject-mattter in the particular suit; and it seems to their Lordships impossible, in construing the section with reference to what was in issue in the former suit, to come to any other conclusion than that the decision did, by necessary implication, find that the green land was within the settled estate of the Maharaja in Shahabad. He came as plaintiff into Court; he claimed the whole of the land as an accretion to his settled estate in Shahabad. From the map and the evidence it is obvious that, if an accretion to his land, it could be an accretion to nothing but the green land. The accretion was found to be an accretion to his land in the settled estate of Shahabad, and that proposition necessarily implied that the green land was a part of the settled estate of Shahabad."

In *Soorjomonee Dayee* v. *Suddanund Mohapatter* (9), the Privy Council held that if

the right to certain property is contested on a ground equally applicable to that and other property, then the decision of the matter will be *res judicata* not only with regard to that property but with regard to all other property embraced by the ground on which the contest is based, and that the pleadings must be referred to to decide what matter was contested between the parties. Their Lordships observe: "In their Lordship's opinion, the effect of the pleadings is that the plaintiff sought, *inter alia*, to set aside the Will on the ground that the testator had not the power to make any of the devises of reality that it contained, inasmuch as he could not devise ancestral real property, and all his real property was in point of law ancestral consisting of such as he had inherited from his father, and such as he had bought out of the income of it .... If both parties invoked the opinion of the Court upon this question, if it was raised by the pleadings and argued, their Lordships are unable to come to the conclusion that, merely because an issue was not framed which, strictly construed, embraced the whole of it, therefore, the judgment upon it was *ultra vires*. To so hold would appear scarcely consistent with the case of *Musammat Mitna* v. *Syad Fuzl Rub* (24), wherein it was held that in a case where there had been no issues at all, but where, nevertheless, it plainly appeared what the question was which was raised by the parties in their pleadings, and was actually submitted by them to the Court, the judgment upon it was valid." This was a decision under Act VIII of 1859, which did not expressly lay down the rule of *res judicata* with regard to an issue in a suit. In *Tiru bhuwan Bahadur Singh* v. *Rameshar Baksh Singh* (25), it was laid down by the Privy Council that the conduct of the parties must be considered in deciding whether an issue was material for the decision in the earlier suit. In *Aghore Nath Mookerjee* v. *Kamuni Debi* (26), Mookerjee and Teunon, JJ., held that if a person, who has no present interest in the bequests contained in a Will, is made a party to a suit which asked for the construction of the Will and the determination of all rights created by it and he takes an active part in the contest relating to the construction, the decision of the Court on the construction would be *res judicata* against him. It is true that it is not always easy to decide what was directly and substantially in issue in a former suit. Issues are often framed by Courts not only on points which are essential for the determination of the actual matter in controversy between the parties but also on subsidiary questions having more or less bearing on the essential points. A decision on such subsidiary questions need not necessarily make the matter raised by them *res judicata* in a subsequent suit where they became material for the decision of the matter then brought under contest. Again, a decision on one of two questions may be enough to determine a contest, but both the questions might be adjudicated on and made the basis of the judgment. In such a case, the matter raised in both the questions would be *res judicata* although if the judgment had been based on one of them alone, the other would not be *res judicata*. Again, suppose a suit is instituted for the recovery of certain properties, the defendant might merely deny the plaintiff's title to those properties and the issues might relate only to the particular properties claimed. In such a case, a pronouncement on points involving both the properties under litigation and other properties might not lead to estoppel by *res judicata*. But suppose the defendant rests his defence on a ground which admittedly covers both the properties claimed by the plaintiff in the suit and other properties as for instance by claiming them all under a Will and the issue as to the Will is decided against him, then in that case if the plaintiff subsequently claims other properties under the Will, the question as to the Will would obviously be *res judicata*. Suppose, again, a plaintiff claims on the basis of his right under a Will some of the properties comprised in it and the defendant contests the genuineness of the Will; the decision of the Court that the Will is or is not genuine will certainly bind both the plaintiff and the defendant in any litigation between the parties with reference to other properties in the will. In a suit for rent for a particular year, it may often not be easy to determine whether any particular question raised relates only to the claim

(24) 13 M. I. A. 573; 15 W. R. (P. C.) 15; 6 B. L. R. 148.

(25) 28 A. 727; 4 C. L. J. 405; 10 C. W. N. 1065; 16 M. L. J. 440; 33 I. A. 156 (P. C.); 3 A. L. J. 695; 8 Bom. L. R. 722; 1 M. L. T. 265; 9 O. C. 377.

(26) 11 C. L. J. 461; 6 Ind. Cas. 554.

made for the year or is one which would affect the right to rent for other years also. The Court has in each case to decide whether the issue covers the plaintiff's right to rent except for the year for which it is claimed. In *Vythilinga Mudaliar* v. *Ramachandra Naicker* (5), cited by Dr. Swaminathan for the respondent, the question raised in the earlier suit for rent was whether the defendant was in possession of all the lands for which rent was claimed. This Court held that any finding on the question would not be *res judicata* in a suit for rent for a subsequent year as the land of which the defendant was in possession might not have been the same in both the years. Mr. Justice Subramania Aiyar, whose judgment was concurred in by Mr. Justice Sankaran Nair, observed, however, that a decision on a point which would affect the right to rent for both the years could not be disputed in the later suit. He observed (page 383): "No doubt, had the decision in the previous suit been to the effect that certain specific parcels constituted part of the *inam*, the choultry in the present suit could not, if it admitted the possession during the period in question here of those parcels, seek to make out that the parcels were not *inam*." *Nil Madhub Sarkar* v. *Brojo Nath Singha* (27) is probably supportable on similar grounds, although some of the observations in the judgment seem to be open to exception. In a very recent case, *Kali Kumar* v. *Bidhu Bhushan* (28), Mookerjee and Teunon, JJ., held that an issue raised on the disputed point in a suit for rent and decided by a Court would operate as *res judicata* in a subsequent suit for rent. Mookerjee, J., considers the point as settled beyond all controversy and refers to *Ekabar Sheikh* v. *Hara Bewah* (29) and *Hara Chandra Bairagi* v. *Bepin Behari Das* (30) in support of his statement. The same view was taken by another Bench of the Calcutta High Court in *Maharani Beni Parshad Koeri* v. *Raja Kumar Chowbey* (31). Sometimes, in a suit for rent by a landlord against his tenant, a third party intervenes and claims the land as his own and it becomes difficult to decide whether a decision in the suit as to the plaintiff's right to rent would be *res judicata* in a subsequent suit regarding the title between the plaintiff in the previous suit and the intervenor. The questions material for deciding a right to rent as against a particular tenant are, of course, very different from the considerations that will arise in a suit for title between rival landlords. If the suit was, in fact, expressly or impliedly allowed to be expanded in character and was regarded also as one for the declaration of the landlord's title as against the intervenor and a decision as to title was arrived at, the finding might be *res judicata* in any subsequent proceedings between the two rival landlords. But a mere decree for rent against a tenant need not amount to any decision in a contest about title. This was the ground on which the decision of the Privy Council in *Run Bahadur Singh* v. *Lucho Koer* (12) proceeded, though estoppel by *res judicata* was avoided in that case on the ground also of the absence of concurrent jurisdiction in the Court that decided the previous suit. In the present case, the question raised in the previous suit, Original Suit No. 430 of 1906, was whether the *patta* tendered was proper. The terms in question did not relate to any incidents special for the year *Fasli* 1314 but to the relationship between the plaintiff and the defendants generally as the owners of *melvaram* and the *kudivaram* interests in the land respectively. Section 4 of the Rent Recovery Act, VIII of 1865, required that the rent payable and all other material incidents of the tenancy should be stated in the *patta* to be tendered to the tenant and according to section 7 of the Act, no suit was maintainable unless the landlord had previously tendered to the tenant such a *patta* as he was bound to accept. The defendants were not bound to accept a *patta* which was incorrect in any particular. If the extent was wrongly stated or the rent was stated to be payable in kind while any portion of it was not, they could refuse to accept the *patta*. The plea raised by them in substance was that there were defects in the *patta* which entitled them not to accept it and that the suit should, therefore, be dismissed. The question, therefore, was whether there were any such defects in the *patta*. The trial would, of course, proceed on the defects which the defendants insisted on. With regard to the issue whether the *patta*

(27) 21 C. 236.
(28) 16 C. L. J. 89; 10 Ind. Cas. 382.
(29) 13 C. L. J. 1; 15 C. W. N. 335; 8 Ind. Cas. 660.
(30) 13 C. L. J. 38; 6 Ind. Cas. 860.
(31) 16 C. L. J. 124; 17 Ind. Cas. 111.

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was proper or not, the defendants were bound to raise all objections that they could to the contents of the *patta*, and if they failed to do so, they must be taken to have raised them and all points that they could have raised must be taken to have been impliedly decided against them. Suppose the defence in this case was that the plaintiff was not the holder at all of the plaint lands. Suppose that though the defendants raised that defence in the previous suit, the matter was not explicitly decided; or suppose they did not raise the defence at all. The question being one which related not merely to the rent for the particular year, 1317, but to the plaintiff's right to claim rent for any year, the matter must be regarded as *res judicata*. It has been established by the cases in this Court that a decision with regard to the proper terms of *patta* to be tendered by a land-holder to his *ryot* for any one year is *res judicata* with regard to subsequent years, unless the terms related specially to the particular year or there was a change in the terms of the tenancy [*Sree Venkatachalapati* v. *Krishna* (32); *Sellappa Chetty* v. *Velayutha Tevan* (33)]. In the latter case, the tenant did not object in the earlier suit to some of the stipulations in the *patta*. It was held by Benson and Wallis, JJ., that estoppel by *res judicata* was nevertheless applicable to the case. Sankaran Nair, J., distinguishes it from the present case on the ground that in both, the suits were to enforce acceptance of *pattas* and not for rent and that the decision that the *patta* is proper would necessarily involve a finding that the lands referred to in the *patta* belong to the plaintiff. But the question raised related to some of the terms of the *patta* only and not to the ownership of the land. The trial of the question as to the ownership of the land in the later suit would not affect the decree in the earlier suit—the cause of action was different. The objections taken in the later suit were not expressly decided in the earlier suit. According to the tests adopted by the learned Judge, *Sellappa Chetty* v. *Velayutha Tevan* (33) must be regarded as wrongly decided. I am of opinion that the principle of that decision is clearly applicable to the present case. In both, the question raised bore on the relationship of the parties, not for the particular year in question in the earlier suit, but subsisting between them during future years also. The defendant raised questions relating to the permanent relationship between the parties. He was entitled to raise them and his pleas, if successful, would be an effective answer to the plaintiff's suit. These are the tests for deciding whether the rule of *res judicata* is applicable. See *Natesa Gramani* v. *Vencatrama Reddi* (34). Assuming, therefore, that the specific objections to the *patta* raised in this suit were not expressly decided in the previous suit, that point is immaterial. It is by no means clear, however, that one at least of the points was not decided. The finding was that the terms of the *patta* "did not contain any objectionable matter." The question as to the extent was certainly raised in the previous suit. There is nothing to show that the Court did not decide everything that was comprised in the written statement of the defendants. The question as to whether the rent was not payable in kind for a portion of the lands was not raised in the written statement. Whether evidence was led with regard to it, it is impossible to say, but the Court was entitled to try the issue as to the correctness of the *patta* on the pleadings in the case; and if any matter of attack with reference to the *patta* was not raised by the defendant, he must be taken to have raised it, for any successful attack of the terms would be a complete defence to the suit for rent. I am of opinion, therefore, that the issue on the question of *res judicata* must be decided in the plaintiff's favour. I cannot agree with the respondent's contention that as the suit for rent related only to the year 1314, the defendant, who resisted the suit on the ground that the terms of the tenancy were not properly embodied in the *patta* tendered by the plaintiff, was entitled to keep back any objections on the ground that it would be profitable to him to do so with respect to that particular year. As the Appellate Court has not disposed of all the questions in the case, the case cannot be finally disposed of here. The decree of this

(32) 13 M. 287.
(33) 30 M. 498; 17 M. L. J. 433; 3 M. L. T. 17.
(34) 30 M. 510; 2 M. L. T. 455; 17 M. L. J. 518.

Court in Second Appeal No. 640 of 1909, and the decree of the lower Appellate Court must be reversed and the appeal remanded for fresh disposal according to law. All costs in this Court must abide the result.

SADASIVA AIYAR, J.—The question for decision in this appeal is whether the defendants, who are tenants under plaintiff, (a landholder), are barred by *res judicata* owing to the decision in a previous suit brought by the plaintiff against them to recover rent for two previous *Faslis* (1314 and 1315) from setting up the contention that the *patta* tendered for the plaint *Fasli* (1316) contained improper terms as to the extent of the lands in defendants' holding and as to defendants' liability to pay *waram* rent for a portion of their holding and that hence they (the defendants) are not liable for the rent of *Fasli* 1316, the present suit having been brought to recover such rent.

2. The former suit brought for the rent of *Faslis* 1314 and 1315 is Original Suit No. 430 of 1906. The *pattas* tendered for those *faslis* contained practically the same entries as are found in the disputed *patta* for *Fasli* 1316. The defendants contended then (see Exhibit C), among other defences, that,—

(*a*) "The *pattas* alleged to have been tendered are not proper" and

(*b*) "The extent of defendant's *jeroyati* land has been very much overstated by plaintiff."

In the present suit also, they put forward the same defences, though they gave more details, *viz.*,

(*a*1) that 3 acres are "cash rent paying lands," and

(*b*1) that the extent of the lands liable to pay rent is 5 acres *plus* 3 acres (and not about 14 acres entered in the *patta*).

3. In the former suit, the very first issue raised the question "whether the *pattas* tendered are proper" and the finding of the Court was as follows :—

"The terms of the *pattas*, Exhibits E and F, do not contain any objectionable matter. I accordingly find the 1st issus in the affirmative." According to section 4 of the Rent Recovery Act VIII of 1865, "the *patta* shall contain.....the local description and *extent of the land*; the amount and *nature of the rent according as the same is payable in money or in kind or by a share of the produce, etc, etc.*" Thus, when the Court in the former suit found no objectionable matter in the *pattas* for *Faslis* 1314 and 1315 and when it found the 1st issue in that case (*viz.*, whether the *pattas* tendered were proper) in the affirmative, it clearly found,

(*a*2) that the nature of the rent payable for the entire lands is *waram* share of the produce as entered in the *pattas*, and

(*b*2) that the extent of the lands liable to pay rent is 14 acres as found in the *pattas*.

The Court, undoubtedly, overruled defendants' contention that the extent was not 14 acres and that the *pattas* were alse otherwise improper. It is not clear whether defendants, at the trial of that suit, prominently put forward the contention that 3 acres of the lands were liable to pay only cash rent and not *waram* produce, but it cannot, in my opinion, be denied that when they attacked the *pattas* as containing improper terms, they were bound to put forward all the grounds on which they attacked the *pattas* as improper and could not be allowed to put forward some grounds of attack alone for one *fasli* and other grounds for other *faslis*. As has been decided in *Vythilinga Mudaliar* v. *Ramachandra Naicker* (5), *Sellappa Chetty* v. *Velayutha Tevan* (33) and *Natesa Gramani* v. *Venkatarama Reddi* (34), a decision as to the standing terms of a *patta* between a landlord and a tenant for one *fasli* is *res judicata* in respect of such terms for all subsequent *faslis*, though, of course, the tenant might prove in a subsequent *fasli* that by the act of God or anything which has subsequently happened (*i. e.*, by proper relinquishment of a portion of his holding, etc.) and which gives him a legal right to have the terms modified, the conditions and terms of the tenancy have been altered.

4. The *pattas* for *Faslis* 1314 and 1315 having been expressly found to be proper *pattas* (that is, to contain the proper extent of land in defendants' holding and proper rates and kinds of rent) in the former suit, the defendants are, in my opinion, clearly barred by *res judicata* from contending that a similar *patta* tendered for plaint *Fasli* (1316) was not a proper *patta*. The learned Judge, whose judgment is under appeal before this Full Bench, held (if I understand

rightly his observations in pages 5 to 8 of his judgment)—

(a) that the question as to the extent of the lands to be entered in the annual *patta* and the kind of rent leviable on 3 acres of the holding was not "directly and substantially in issue" in the former suit, because a decision on the above question was "not essential for the decree that was passed in Original Suit No. 430 of 1906" and was "not essential for the relief finally granted in the former case" as "a decree for rent does not necessarily involve" or "require a decision as to the terms of the *patta* or the extent of the land for which the rent has to be paid;"

(b) that assuming that a decision on that question was essential in the former suit, and assuming, therefore, that "the question must be deemed to have been directly and substantially in issue under Explanation IV to section 11 of the Civil Procedure Code, even though the parties did not raise that question as they were bound to raise it," it did not follow that the question must be deemed to have been "*as a matter of fact*" "heard and decided;"

(c) that in the former suit, the question in the present suit was not 'heard and decided' expressly and 'we are not bound to imply' that it was so decided;

(d) that the 'causes of action' and the 'subject-matters' of the two suits are different;

(e) that it 'is not enough' that 'a determination' in the present suit (about the extent of lands and rate of rent) 'would be inconsistent with the decision in the previous case that the *patta* then tendered was proper' to prevent such determination in the present suit by the bar of *res judicata*, and

(f) that on all the above grounds, the question in the present suit whether the *patta* for *Fasli* 1316 is a proper one is not concluded by the decision in the former suit.

5. A decree for rent between an ordinary landlord and an ordinary tenant may not necessarily involve a decision as to the terms of the lease or as to the extent of land comprised in the lease. But a decision under the Rent Recovery Act VIII of 1865, where the landlord sued for rent on the allegation that the standing terms of the tenancy were contained in the *patta* tendered by him mentioning particular terms and the particular extent of the holding, does, in my opinion, involve and require a decision as to whether the terms of the lease are proper and the extent of land covered by the holding is as alleged in the *patta* tendered by the landlord and hence the reason (a) given by the learned Judge seems to me to fail. The case in *Nil Madhub Sarkar* v. *Brojo Nath Singha* (27), quoted by the learned Judge, is, therefore, not applicable and the earlier case in *Gobind Chunder Koondoo* v. *Taruck Chunder Bose* (23) and the cases in *Venkatachalapathi* v. *Krishna* (32), *Natesa Gramani* v. *Venkatarama Reddi* (34), *Pittapur Raja* v. *Buchi Sitayya* (10) and *Sellappa Chettyar* v. *Velayutha Tevan* (33), also quoted by the learned Judge and referred to by him with approval, seem to me to clearly govern this case.

6. I shall next deal with the argument that even though the question was directly and substantially in issue because the decision involved the finding on that issue, it must also have been heard and decided before it can be deemed *res judicata*. There are, no doubt, observations in *Kailash Mondul* v. *Baroda Sundari Dasi* (14); *Woomesh Chandra Maitra* v. *Barada Das Maitra* (15), and *Rajendranath Ghose* v. *Tarangini Dasi* (17), to the above effect, but, as pointed out by Subramania Iyer, J., in *Arunachalam Chetti* v. *Meyyappa Chetti* (21), if a Court is bound, by Explanation II to section 13 of the old Civil Procedure Code (corresponding to Explanation IV to section 11 of the new Code), to adopt and act upon the fiction that a matter, which might and ought to have been made a ground of defence or attack in the former suit, should be deemed to have been a matter directly and substantially in issue in such suit, that same Explanation necessarily imposes the duty of acting upon the further fiction that that matter was also heard and decided and adjudicated upon in the former suit. Explanation II to section 13 would be meaningless,

as pointed out by the Allahabad High Court in *Sri Gopal* v. *Pirthi Singh* (1), if it were necessary in cases which were covered by it that the matter should have been, as a matter of fact, heard and finally decided in the previous suit. That case in *Sri Gopal* v. *Pirthe Singh* (1) follows the Privy Council cases in *Mahabir Pershad Singh* v. *Macnaghten* (35) and *Kameswar Pershad* v. *Rajkumari Ruttan Keor* (36) and the interpretation of section 13 by the Allahabad High Court in that case was approved and adopted by the Privy Council when the case went on appeal before their Lordships in *Sri Gopal* v. *Pirthi Singh* (2). The cases in *Kailash Mondul* v. *Baroda Sundari Dasi* (14); *Woomesh Chandra Maitra* v. *Barada Das Maitra* (15) and *Rajendranath Ghose* v. *Tarangini Dasi* (17), being opposed to the above decision of their Lordships of the Privy Council, can, no longer, be considered good law. In fact, the Calcutta High Court itself, in *Jamadar Singh* v. *Serajuddin Ahmed Chaudhuri* (19), has virtually dissented from the cases in *Kailash Mondal* v. *Baroda Sunndari Dasi* (14) and *Woomesh Chandra Maitra* v. *Barada Das Maitra* (15). At page 937, one of the learned Judges says [In *Jamadar Singh's* case (19) :—"It is very difficult to see how a matter, which *ex hypothesi* was not before the former Court, could possibly have been heard and finally decided by it; and it seems to me that if this were necessary, the whole of Explanation II (to section 13) would be rendered meaningless." Their Lordships also decided in that case that the decision in *Sri Gopal* v. *Pirthi Singh* (1), is good law and that it is not necessary that the subject-matter of the two suits must be the same before Explanation II (to section 13) can be applied. I might, however, state that this question (*b*) does not really arise in this case because I am unable to agree with the learned Judge whose judgment is under appeal, that the present question was not, as a matter of fact, heard and decided in the former suit. In the statement of facts in the beginning of this judgment, I believe I have shown that the question was really heard and decided as the defendant raised the plea as to the impropriety of the *patta* in the former suit and his plea was expressly overruled. (See *Soorjomonee Dayee* v. *Suddanund Mohapatter* (9), which decides that pleadings must be looked into to understand what was in issue and what was decided in the former suit). The fact that the cause of action and the subject-matters of the two suits are different is immaterial because the only question is whether the decision in the former suit on certain issues of fact is *res judicata* in the present suit and it is not necessary under section 11 that the causes of action and the subject-matters of the two suits should be the same for a decision on issues of fact to constitute *res judicata* in a subsequent suit. Lastly, I am unable to hold that the decision as to the terms of the *patta* in the former suit was on a mere collateral question in the former suit. Section 11 does not use the word 'collateral' but uses the words 'directly and substantially in issue.' The Privy Council case in *Misir Raghobardial* v. *Sheo Baksh Singh* (11) was decided mainly on the ground that the Court which tried the first suit was not competent to try the second suit and hence that the decision of an issue in the first suit was not *res judicata* in the second suit. There is an expression at page 445 of the judgment that the issue decided in the former suit was merely a "collateral" issue, though the facts show that it was a direct and substantial issue. In the *Duchess of Kingston's* case (13), it would seem to have been held that where the Court which decided the first suit was not competent to decide the second suit, the question of fact decided by the former Court, though material for the decision, must be deemed to have been "collateral" to the subject-matter of the first suit. It was with reference to that use of the word "collateral" that the Privy Council held that the Court, which decided the first suit, dealt with that issue only as a collateral issue. If the Privy Council, by their *obiter dictum*, intended to state that the question was not directly and substantially in issue in the former suit, a *dictum* irreconcilable with the Privy Council decision in *Pahalwan Singh* v. *Maharaja Muheshur Buksh Singh Bahadur* (4), such *dictum* must be held to have been overruled by their later decisions already set out including *Sri Gopal* v. *Pirithi Singh* (2). The latest Privy Council case in *Mahomed Ibrahim*

(35) 16 C. 682; 16 I. A. 107.
(36) 20 C. 79; 19 I. A. 234.

Hossain Khan v. *Ambika Pershad Singh* (16), seems to me to be conclusive on the matter, for their Lordships decide that section 13, Explanation II, would bar a defendant who omits to raise a material issue in a former suit when he was a party thereto, even though that issue was not, as a matter of fact, heard and decided in the former suit. The case in *Masilamani Pillai* v. *Tiruvengadam Pillai* (22) seems also to me to be conclusive on this question of *res judicata*. It is, no doubt, not enough to constitute *res judicata* that a *determination contra* in a later suit would be inconsistent with the determination in the former suit; for there is also a further requisite that the Court which decided the former suit should have been competent to decide the later suit. In this case, this latter requisite also is complied with, and I am, therefore, clear that the findings of fact in the former suit are *res judicata*, one of those findings being that the defendants held the extent of lands mentioned in the *patta* tendered to them and are bound to pay rent according to the terms of the said *patta*.

7. I may now refer, shortly, to one important question which was lightly touched upon during the arguments, namely, whether, where the subject-matter of the former litigation and the relief claimed therein were the same as those claimed in the subsequent litigation, the plaintiff can bring two suits on what is put forward by him as two different causes of action. The question does not really arise in this case, but I wish to state that I agree with Subramania Aiyar, J, in *Arunachellam Chetty* v. *Meyyappa Chetty* (21) that Courts should try their best to hold that the causes of action in such cases are substantially the same. I shall here quote West, J.'s observations (quoted also by Subramania Aiyar, J.): "Under systems such as the Roman Law or the English Common Law, in which the development of legal rights and duties has been greatly influenced by the re-action of a highly artificial mode of procedure, appropriate forms of action can be found for nearly all the ordinary cases which the legal consciousness of the community recognises as justifying an exercise of the coercive power of the State; but, as the variety of human relations greatly exceeds that of the conceptions, upon which a system of actions can be framed, it happens that the same transction or group of circumstances may furnish a ground for several different actions. In such cases, different causes of action arise to the party injured; but as it is felt that the same set of facts, which the mind at once grasps as jurally integral, ought not to be made the basis of repeated proceedings, the complaining party is allowed to frame his complaint in various ways, and the rule obtains that all the circumstances which exist when the former of two actions is brought and can be brought forward in support of it, shall be brought forward then, not reserved for a second action arising out of the same events. The cause of action is regarded as identical, though the form of action differs on the second occasion, and the test applied is whether the evidence to support both actions is *substantially* the same [*Hitchin* v. *Campbell* (37): *Martin* v. *Kennedy* (38)]. Under a freer system of procedure, such as that of the Equity Courts in England or of the Civil Courts in India, second suits are to be admitted more sparingly than when the plaintiff has to proceed by set forms of action. As he can bring forward his whole case, unfettered by artificial restraints, and seek all remedies that the Court can justly award upon the facts proved, there is no reason why he should be permitted to harass his opponent and occupy the time of the Courts by repeated investigations of a set of facts which ought all to have been submitted for adjudication at once. His cause of action, into whatever Protean forms it may be moulded by the ingenuity of Pleaders, is to be regarded as the same, if it rests on facts which are integrally connected with those upon which a right and infringement of the right have already been once asserted as a ground for the Court's interference".

I am aware that Benson and Bashyam Iyengar, JJ., in *Ramaswami Aiyar* v. *Vythinatha Aiyar* (39) discuss some of the observations in the decision in *Arunachellam Chetty* v. *Meyyappa Chetty* (21) with disapproval and Subramania Aiyar, J., himself in *Veeranna Pillai* v. *Muthukumara Asari* (40) said that "anything in the language used" by him in *Arunachellam Chetty* v. *Meyyaypa Chetty* (21)

(37) 2 W. Bl. 827 at 831; 3 Wils. 304; Lofft 208.
(38) 2 Bos. & P. 69.
(39) 26 M. 760; 13 M. L. J. 448.
(40) 27 M. 102; 13 M. L. J. 439.

"inconsistent with the view of the law as expounded" in *Ramaswami Aiyar* v. *Vythinatha Aiyar* (39) "can no longer be treated as an authority." I am, however, inclined to hold, with due deference to the contrary opinions, that all the observations in *Arunachellam Chetty* v. *Meyyappa Chetty* (21) as to the scope of the doctrine of *res judicata* are sound law and those observations in *Ramaswami Aiyar* v. *Vythinatha Aiyar* (39), which conflict with the views in *Arunachellam Chetty* v. *Meyyappa Chetty* (21), seem to me to draw rather fine distinctions and, in my humble judgment, would lead to unnecessary and undesirable multiplicity of litigation. However, in so far as any principle in *Arunachellam Chetty* v. *Meyyappa Chetty* (21) is directly inconsistent with the later Full Bench decision of the Madras High Court in *Thrikaikat Madathil Raman* v. *Thiruthiyil Krishnan Nair* (41), [which approves of the decision in *Ramaswami Aiyar* v. *Vythinatha Aiyar* (39), but which does not refer to and do not expressly overrule *Arunachellam Chetty* v. *Meyyappa Chetty* (21), though it expressly overruled only *Rangasami Pillai* v. *Krishna Pillai* (42)], I am not anxious that such directly overruled principle should be again reconsidered. As at present advised, I do not see anything in *Thrikaikat Madathil Raman* v. *Thiruthiyil Krishnan Nair* (41), irreconcilably inconsistent with any observation in *Arunachellam Chetty* v. *Meyyappa Chetty* (21), as two separate mortgages can be separately redeemed, especially if there is an express understanding to that effect between the parties and all that *Thrikaikat Madathil Raman* v. *Thiruthiyil Krishnan Nair* (41) decided was that the failure of a suit to redeem one mortgage is not a bar to a suit to redeem another.

8. I would, for the reasons mentioned in paragraphs 5 and 6 of this opinion, reverse the judgment of the lower Courts and remand the case to the lower Appellate Court for a fresh disposal of the appeal before it, the District Munsif not having decided the questions involved in issues 4 and 5 and the lower Appellate Court also not having considered all the issues. The costs hitherto will abide the result.

Appeal allowed.

(41) 29 M. 153; 16 M. L. J. 48.
(42) 22 M. 259.

OUDH JUDICIAL COMMISSIONER'S COURT.

RENT APPEALS NOS. 62 TO 66 OF 1912.

July 16, 1912.

Present:—Mr. Stuart, J. C.

DEPUTY COMMISSIONER, FYZABAD, FOR NANEMAU ESTATE—PLAINTIFF—APPELLANT

versus

GUR DAYAL SINGH—DEFENDANT—RESPONDENT.

Tenant, holding on after formal ejectment—Oudh Rent Act (XXII of 1886), s. 127.

Where a tenant was ejected formally under the provisions of section 60 of the Oudh Rent Act, but nevertheless continued to cultivate the holding in question without any break for any period, however small:

Held, that the provisions of section 127 of the Oudh Rent Act could not apply to such a case.

Deputy Commissioner of Patrabgarh, Manager of Baragaon Estate v. *Sheoambars*, 1 O. C. 29, followed.

Appeal against the decision of the District Judge, Fyzabad, dated 15th January 1912, upholding that of the Assistant Collector, Fyzabad, dated 13th October 1911.

Babu *N. N. Ghoshal*, for the Appellant.

Babu *Ishri Dayal*, for the Respondent.

JUDGMENT.—The respondents were tenants of the Nanemau Estate. They were served with notices of ejectment in November, 1907. They filed objections to ejectment. On 5th April 1908, the Nanemau Estate took counter-parts from the respondents, and leases were prepared in the respondents' favour, but those leases were never signed by or on behalf of the Estate. On 9th April 1908, the respondents withdrew their objections in Court. They stated that the Estate had come to amicable terms with them and had permitted them to remain on as tenants on leases which had been executed. Nevertheless on 15th May 1908, an application was made on behalf of the Estate, under section 60 of the Oudh Rent Act, to eject these tenants from their holdings and they were ejected accordingly in June 1908. The appellant, who represents the Estate, has since come into Court on the allegations that, although the respondents were formally ejected, they have nevertheless remained in cultivatory possession of the holdings in question. The appellant wants to assess rent upon them and to obtain arrears of rent for the two years 1316-17 *Faslis*. Both the Courts below have decided that rent cannot be assessed in this case under the provisions of section 127 of the Oudh Rent

Act. I concur with their conclusion. The facts show that there has been no period during which the respondents have not been in cultivatory possession of the land. Although they were ejected formally under the provisions of section 60 of the Oudh Rent Act, they have never ceased to cultivate the holdings in question for any period, however small. In the case of *Deputy Commissioner, Partabgarh, Manager of Birigaon* v. *Sheoambar* (1), it was decided by Mr. Spankie, that the provisions of section 127 could only apply to the case of a person wrongfully and unwarrantably entering upon and cultivating the land of a landlord without his consent and not to the case of a person lawfully entering upon the land with the landlord's consent, but remaining on it against his Will. That decision applies to the present case. And, upon the interpretation of the provisions of the section contained therein, it is clear that the rent cannot be fixed against the respondents under the provisions of section 127. As the rent cannot be fixed against them, it is, of course, obvious that a decree for rent cannot be passed against them under the provisions of section 103, clause (2). It would be open to the appellant either to recognise the counter-parts, if the respondents are still ready to abide by their terms, and to treat them as tenants under the terms of the counter-parts, or to sue to eject them from their holdings through the Civil Courts and to obtain mesne profits from them. But I am satisfied that it is impossible to give him any relief upon the claims which he has put in. I accordingly dismiss Appeals Nos. 62, 63, 64, 65 and 66 of 1912 with costs.

Appeals dismissed.

(1) 1 O. C. 29.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 51 OF 1912.

November 15, 1912.

Present:—Sir Henry Richards, Kt., Chief Justice, and Mr. Justice Banerji.

KIRTA KISHEN—PLAINTIFF—APPELLANT

versus

HARNAM CHAND—DEFENDANT—RESPONDENT.

Registration Act (XVI of 1908), s. 32—Presentation for registration—Executant present before Sub-Registrar when document handed over for registration by servant—Presentation, whether valid.

H. executed a mortgage-deed in favour of *K.* The document was handed over to the Sub-Registrar for registration by a servant of the mortgagee. The mortgagor was also present there assenting to the registration of the document:

Held, that the presentation was a valid presentation within the meaning of the Registration Act.

Nathumal v. *Abdul Wahid Khan*, 34 A. 355; 9 A. L. J. 362; 14 Ind. Cas. 812, followed.

Jambu Prasad v. *Aftab Ali Khan*, 34 A. 331; 9 A. L. J. 420; 15 Ind. Cas. 881; *Mujib-un-nissa* v. *Abdur Rahim*, 23 A. 233; 28 I. A. 15 (P. C.); 11 M. L. J. 58; 5 C. W. N. 193; 3 Bom. L. R. 154, referred to.

Second appeal from the decision of the District Judge of Saharanpur, dated the 19th day of July 1911.

Mr. *J. N. Choudhri*, (with him Messrs. *Nihal Chand* and *A. P. Dube*), for the Appellant.

Mr. *B. E. O'Conor*, for the Respondent.

JUDGMENT.—The only question which has been argued in this appeal is whether or not the mortgage sued upon was duly presented and registered in accordance with the provisions of the Indian Registration Act. The document was in fact registered. It has an endorsement that it was presented for registration in the office of the Sub-Registrar. Below this is the name of a person which is variously read as Santha, Nanha, Natha or Sehna. He is described as the servant of the mortgagee. The mortgagor, in answer to the interrogatories served upon him, admits that he was present when the document was being registered and when it was handed over to the Sub-Registrar. He cannot remember apparently who actually handed over the document but he says that some person, whose name probably was Santha, handed over the document. It is clear, however, from the admitted facts in the case that at the time of registration, the mortgagor was present assenting to the registration of the document with full knowledge of what was being done in the office of the Sub-Registrar. The real question for consideration is, whether or not these circumstances amount to a "presentation" within the meaning of section 32 of the Indian Registration Act. Both the Courts below have dismissed the plaintiff's suit on the preliminary point that the mortgage was not duly "presented" for registration There has been some conflict of authority on this question and the point was very fully argued recently before a Full Bench of the

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Court, but unfortunately no decision was pronounced by the Court on the question now before us, the case turning on another point. In the case of *Nathumal* v. *Abdul Wahid Khan* (1), a case, in which the facts were very similar to those of the present case, it was decided that where a person who was authorised to "present" a document for registration was present assenting to the registration, the mere fact that his was not the hand to give the document to the Sub-Registrar did not prevent the document being regarded as duly "presented" within the meaning of section. No doubt, a somewhat contrary view was taken in the case of *Jambu Prasad* v. *Aftab Ali Khan* (2). We think, under the circumstances, we are entitled to consider the question on its merits without feeling bound by authority, particularly as we have had so recently the benefit of the very full argument advanced in the Full Bench case to which we have referred.

The Privy Council decision in the case of *Mujib-un-nissa* v. *Abdur Rahim* (3) has, in our opinion, no application to the circumstances of the present case. In that case, the person who presented the document had been the attorney of a deceased person who wished to execute and register a deed of *wakf*. Before the document was presented for registration, the donor of the power-of-attorney had died. Consequently, the person presenting the document for registration had no authority from any one to present the document, nor was there any other person present who could have legally "presented"|the document for registration. We think that the remarks of their Lordships in this case must be read and understood in connection with the facts of the case which were before them.

Afther full consideration, we see no reason to depart from the view which we expressed in the case of *Nathumal* v. *Abdul Wahid Khan* (1).

We accordingly allow the appeal, set aside the decrees of both the Courts below and remand the case to the Court of first instance through the lower Appellate Court, with directions to re-admit the case upon its original number in the file, and proceed to hear and determine the same according to law. Costs here and heretofore will be costs in the cause. Costs in this Court will include fees on the higher scale.

Appeal allowed; Case remanded.

(1) 34 A. 355; 9 A. L. J. 362; 14 Ind. Cas. 812.
(2) 34 A. 331; 9 A. L. 420; 15 Ind. Cas. 881.
(3) 23 A. 233; 28 I. A. 15 (P. C.); 11 M. L. J. 58; 5 C. W. N. 193; 3 Bom. L. L. 154.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 201 OF 1911.

July 22, 1912.

Present:—Mr. Stuart, J. C.

Saiyad ZAKIR ALI—DEFENDANT—APPELLANT

versus

Munshi GULAB RAI—PLAINTIFF—RESPONDENT.

Contract Act (IX of 1872), *s.* 2 *(d)—Consideration—Forbearance to prosecute appeal.*

A forbearance to continue an appeal against a person on that person's brother agreeing to pay the amount claimed in appeal is a good consideration.

Appeal against the decree of the District Judge, Rae Bareli, dated 11th March 1911, upholding that of the Subordinate Judge of Rae Bareli, dated 17th October 1910.

Babu *Salig Ram*, for the Appellant.

Mr. *Shahanshah Husain*, for the Respondent.

JUDGMENT.—The appellant was defendant in a suit brought in the Court of the Subordinate Judge of Rae Bareli upon the basis of a deed of mortgage, dated 30th July 1907. The learned Subordinate Judge decreed the suit against the appellant. An appeal was filed to the Court of the learned District Judge. He dismissed that appeal. The appellant comes here in second appeal. Three points only were argued on behalf of the appellant. The *first* was, that a portion of the alleged consideration for the deed in question cannot be considered legal consideration. The *second* point was, that the execution of the deed in question had been obtained by the exercise of undue influence on the appellant. The *third* point was, that the burden of proof had been improperly placed by the Courts below. The alleged consideration to which objection is taken is

with regard to an item of Rs. 447-1-9, which, it is alleged, was due from Zohra Begam, sister of the appellant. It appears that the respondent had filed a suit against Zohra Begam with reference to this item and that the suit had been dismissed, but that the respondent had preferred an appeal against the dismissal of the suit against Zohra Begam. The respondent's case is, that the appellant permitted this amount to be entered in the deed and agreed to make himself responsible for the satisfaction of this claim in consideration of the respondent's forbearing to continue his appeal against Zohra Begam. The respondent thus abstained from doing what he had a right to do, and, under the definition of "consideration" in section 2 (*d*) of Act IX of 1872, it appears that the consideration so alleged is a good consideration. I am supported in this view by the decision in *Jogadindra Nath Roy* v. *Chundra Nath Poddar* (1) and the decision in *Orears* v. *Hunter* (2). I find against the appellant on this point.

With regard to the allegation of undue influence, the learned District Judge has found that the appellant's witnesses on this point do not deserve credit. I cannot go behind this finding of fact. Leaving on one side the evidence of these witnesses, the following facts are proved. The respondent is a money-lender and a co-sharer in the village, and the appellant owed him money on more than one account. The brother of the respondent had issued a warrant for the arrest of the appellant in execution of a decree. When an attempt was made to execute this warrant, it was alleged by the process-servers engaged that the appellant had resisted arrest and the Civil Court had thereupon considered whether the appellant should be prosecuted criminally. On the other hand, however, the Civil Court had decided the matter, and had finally decided not to take action against the appellant some time before the deed in question was executed, and at the time when the deed was executed, there were no proceedings for arrest of the appellant pending in the Civil Court. On these facts, I am unable to find that the execution of the deed was caused by undue influence.

(1) 31 C. 242.

(2) 19 Q. B. D. 341; 56 L. J. Q. B. 518; 57 L. T. 554; 35 W. R. 821.

With regard to the question of the burden of proof, the appellant relies on the provisions of section 16 of Act IX of 1872. As I am unable to find on the facts that the respondent was in a position to dominate the will of the appellant, or that the transaction was unconscionable, I find that the burden of proof lay on the appellant.

I, therefore, dismiss this appeal with costs.

Appeal dismissed.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 547 OF 1912.

November 19, 1912.

Present:—Mr. Justice Banerji.

SHYAM CHANDRA SINGH—PLAINTIFF—APPELLANT

versus

BALDEO AND OTHERS—DEFENDANTS—RESPONDENTS.

Mortgage by conditional sale—Foreclosure—Limitation—Regulation XVII of 1806—*Limitation Act (XV of* 1877), *Sch. II, Art.* 147, *scope of—Transfer of Property Act (IV of* 1882).

The limitation for an application for foreclosure under Regulation XVII of 1806 is 12 years.

Article 147, Schedule II, Limitation Act of 1877, applied not to foreclosure proceedings under the Regulation but to such *suits* for foreclosure as under the law then in force could be brought.

Where a right to make an application for foreclosure had come to an end by reason of efflux of time, before the enactment of the Transfer of Property Act, the subsequent enactment of the Act could not resuscitate that right.

Where a mortgage by way of conditional sale, governed by Regulation XVII of 1806, has not provided for possession of the mortgagee, the latter has no right to take possession unless foreclosure proceedings have been taken under the Regulation.

A mortgage by conditional sale, executed in 1865, provided for payment of mortgage-money with interest on 31st March 1866. The mortgagee made no application for foreclosure under Regulation XVII of 1806. In 1910, he brought a suit for foreclosure:

Held, that the suit was barred.

Second appeal from the decision of the District Judge of Jhansi, dated the 30th of January 1912.

Dr. *Tej Bahadur Sapru* (with him Mr. *S. Mushren*), for the Appellant.

Dr. *S. C. Banerji*, for the Respondent.

JUDGMENT.—This was a suit for foreclosure of a mortgage by way of conditional

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sale, dated May 6th, 1865. The amount secured by the mortgage was Rs. 99-13-0. The document provided that the said amount should be re-paid with interest on *Chait Sudi* 15th of the following year, corresponding to March 31st, 1866. The defendants Nos. 1 to 3 are heirs of the mortgagor. The defendants Nos. 4 to 5 are in possession of the mortgaged property under a foreclosure decree obtained subsequently to the date of the plaintiff's mortgage. The present suit was brought on August 4th, 1910, and by it the plaintiff claimed foreclosure of the mortgage and possession of the property comprised in it. The Court of first instance dismissed the suit on the ground that it was time-barred and this decree has been affirmed by the lower Appellate Court. The Courts below were of opinion that as the plaintiff mortgagee did not take possession within 12 years of March 31st, 1865, the claim was barred by limitation. This appeal has been preferred by the plaintiff and it is contended that as the plaintiff could not take possession without obtaining foreclosure proceedings, the fact of his not having taken possession within 12 years, did not deprive him of his right to foreclose the mortgage and to sue for possession. This being a mortgage to which Regulation XVII of 1806 applied, the procedure for foreclosing it was that prescribed by section 8 of the Regulation. Until the mortgage was foreclosed in accordance with the Regulation, the mortgagee's right to possession did not accrue. This was held by their Lordships of the Privy Council in *Hub Ali* v. *Wazir-un-nissa* (1). In that case, their Lordships observed that "there was no right to take possession of the property without the procedure prescribed by law." So that, unless foreclosure proceedings were taken under the Regulation, the mortgagee had no right to take possession. If the mortgage-deed had provided for possession, the mortgagee would have been bound to sue for possession within twelve years and if he did not do so, his right as mortgagee would become extinct and the result would have been that he could not subsequently bring a suit for foreclosure. This was the case in *Srinath Das* v. *Khetter Mohun Singh* (2). The distinction between a case in which the mortgage-deed provided for possession and a case in which the mortgagee could only take possession after getting the mortgage foreclosed by taking foreclosure proceedings under Regulation XVII of 1806, was pointed out in *Modun Mohun Chawdhri* v. *Ashad Ally Beparee* (3). It seems to me, therefore, that the ground on which the Courts below dismissed the suit cannot be supported. The learned Advocate for the respondents, however, contends, that, as, before the passing of the Transfer of Property Act, no suit for foreclosure could be brought and the only remedy of a mortgagee under a mortgage by way of conditional sale was to take foreclosure proceedings under Regulation XVII of 1806, the plaintiff could not maintain his suit unless he had taken those proceedings within the period of limitation applicable thereto, that the period of limitation for such proceedings was 12 years, and as no proceedings was taken within 12 years of March 31st, 1865, the right to foreclosure had become extinct before the Transfer of Property Act came into operation, and the passing of that Act could not revive it. This contention seems to me to be well founded. It has been held by the Calcutta High Court and by this Court, that the limitation for an application for foreclosure under Regulation XVII of 1806 was 12 years. I need only refer to the case of *Karimdad Khan* v. *Mustaqim Khan* (4), in which other cases on the point are cited. Therefore, the plaintiff's right to apply for foreclosure proceedings became extinct on March 31st, 1878. On that date no suit for foreclosure could be brought in respect of a mortgage like the one now in question. It was only upon the enactment of Act IV of 1882 (The Transfer of Property Act) that a suit for foreclosure was provided for. It is true that before the date above-mentioned, Act XV of 1877 was enacted and Article 147 of the Schedule to that Act provided a limitation of 60 years for a suit for foreclosure or sale. But that evidently applied not to foreclosure proceedings under the Regulation mentioned above but to such suits for foreclosure as, under the law then in force, could be brought, as for instance, a suit to foreclosure a mortgage made in the English form. The Article was evidently not enacted

(1) 28 A. 496; 3 C. L. J. 601; 10 C.W. N. 778 (P.C.); 3 A. L. J. 712; 1 M. L. T. 297; 33 I. A. 107.
(2) 16 C. 693; 16 I. A. 85.

(3) 10 C. 68; 13 C. L. R. 51.
(4) 26 A. 4; A. W. N. (1903) 175.

to provide for the case of foreclosure proceedings under the Regulation. Consequently, the plaintiff could not take the benefit of that Article. His right to make an application for foreclosure having come to an end by reason of efflux of time on March 31st, 1878, the subsequent enactment of the Transfer of Property Act could not resuscitate that right and as he could not take possession without obtaining foreclosure in accordance with the provisions of the Regulation, his present claim could not be sustained. On this ground, I would affirm the decree of the Courts below and dismiss the appeal with costs and I order accordingly.

Appeal dismissed.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 263 OF 1911.

July 22, 1912.

Present:—Mr. Stuart, J. C.

SITA RAM AND ANOTHER—DEFENDANTS—APPELLANTS

versus

JAGAN NATH—PLAINTIFF—RESPONDENT.

Specific Relief Act (I of 1877), s. 9—Suit in ejectment by licensee against trespasser, maintainability of.

A licensee of land, if dispossessed by a trespasser, is entitled to maintain not merely a suit under section 9 of the Specific Relief Act, but also a regular suit on the basis of his title as lessee.

Appeal against the decree of the Officiating District Judge, Rae Bareli, dated 17th May 1911, reversing that of the Subordinate Judge, Rae Bareli, dated 8th February 1911.

Mr. *Sidheshwar Banerji*, for the Appellants.

Mr. *Bisheshar Nath*, for the Respondent.

JUDGMENT.—The point argued in this appeal is that the plaintiff-respondent should have brought his suit under the provisions of section 9 of Act I of 1877, and that as his suit was dismissed by the Court of the learned Subordinate Judge, no appeal lay against the dismissal and that, therefore, the reversal of the learned Subordinate Judge's decree by the learned District Judge was illegal. It is clear from the plaintiff-respondent's plaint that he did not bring this suit under the provisions of section 9 of the Specific Relief Act (I of 1877). There is nothing in the plaint to show that he brought his suit under the provisions of that section and the wording of the plaint contradicts any such

supposition. Further, whereas by the provisions of the law, he could have brought a suit under the provisions of section 9 of the Specific Relief Act (I of 1877) on half of the ordinary Court-fee he paid the full Court-fee. I find accordingly that although the plaintiff-respondent could, had he wished, have brought a suit for possession of the property in question under the provisions of section 9 of the Specific Relief Act (I of 1877), he did not bring such a suit, but brought a suit for possession under the ordinary law. It is asserted by the appellants that the plaintiff-respondent had no right to bring a suit under the ordinary law and that his only remedy was to bring a suit under the provisions of section 9 of the Specific Relief Act (I of 1877). The learned Counsel for the appellants has produced no authority in support of this view. The plaintiff-respondent is proved to be a licensee of the land in question and the proposition that a licensee when dispossessed by a trespasser has only the right to bring a suit under the provisions of section 9 of the Specific Relief Act (I of 1877) upon the mere fact of dispossession without stating his title appears insupportable. If that were the law, a licensee, who had been dispossessed by a trespasser, would be debarred from any right of appeal in case the Court found against him on the fact of dispossession. There is, however, nothing to show that the law lays down any such stipulation. This disposes of the main grounds of appeal. It is sufficient to add as to the remainder that the plaintiff-respondent proved clearly his possession within the period of limitation and that the learned District Judge applied the principles of the law correctly.

I dismiss this appeal with costs.

Appeal dismissed.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 638 OF 1912.

November 22, 1912.

Present:—Mr. Justice Chamier.

ROHAN SINGH—DEFENDANT—APPELLANT

versus

Musammat AHSANI BEGAM AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Possession, suit for—Heir of person in possession

RAGHURAJ SINGH *v.* SAHIB DIN.

can sue for possession as against person who shows no better title—Ejectment—Suit to eject trespasser by one of several persons jointly interested.

The heir of a person in possession of property is entitled to bring a suit for possession as against one who can show no better title.

One of several persons jointly interested in land may sue to eject a trespasser where the removal of the trespasser is necessary to give the plaintiff enjoyment of his rights.

Second appeal from the decision of the Subordinate Judge of Farukhabad, dated the 29th of April 1912.

Mr. *S. N. Sen*, for the Appellant.

Mr. *Govind Proshad*, for the Respondents.

JUDGMENT.—This was a suit by one of the widows and the daughter of Qudrat Husain for possession of a *bagh*. The plaintiffs alleged that Qudrat Husain had purchased half the *bagh* by private treaty and the other half at an execution sale, that he had died leaving the plaintiffs as his heirs, and that the defendant had interfered with their possession. The lower Appellate Court has found that Qudrat Husain acquired the *bagh* as stated, that he was in possession of the same within 12 years of the suit, and that he left another widow and a son, whose whereabouts were unknown but whose death had not been proved, but that the plaintiffs as two of the heirs of Qudrat Husain were entitled to a decree for possession of the whole *bagh*.

The first point taken in second appeal is that secondary evidence of the purchase of half the *bagh* was not admissible. It appears to me, on the facts found, that the case falls under section 65 (*a*) or 65 (*c*) of the Evidence Act and that any secondary evidence of the sale was admissible. The Subordinate Judge finds the sale proved and it is not suggested that there is no evidence to support the finding. Next, it is contended that the rights of the original owners of the *bagh* were not transferable. It appears to me that even if they were not transferable, Qudrat Husain, having held possession of the *bagh*, had an interest which devolved upon his heirs and that his heirs are entitled to recover possession against any one who cannot show a better title than they have. The *third* and last point taken is that the plaintiffs are not entitled to recover more than their share of the grove, because the existence of another widow and of a son has been proved. The plaintiffs rely on the decision reported as *Munnu* v. *Nusrat Ullah Khan* (1), which follows a previous ruling of this Court reported as *Hira Lal* v. *Bhairon* (2). It seems to me that the decisions cited do not cover the present case. They amount to no more than this that one of several persons jointly interested in land may sue to eject a trespasser where the removal of the trespasser is necessary to give the plaintiff enjoyment of his rights. In the present case, the plaintiffs have definite shares in the grove of which they can be given possession and, in my opinion, they are not entitled to possession of any larger share. The plaintiffs are, as between them entitled to a 17/48ths share in the grove. I modify the decree of the lower Appellate Court by giving the plaintiffs a decree for possession of a 17/48ths share in the grove. The parties will pay and receive proportionate costs throughout.

Decree modified.

(1) A. W. N. (1901) 36.
(2) 5 A. 602.

OUDH JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION APPLICATION No. 168 OF 1911.

July 30, 1912.

Present:—Mr. Stuart, J. C.

Raja RAGHURAJ SINGH—DEFENDANT—APPLICANT

versus

SAHIB DIN—PLAINTIFF—OPPOSITE PARTY.

Provincial Small Cause Courts Act (IX of 1887), s. 25—Revision—Limitation, question of, whether a good ground of revision.

Section 25 of the Small Cause Courts Act does not give any right of appeal on law or fact and the powers conferred by the section are purely discretionary, not to be exercised unless it appears that some substantial injustice has resulted from the decree of a Court of Small Causes.

An error by a Small Cause Court on a question of limitation does not justify interference by the High Court under the section.

Ram Gopal Jhoonjhoonwala v. *Joharmal Khemka*, 39 C. 473; 15 Ind. Cas. 547; *Raghu Nath Sahai* v. *The Official Liquidator of the Himalaya Bank*, 15 A. 139; A. W. N. (1893) 59, referred to.

Muhammad Bakar v. *Bahal Singh*, 13 A. 277; A. W. W. N. (1891) 80, followed.

Application for revision against an order of the Subordinate Judge, Fyzabad, dated 3rd November 1911, exercising Small Cause Court powers.

NASIR-UD-DIN v. BALLABH DAS.

Babu *Hargovind Das*, for the Applicant.

Babu *Rajeshwri Prasad*, for the Opposite Party.

JUDGMENT.—This is an application under section 25 of Act IX of 1887 for revision of a decree of the Subordinate Judge of Fyzabad in a Small Cause Court case. The first point is that the suit is barred by limitation. It has recently been decided in *Ram Gopal Jhoonjhoonwala* v. *Joharmal Khemka* (1) that an error by a Small Cause Court on a question of limitation does not justify the interference of the High Court under section 115, Act V of 1908, and there is a decision of the Allahabad High Court in *Raghu Nath Sahai* v. *The Official Liquidator of the Himalaya Bank* (2), that an application under section 25, Act IX of 1887, ought not to be entertained except in cases in which a similar application under section 622 of the then Code of Civil Procedure would be allowed. That section corresponds to section 115 of Act V of 1908. This follows a previous ruling of a Full Bench of the Allahabad High Court in *Muhammad Bakar* v. *Bahal Singh* (3) that section 25 of Act IX of 1887 does not give any right of appeal on law or fact, and that the powers conferred by that section are purely discretionary and not to be exercised unless it appears that some substantial injustice has resulted from the decree of the Court of Small Causes. That Full Bench decision does not appear to be considered invariably by applicants for revision of Small Cause Court decrees in this Court. As, upon the merits of the case, it is apparent that no substantial injustice has resulted from the decree in question, I should, in any circumstance, dismiss this application; but, even upon the grounds raised before me there is no reason to suppose that the learned Subordinate Judge made any error either of law or of fact.

This application is dismissed with costs.

Appeal dismissed.

(1) 39 C. 473; 15 Ind. Cas. 547.
(2) 15 A. 139; A. W. N. (1893) 59.
(3) 13 A. 277; A. W. N. (1891) 80.

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL NO. 214 OF 1911.

November 11, 1912.

Present:—Sir Henry Griffin, KT., Judge, and Mr. Justice Chamier.

Sheikh NASIR-UD-DIN—PLAINTIFF—APPELLANT

versus

BALLABH DAS AND OTHERS—DEFENDANTS—RESPONDENTS.

Muhammadan Law—Waqf—Waqif *not owner of property at creation of* waqf—*No subsequent ratification by real owner*—*Validity of* waqf.

A Muhammadan made a *waqf* of property of which he was not the owner at the time of dedication. The true owner did not ratify the *waqf*:

Held, that the *wakf* was invalid under the Muhammadan Law.

First appeal from the decision of the Subordinate Judge of Banda, dated 29th of March 1911.

Mr. *J. N. Choudhari*, for the Appellant.

The Hon'ble Mr. *Sunder Lal* (with him The Hon'ble Mr. *Moti Lal*, Messrs. *Durga Charan Banerji* and *Bajpai*), for the Respondents.

JUDGMENT.

GRIFFIN, J.—This appeal arises out of a suit to enforce a claim under an indemnity bond, executed in favour of one Abdullah by Kishun Chand and Gokul Chand on the 12th of November 1889. On that date, Kishen Chand and Gokul Chand executed a sale-deed of a village named Lasra in favour of Abdullah. The latter apparently had some doubts as to the validity of his vendors' title, for on the same date he took from his vendors an indemnity bond, the conditions of which have given rise to the present suit. By this indemnity bond the vendors undertook to make good to Abdullah the sale price together with any loss he might sustain on account of any defect of title in the property conveyed by the sale-deed. Apparently, Abdullah entered into possession of the property sold and remained in possession until the 27th of May 1897, when he made a dedication of this village along with others for certain religious purposes. Under the *waqfnamah*, he appointed himself the first *mutwalli* and nominated his son, the appellant before us, his successor. In the life-time of Abdullah, *Musammat* Naraini appeared as a claimant of the ownership of the village Lasra. She was the adoptive mother of one Ramgopal, a nephew of Abdullah's vendors. Her suit was decreed by this Court on the 21st of

NASIR-UD-DIN *v.* BALLABH DAS.

December 1905 and *Musammat* Naraini obtained possession of the village Lasra in May 1906. This suit was instituted on the 3rd of August 1910, to recover a sum of Rs. 52,000 on account of the price of the village Lasra and the loss incurred by the plaintiff owing to the village having passed out of his possession. The defendants Nos. 1 to 5 are transferees from the vendors of Abdullah of the village hypothecated under the indemnity bond mentioned above. *Musammat* Naraini, the sixth defendant, is the person who, under a decree of this Court, obtained possession of the village Lasra. The defendants Nos. 7, 8 and 9 are representatives of the vendors. They have not appeared to defend the suit and no relief was asked as against them. Abdullah died during the pendency of the appeal in this Court in the suit brought by *Musammat* Naraini and his son who is the appellant here was brought on the record as his representative. The present suit was defended on various grounds and we are concerned here with two only. The lower Court has upheld the contention of the defendants, *first*, that the *waqf* is invalid and, therefore, the plaintiff is not entitled to maintain the suit, and *secondly*, that Abdullah, the vendee, at the time he created the *waqf*, did not at the same time convey to the *mutwalli* his rights under the indemnity bond. In appeal it is contended that the Court below was wrong in holding that the *waqf* was invalid and that the plaintiff has no right to maintain the suit because the *waqfnamah* contained no mention of a conveyance to the *mutwalli* of the vendee's rights under the indemnity bond. It is further contended that if the present suit cannot be maintained by reason of any defect in the plaintiff's position as *mutwalli*, he ought to be allowed to continue the suit as heir of the vendee Abdullah. This Court, in its decision of the 21st December 1905, held that the sale to Sheikh Abdullah was not a valid sale and that Abdullah was not a *bona fide* purchaser under that sale. The Muhammadan Law on the subject of *waqf*, which it is necessary to refer to in this case, will be found at page 134 of Ameer Ali's Muhammadan Law Volume I: "The subject-matter of the dedication must be the property of the *waqif* at the time the *waqf* is made, that is, he must be in a position to exercise dominion over it. Consequently, if a *waqf* is made by a person of some property of which he is in unlawful possession, but which he subsequently purchases from the rightful owner, such *waqf* is invalid. So also, when a man makes a *waqf* for certain good purposes of land belonging to another, and then becomes the proprietor of it, the *waqf* is not lawful but it would become validly dedicated if ratified by the proprietor. Accordingly, when a person purports to make a *waqf* of property which does not belong to him and such *waqf* is subsequently ratified by the true owner, the dedication is valid." Here it will be seen that Abdullah made a dedication of certain property of which he was not the true owner. There has been no ratification of the *waqf* by the true owner and I am not satisfied that according, to the Muhammadan Law, as set out above the so-called *waqf*, so far as the particular village Lasra was concerned, was valid. I agree, therefore, with the lower Court in dismissing the plaintiff's suit on that ground. I do not consider it necessary to go into the second ground as to what was the exact intention of Abdullah in regard to his rights under the indemnity bond at the time he executed the *waqfnamah*. As to the plea advanced on behalf of the appellant that he should be permitted to continue the suit in his capacity as heir of the deceased Abdullah, I do not think that the request is one which, should be acceded to at this stage of the case. It is not pretended that the plaintiff is the one and only heir of Abdullah and I am not prepared at this stage of the case to allow the plaintiff to continue the suit in an entirely different capacity. In my opinion, the suit was rightly dismissed by the Court below and I dismiss this appeal with costs including fees on the higher scale.

CHAMIER, J.—I agree that the appeal should be dismissed but I should prefer to rest the dismissal of the appeal on the ground that even if the *waqf* was valid, the plaintiff has no right to sue on the deed of indemnity as *mutwalli* of the *waqf*. The right to sue on that deed does not appear to have been transferred to the *mutwalli* for the time being. Under the *waqfnamah*, Abdullah abandoned his title to *Mouza* Lasra, but did not mention, or in any way refer to the deed of indemnity. The right to sue on that deed is not appurtenant to the interest of Abdullah

in *Mouza* Lasra and did not pass to the *mutwalli* for the time being under section 8 of the Transfer of Property Act or under any other provision of which I am aware. If it was intended that the *mutwalli* for the time being should have the right to sue on the deed of indemnity, I can only say that, in my opinion, no such intention has been expressed in the *waqfnamah*. I agree that the plaintiff should not, at this stage, be allowed to convert the suit by him as *mutwalli* into a suit by him as one of the heirs of Abdullah.

BY THE COURT.—The appeal is dismissed with costs including fees on the higher scale so far as defendants Nos. 1 to 5 are concerned.

Appeal dismissed.

MADRAS HIGH COURT.

APPEAL AGAINST ORDER No. 88 OF 1912.

October 17, 1912.

Present:—Mr. Justice Sundara Aiyar and Mr. Justice Sadasiva Aiyar.

P. K. GOVINDAN NAIR AND OTHERS—PETITIONERS—APPELLANTS

versus

P. NARAYANAN NAIR AND OTHEES—RESPONDENTS.

Lunacy Act (XXXV of 1858)—Malabar Law and Usage—Tarwad *property, nature of*—Karnavan *of a Malabar* tarwad, *declaration of, as lunatic—Appointment of manager in his stead—Powers of* karnavan.

The property of a Malabar *tarwad* is not the individual property of the *karnavan* and a manager appointed for him obtains no rights over the *tarwad* property. His powers of management may be modified by a *karar* entered into by the other members of the family. The members concurring with each other may dispose of the property as they please. The right of disposition is the crucial mark of ownership. If any one of the members does not join, the alienation, unless justified by family necessity, would be invalid because the ownership is as much in any one dissenting member as in all the other members together.

No application can lie for a declaration of lunacy of the *karnavan* of a Malabar *tarwad* under Act XXXV of 1858 and for the appointment of a manager in his stead for property other than his separate property. Lunacy of a *karnavan* is a conclusive ground on which the next Anandravan could claim to have the *karnavan* removed. Act XXXV of 1858 cannot be applied to a member of a Hindu *Mitakshara* family who owns no separate property.

Per *Sundara Aiyar, J. Quære*:—Whether the lunacy of a *karnavan* would automatically work a forfeiture of his right of management or whether it would be necessary to get him removed by Court?

Trimbaklal Govandas v. *Hiralal*, 20 B. 659; *In the matter of the petition of Bhoopendra Narain Roy*, 6 C. 539; 8 C. L. R. 30; *Sham Koer* v. *Mohanunda Sahoy*, 19 C. 301; *Virupakshappa* v. *Nilgangava*, 19 B. 309; *Bandhu Prasad* v. *Dhiraji Koer*, 20 A. 400; *Gharib-ullah* v. *Khalak Singh*, 7 C.W.N. 681; 5 Bom. L. R. 478; 30 I. A. 165; 25 A. 407 (P. C.); *Varnakot Narayanan Numburi* v. *Vernakot Narayan Namburi*, 2 M. 328; *Vasudevan* v. *Sankaran*, 20 M. 129; 7 M. L. J. 102; *Narayani* v. *Govinda*, 7 M. 352; *Moidin Kutti* v. *Krishnan*, 10 M. 322; *Kunhichekan* v. *Lydia Arukenden*, (1912) 1 M. W. N. 386; 14 Ind. Cas. 480; 11 M. L. T. 232; *Kalliana Amma* v. *Govinda Menon*, 22 M. L. J. 23; 12 Ind. Cas. 492: 10 M. L. T. 399; 35 M. 649; (1911) 2 M. W. N. 487; *Kenath Puthen Vittil Tavazi* v. *Narayanan*, 28 M. 182; 14 M. L. J. 415; *Gourah Koer* v. *Gajadhar Prasad*, 5 C. 219; 4 C. L. R. 398, *Sheo Nandun Singh* v. *Musammat Ghunsam Kooeree*, 21 W. R. 143; *Musammat Ajhola Kooeree* v. *Babu Digambur Singh*, 23 W. R. 206; *Soobanse Singh* v. *Juggeshur Koer*, 13 C. L. R. 86, referred to.

Appeal against the orders of the District Judge of South Malabar, in Civil Miscellaneous Petition No. 2 of 1912, dated 21st day of February 1912.

Mr. *T. R. Ramachandra Iyer*, for the Appellants.

The Hon'ble Mr. *J. L. Rosario*, for the Respondents.

JUDGMENT.

SUNDARA AIYAR, J.—The application which gave rise to this appeal was one under Act XXXV of 1858 to adjudicate the *karnavan* of a Malabar *tarwad* a lunatic and to appoint a manager for his estate. The application was dismissed by the District Judge of South Malabar, he being of opinion that no application would lie under the provisions of Act XXXV of 1858 to adjudicate a member of an undivided Malabar *tarwad* a lunatic. He did not, on the view he took, consider it necessary to hold an inquiry as to the question whether the *karnavan* was in fact a lunatic or not.

The question for our decision is, whether that view is right. No decision bearing on the precise question has been brought to our notice. The competence of the Court to adjudicate an undivided member of a *Mitakshara* family a lunatic has been considered in some cases. In *Trimbaklal Govandas* v. *Hiralal* (1), it was not necessary for the Court actually to decide the question, an adjudication having, as a matter of fact, been previously made in that case and a manager having been appointed. The question before the Court was whether the manager so appointed, who was another member of the undivided family, was bound to render accounts in accordance with the

(1) 20 B. 659.

provisions of section 17 of the Act. Farran, C. J., and Parsons, J., held that the Court would not make him render an account under the section. At page 666 Farran, C. J., observed: "The Act provides no machinery nor does it confer any power upon the Court to deal with joint family property or interfere in the affairs of a joint family." This observation tends to show that, if the question had actually arisen, the learned Judges would probably have decided that no adjudication could be made with reference to the member of an undivided *Mitakshara* family. In *In the matter of the petition of Bhoopendra Narain Roy* (2), Pontifex, J., observed at page 541: "It has been objected before us, and apparently the Judge seems to have been of opinion, that Act XXXV of 1858 cannot and does not apply to members of a *Mitakshara* family. We are unable, as at present advised, to admit that as a correct proposition. It appears to us that there may be cases where it is essentially necessary that a guardian should be appointed for a member of a *Mitakshara* family as much as for a member of any other family. It is not necessary, however, for us to decide that question, because we think the application fails on other grounds." It was argued before the learned Judges that the application for adjudication in that case was made with a view to enforce partition of the share belonging to the alleged lunatic. Dealing with that argument, the learned Judge observed: "Now, with respect to the supposition of the Judge that these proceedings were taken with the intention of ultimate proceedings for a partition, without deciding whether or not a partition could be had under such circumstances, if the lunatic were declared a lunatic under the Act, it may be not improper to refer to the policy of the Lunacy Enactments in England. Under these Acts, it has always been the policy of the Legislature not to interfere with the course of inheritance of the lunatic's property, and provisions for that purpose have been inserted into these Acts, so that even where it is necessary for payment of debts or otherwise, that the lunatic's real property should be sold, it is provided that the surplus monies should be considered as in the same condition as if invested in land, leaving them heritable as if they were land, possibly, therefore, even if an application for partition were made, it might be refused in accordance with that policy." If the Court would refuse a partition at the instance of the manager of a lunatic, then it is difficult to see what object would be served by the appointment of a manager for his undivided share in the estate.

The learned Judges do not point out in what circumstances it would be permissible to appoint a manager for a lunatic co-parcener of an undivided family. In several cases, the Indian Courts have held that a guardian cannot be appointed under the Guardians and Wards Act for an undivided member of a *Mitakshara* family. See *Sham Kuar* v. *Mohanunda Sahoy*(3); *Virupakshappa* v. *Nilgangava* (4); *Bandhu Prasad* v. *Dhiraji Kuar* (5). That question is really concluded by the opinion of the Privy Council in *Gharib-ul lah* v. *Khalak Singh* (6). Sir Arther Wilson, delivering the judgment of their Lordships in that case, observed: "It has been well settled by a long series of decisions in India that a guardian of the property of an infant cannot properly be appointed in respect of the infant's interest in the property of an undivided *Mitakshara* family. And, in their Lordships' opinion, those decisions are clearly right, on the plain ground that the interest of the member of such a family is not individual property at all, and that, therefore, a guardian, if appointed, would have nothing to do with the family property." These observations are, in my opinion, equally applicable to the appointment of a manager for a lunatic co-parcerner in a *Mitakshara* family. The question then is, can a different view be taken with respect to the *karnavan* of a Malabar *tarwad*? Mr. T. R. Ramachandra Iyer, the learned Vakil who appears for the appellants, has strenuously contended that the *karnavan* should, for all practical purposes, be regarded as the owner of the property and that,

(2) 6 C. 539; 8 C. L. R. 30.

(3) 19 C. 301.
(4) 19 B. 309.
(5) 20 A. 400.
(6) 7 C. W. N. 681; 5 Bom. L. R. 478; 30 I. A. 165; 25 A. 407 (P. C.).

although in theory the property of a *tarwad* may be vested in all its members, the ownership of the others is practically worthless, their substantial rights being confined to the receipt of maintenance and to prevent the *karnavan* from wasting or misusing the property of the *tarwad*. Whatever may be the extent of the *karnavan's* powers of management, I cannot doubt that the *tarwad* property is not, to use the language of the Privy Council, the individual property of the *karnavan*, and that a manager appointed for him will obtain no rights over the *tarwad* property. Observations are, no doubt, to be found in *Varnakot Narayanan Namburi* v. *Vernakot Narayanan Namburi* (7), which might encourage the notion that the property of a *tarwad* is vested in the *karnavan*. The question in that case was whether a decree obtained against a *karnavan* in a properly contested suit would be binding on the other members. It was, with reference to that question, that Kernan, J., observed that the *tarwad* property was vested in the *karnavan* and that he had large powers of dealing with it. This observation was referred to in *Vasudevan* v. *Sunkaran* (8), where also the question was similar to that raised in *Vernakot Narayanan Namburi* v. *Vernakot Narayanan Namburi* (7). Subramanya Iyer, J., observed: "The family property is not liable to partition, except with the consent of all, the right of the members other than the *karnavan*, being practically limited to claim maintenance and to prevent the *karnavan* from wasting or improperly alienating the family property; and the title to hold possession of the estate and to receive and expend its income is vested in the *karnavan*, not by the sufferance of the other members, but of right, which is indefeasible so long as he exercises his functions without injury to the family. Therefore, according to the substantive law to which he is subject, a *karnavan* is necessarily the natural representative of the family in all matters concerning it as between it on the one hand and outsider on the other". These observations, understood with regard to the context, cannot, in my opinion, be taken to lay down that the *karnavan* has any larger right of ownership than any junior member over the *tarwad* property. What is vested in him, according to the learned Judge, is the right "to hold possession of the estate and to receive and expend its income" and this right, he observes, is one not derived by appointment or sufferance of the other members, but under the law of the land. The *karnavan's* power of management, extensive as it may be, is, in my opinion, in no respect different in character from that of the managing member of a *Mitakshara* family. The only difference between the latter and the *karnavan* of a Malabar *tarwad* arises from the fact that partition cannot be enforced except with the consent of all the members. But the substantive right of the *karnavan* in the *tarwad* property is of exactly the same character as that of the managing member of a *Mitakshara* family.

In *Narayani* v. *Gobinda* (9), it was pointed out by this Court that the *karnavan* has no higher rights over the income of the *tarwad* than any other members. The equal ownership of all the members was also recognised in *Moidin Kutti* v. *Krishnan* (10). In *Lunhichekkan* v. *Sydia Arukenden* (11), I have referred to other cases in which the same view was adopted. My observations in *Kallani Amma* v. *Govinda Menon* (12), do not, I think, throw any doubt on the equal ownership of all the members of a *tarwad*. The question in that case was whether the *karnavan* had the right to claim the actual possession and custody of all the property of the *tarwad* against any other members who might take possession of any part of it, and I expressed the opinion that he had the right. There can be no doubt that, both in a Malabar family and in a *Mitakshara* family, so long as it remains undivided, the manager is the person entitled to the actual possession of all the property of the family, although in the case of a *Mitakshara* family, this right is of comparatively small value because a partition could be enforced by any of the co-parceners at his will. The

(7) 2 M. 328.
(8) 20 M. 129; 7 M. L. J. 102.
(9) 7 M. 352.
(10) 10 M. 322.
(11) (1912) M. W. N. 386; 4 Ind. Cas. 480; 11 M. L. T. 232.
(12) 22 M. L. J. 23; 12 Ind. Cas. 492; 10 M. L. T 399; 35 M. 649; (1911) 2 M. W. N. 487.

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case of *Kenath Puthen Vittil Tavazi* v. *Narayanan* (13), merely laid down that the *karnavan* was not bound to account to the other members or to pay them the surplus profits. This really has no bearing on the question of the equal ownership of all the owners. The case cannot be taken to lay down that the *karnavan* himself has any right to use the surplus profits for his own purposes This he has not, as pointed in *Narayani* v. *Gobinda*(9), He has the right to dispose of the income for the benefit of the members of the *tarwad*, and, as the manager, he has considerable discretion in the actual distribution of the income. The right to distribute, however, can be exercised only in the interests of the *tarwad* and of its members, and unequal distribution cannot be supported on the larger right of any one member to the income than of any other. Ordinarily, no doubt the right of a junior member would be to receive maintenance and to prevent waste of the *tarwad* property. But the equal ownership of all is demonstrated by the fact that the members by joining together may divide the property between themselves If a *karnavan* wastes *tarwad* property, it has been held that a junior member may recover the property for the use of the *tarwad*, a position inconsistent with anything but his right of ownership. The *karnavan's* rights of management may be modified by a *karar* entered into by all the members of the family. The members concurring with each other may dispose of the property as they please. The right of disposition is the crucial mark of ownership. If any one of the members does not join in the alienation, unless justified by family necessity, it would be invalid because the ownership is as much in any one dissenting member as in all the other members together.

It is imposible for me to come to any other conclusion than that the property of a *tarwad* is not the *individual* property of the *karnavan* and that is the test, according to the view of the Privy Council, which must decide whether a guardian can be appointed under the Guardians and Wards Act, and, as I take it, a manager under Act XXXV of 1858. As observed by their Lordships, a manager appointed would obtain no right of management over the property of the *tarwad*, but only over the individual property of the lunatic for whom he is appointed. The appointment of a manager, therefore, would be of absolutely no use. If the *karnavan* becomes a lunatic, then the next senior member of the *tarwad* has the right to succeed to the management. How then can the Court displace that right by appointing a stranger? If the Court could appoint a manager it may appoint any one to that position. It is unnecessary to consider whether lunacy would automatically work a forfeiture of the *karnavan's* right of management, or whether it would be necessary to get him removed by Court. It is quite clear that in either case, lunacy would be a conclusive ground on which the next Anandravan could claim to have the *karnavan* removed. Such a right cannot be prejudiced by any appointment of a manager under Act XXXV of 1858. It would, therefore, be absolutely useless to take any proceedings under that Act. It was pointed out that the *karnavan* has large powers and that the powers vested in a lunatic may be exercised by his manager. Apart from the answer already given, namely, that the right of junior members could not be affected by any order made under Act XXXV of 1858. I should observe that a power which may be exercised by a lunatic's manager, must be a power attached to his beneficial estate. See Halsbury's Laws of England, Volume 19, page 449. The right of management of a *karnavan* of a *trawad* and the powers attaching to that right are not incidental to the *karnavan's* beneficial right in the *tarwad* property, but to his being the seniormost member of the *tarwad* or to his being allowed to be the manager by the *tarwad* including the senior most member. His beneficial interest, as already pointed out, is no more than that of any other member and does not carry any powers, which the *karnavan* could exercise in virtue of it.

I am, therefore, of opinion that the order of the lower Court is right and that the appeal must be dismissed with costs.

SADASIVA AIYAR, J.—Twenty-three out of the 28 junior members of a Malabar *tarwad* applied to the District Court of South Malabar under the Lunacy Act (XXXV of 1858) for a declaration that their old *karnavan* (Chathu Nair) was of unsound mind and for the appointment of a manager of his properties and

(13) 28 M. 182, 14 M. L. J. 415.

of a guardian for his person. The District Court refused to grant their prayer and hence they have appealed to this Court.

The alleged lunatic has evidently no property except what he was managing as *karnavan* of the *tarwad*. This application to the District Court was made, not because the bowels of compassion of the petitioners were moved towards their *karnavan* by his alleged lunacy or because they wished to protect the *karnavan* (who has one foot in the grave, being nearly 90 years old). The 4th paragraph of the petition is as follows:—"As the (*tarwad*) properties are not properly managed owing to the *karnavan's* lunacy, "the petitioners are put to great hardship and inconvenience as they do not get their maintenance and other expenses. Besides this, it is likely that the properties to which the petitioners are also entitled will be wasted."

The District Judge's reasons for dismissing the petition are as follows:—"A consideration of the Lunacy Act XXXV of 1858 shows that the property of, which the person alleged to be a lunatic is possessed of should belong to the lunatic and that it is not intended that the Court should deal with joint family property nor interfere in the affairs of a joint family. In *Trimbak Lal Govindas* v. *Hiralal* (1), it was held that the Act provides no machinery nor does it confer any power upon the Court to deal with joint family property or interfere in the affairs of a joint family. In the analogous case of the appointment of a guardian under the Guardians and Wards Act of 1890, it has been held that a guardian cannot be appointed of the property of a minor who is a member of a joint Hindu family governed by the *Mitakshara* Law and possessed of no separate property. *Sham Kuar* v. *Mohanunda Sahy*(3)." "*A fortiori* does this reasoning apply in the case of a *karnavan* of a Malabar *tarwad* in which partition cannot be demanded." "I do not think that it is desirable that the provisions of the Lunacy Act should be invoked to remove the head of a *tarwad* from office when the obvious and ordinary remedy of suing for his removal is available to the members of the *tarwad*. It is not improbable that the petitioners have devised an inexpensive method of attaining their object by means of this petition."

The appellants' learned Vakil attacked the District Judge's above observations at great length but has left me unconvinced that there is any flaw in the reasoning of the learned District Judge, whose language I adopt *in toto*. Act XXXV of 1858 was enacted "to make better provision for the care of the estates of lunatics" and not to enable junior members of a *tarwad* to deprive their *karnavan* of his powers of management by charging him with lunacy. Act XIV and XL of 1858 (which were repealed by the consolidating and amending Act VIII of 1890) were passed in the same year as the Lunacy Act XXXV of 1858 to protect the estates of minors. The analogous provisions in these Acts have been construed as not applying to cases of minors, who are members of a joint Hindu family and whose only property is their undivided share in the joint family property. [See *Gourah Koeri* v. *Gajadhar Prasad* (14); *Sheo Nundun Singh* v. *Musammat Ghunsam Kooree* (15); *Musammat Ajhola Kooeree* v. *Babu Digambur Singh* (16); *Sham Kuar* v. *Mohanunda Sahoy* (3) and *Gharib-ul-la* v. *Khalak Singh* (6)]. A member of a Malabar *tarwad* is in a position worse than that of a male member of a joint Hindu family in two respects:—

(*a*) A *tarwad* member, even if he was the *karnavan*, cannot enforce partition by suit and no partition of *tarwad* property can take place unless by a family arrangement assented to by all the members, whereas a male member of a Hindu co-parcenary can always sue for partition. (The suit can be brought even on behalf of a minor member if the Court could be persuaded that it is for the minor's benefit, viewed in a broad sense, that the suit should be conducted).

(*b*). A *tarwad* member cannot alienate for his own private purposes a particular fraction or share of the *tarwad* property as belonging to him, while a Hindu family co-parcener could do so.

I am, therefore, clear that Act XXXV of 1858 was not intended to authorise Courts to

(14) 5 C. 219; 4 C. L. R. 398.
(15) 21 W. R. 143.
(16) 23 W. R. 206.

entertain proceedings under it in respect of an alleged lunatic who is a member of a Malabar *tarwad*, or of a joint Hindu family and owns no separate property. Though the learned Judges, who decided *Trimbaklal Govindas* v. *Hiralal*(1), say that they 'express no opinion upon this general question', the inclination of their opinion seems clear. I do not agree with the *obiter dicta* in *In the matter of the petition of Bhoopendra Narain Roy* (2) and *Soobanse Singh* v. *Juggeshur Koer* (17), that Act XXXV of 1858 may be applied to a member of a *Mitakshara* family who owns no separate property. I, however, agree entirely with many of the other observations in the first case. One such observation is that sufficient cause must be made out by the petitioners for putting the Lunacy Act into operation against an individual alleged to be a lunatic, such sufficient cause being, not certainly the benefit to the petitioners but, the lunatic's benefit, and "the proper protection and care" of his person and of his properties. In construing the provisions of statutes relating to minors and lunatics, the paramount consideration is the benefit of the disqualified person. I am of opinion that it would be an abuse of the powers granted to the Court by the Lunacy Act to exercise such powers in the interest of persons other than the alleged lunatic. Further, if (as the petitioners alleged) the old *karnavan*, Chathu Nair, has become a lunatic, he has become civilly incapable of holding the office of *karnavan* and the next senior *Anandravan ipso facto* has become the head of the family entitled to possession and management of the *tarwad* properties. Chathu Nair has ceased to possess even the right of management of the family property and the Lunacy Act, which could only be invoked where the lunatic has got property, becomes wholly incapable of application. It was argued that as a *karnavan* who becomes blind does not lose his position merely by reason of his blindness, a *karnavan* who becomes a lunatic does not lose his right to manage as *karnavan*. There is absolutely no analogy between the two cases. A minor or a lunatic cannot be a *karnavan*. If a *karnavan* dies and the next senior male is the minor or a lunatic, he cannot succeed to the office at all, whereas if he is merely blind, there is no legal objection to his succeeding. If his blindness is shown to have led to gross incompetency in management, he might be removed, but a minor or lunatic can never hold the office at all till the minority ceases or the lunacy is cured. Lunacy deprives a man of all legal competence to contract or to manage affairs and the lunacy of even one partner dissolves the partnership [section 254 (1) of the Contract Act]. If the *karnavan* is the agent or *karta* of the *tarwad*, his powers as agent ought to terminate on his becoming of unsound mind (compare the provision in section 201 of the Contract Act, which of course does not directly apply). To hold that a *karnavan*, who can become such only if he is an adult, of sound mind and who has to represent the *tarwad* as its managing member, could continue to be *karnavan* and to possess the powers of representing the *tarwad* when he has become a lunatic, seems to be a contradiction in terms.

In the result, I agree with my learned brother that the appeal fails and must be dismissed with costs.

Appeal dismissed.

(17) 13 C. L. R. 86.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL No. 2030 OF 1907.

July 8, 1912.

Present:—Sir Ashutosh Mookerjee, Kt., Judge, and Mr. Justice Beachcroft.

NANDA GOPAL SINHA ROY AND OTHERS —DEFENDANTS—APPELLANTS

versus

Srimati PARESHMONI DEBI AND OTHERS —PLAINTIFFS—RESPONDENTS.

Hindu Law—Dayabhaga—*Gift of immoveable property by father to daughter at her marriage*—Stridhan —Yautuka—*Death of daughter without male issue—Inheritance—Daughter of daughter—Original owner's sister's son.*

A Hindu governed by the *Dayabhaga* School, executed a deed of gift in respect of certain immoveable property in favour of his daughter on the occasion of her marriage. A clause in the deed ran thus:—"You do remain in possession of the land held by myself down to your sons, son's son and so on in succession. Your sons, son's son, etc, heirs in succession and not your husband or his heirs or any other wife that may be taken by him, shall be competent to own the said property". The daughter died sonless:

Held, that the gift was not limited for the life of the daughter, but was an absolute gift in her favour

NANDA GOPAL SINHA ROY v. PARESHMONI DEBI.

and, therefore, was not defeasible upon her death without male issue; that the intention of the grantor was not to exclude female children of his daughter from the line of succession, and that the daughter of the grantee was entitled to take the property by right of inheritance and not the grantor's sister's son.

Appeal from the decree of the District Judge of Midnapur, dated July 25th, 1907, affirming that of the Sub-Judge of that District, dated February 27th, 1907.

Mr. *C. R. Dass*, Babus *Biraj Mohan Majumdar* and *Suresh Chandra Das*, for the Appellants.

Dr. *Rash Behary Ghosh* and Babu *Surendra Nath Ghoshal*, for the Respondents.

JUDGMENT.—The subject-matter of the litigation which has given rise to this appeal belonged admittedly at one stage to a person of the name of Kali Prosad Singha Roy. On the 4th December 1864, he executed a deed of gift in respect of this property in favour of his daughter, Dhan Kumari Debi, on the occasion of her marriage. The sole question in controversy in this litigation is, whether the property has passed by inheritance to the defendants, the sons of the sister of the original owner, or to the plaintiff, the daughter of the donee. The Courts below have concurrently held in favour of the plaintiff.

In the present appeal, it has been argued by the defendants that the gift in favour of the daughter was limited for her life, and that, in any event, if there was an absolute gift in her favour, it was defeasible upon her death without male issue.

In support of the first contention, reliance has been placed upon two circumstances, namely, *first*, that the grant was for maintenance; and *secondly*, that the gift was by a Hindu to his daughter. In support of the second contention, reliance has been placed upon a clause in the deed of gift which has been rendered as follows:—"You are vested with the right and possession from this day, and you do remain in possession of the land held by myself down to your sons, son's son and so on in succession on payment of the rent thereof. You shall not give up any land comprised within the boundaries in favour of any body. Your sons, son's sons, etc, heirs in succession and not your husband or his heirs or any member of a different family shall be competent to own and hold the said property." In our opinion, there is no substance in either of these contentions.

In so far as the first contention is concerned, we observe that the clause in the deed of gift upon the construction whereof the decision of this appeal really depends, stands in the vernacular as follows:—*Tomakay dan karilam. Adyakar tarikh haitay tumi svatvadhikari hailay. Uhar rajasva malguzari sarbaraha kariya putra pautradi kramay amar dakhali jamitay svatvaban o dakhalikar thakibay. Chowhaddir madhye jote kahakayo chharia dibayna. Ar ai bastutay tomar putra pautradi waris bhinna tomar svasmir kingba tihar waris othaba anya paribar svatvadhikari haibay na.* Now, it may be conceded, that a grant for maintenance is presumably intended to continue for the life of the grantee. This is indicated by the decisions in the cases of *Ram Chandra* v. *Jogendra Nath Banerji* (1); *Rameshar* v. *Gobardhan Lal* (2); *Bhujanga Rau* v. *Ramayamma* (3); *Rameshar Bakhsh Singh* v. *Arjun Singh* (4) and *Rama Chandra Naiker* v. *Vijayaragavulu Naidu* (5). The rule, however, is not inflexible; and, if there is any indication to the contrary, for instance, if by express terms a right of alienation has been vested in the maintenance-holder, as in the cases of *Jogeswar Narain Deo* v. *Ram Chandar Dutt* (6) and *Saroda Sundari* v. *Kristo Jiban Pal* (7), or if the maintenance holder has been expressly constituted a full owner as in the case of *Moti Lal Mithalal* v. *Advocate-General* (8), the grant must be deemed permanent, although it may be for the purpose of maintenance.

It need not also be disputed, as pointed out by their Lordships of the Judicial Committee in the cases of *Moulvi Mahomed Shamsool Hooda* v. *Shewak Ram* (9) and *Radha Prasad Mallik* v. *Ramimoni Dassi* (10), that when a deed of gift by a Hindu in favour of his daughter or any other female relations has to be construed, it must be borne in mind that a Hindu is ordinarily aware that a woman takes only a limited interest under

(1) 4 C. L. J. 399.
(2) 7 C. L. J. 202.
(3) 7 M. 387.
(4) 23 A. 194; 28 I. A. 1 (P. C.).
(5) 31 M. 349; 4 M. L. T. 198.
(6) 23 I. A. 37; 23 C. 670.
(7) 5 C. W. N. 300.
(8) 35 B. 279; 13 Bom. L. R. 471; 11 Ind. Cas. 547.
(9) 2 I. A. 7; 14 B. L. R. 226; 22 W. R. 409.
(10) 35 C. 596; 8 C. L. J. 48; 12 C. W. N. 729 (P C.); 10 Bom. L. R. 604; 5 A. L. J. 460; 18 M. L. J. 287; 35 I. A. 118.

the Hindu Law and that his desire presumably is that his estate should not pass out of his family and be vested in a different family. This rule again is not inflexible and it cannot be disputed that if there are appropriate words in the deed of gift, although it may be in favour of the daughter or of the wife, it may have to be treated as a gift in perpetuity. [*Suraj Mani* v. *Rabinath Ojha* (11); *Thakur Parshad* v. *Jamni Kunwar* (12)]. Now, in the case before us, the gift is made in favour of the daughter, and, at the same time, it is expressly stated that it is to be held by her down to her sons, son's sons etc., and so on in succession. These words create a permanent estate, as is clear from the decision of their Lordships of the Judicial Committee in the cases of *Ramlal Mukerjee* v. *Secretary of State for India in Council* (13) and *Lalit Mohun Singh Roy* v. *Chukkun Lal Roy* (14). The first contention of the appellant, therefore, that this was intended to be a grant of a life-interest in favour of the daughter cannot possibly be supported.

In so far as the second contention is concerned, it has been argued that the intention of the grantor was that the daughter should take an estate defeasible upon her death without male issue. In support of this contention, reliance has been placed upon the decision of the Judicial Committee in the case of *Bhoobun Mohini Debia* v. *Hurrish Chunder Chowdhry* (15) and reference has been made to the clause in the deed of gift already quoted. It has also been argued that even though the grantor expressly stated that, the property was not to descend in a particular line, effect cannot be given to such an intention unless there has been a valid prior disposition. This last contention is, undoubtedly, sound, as is clear from the observations of their Lordships of the Judicial Committee in *Jatindra Mohan Tagore* v. *Gonendra Mohan Tagore* (16). But, in the case before us, it is impossible to construe the deed of gift in the way suggested by the appellant. It will be observed that the vernacular words "*Tomar swamir kimbi tahar waris athaba anya paribar swatwadhikari haibeni*" have been translated as "Your husband or his heirs or any member of a different family shall not be competent to own and hold the said property." The learned Judges in the Courts below have expressed the opinion that this interpretation is not quite intelligible and that it is rather difficult to say what is meant by *paribar*. In our opinion, it is fairly clear that "*anya paribar*" means "another wife" of the husband of the donee. What the grantor evidently intended was that the daughter should take an absolute estate descendible to her children; but that, in the event of her death without children, the property should not; in any event; pass to her husband or to any other wife of her husband, or to the members of her husband's family. But even if we do not interpret the word *paribar* as meaning another wife of the husband of the grantee, it is quite clear that the object of the donor was that the property should not, upon the death of the donee, pass to her husband or his representatives. The object of the grantor is obvious; and that this was the true object, becomes fairly clear when we remember the law of succession in relation to *stridhan* property. Under the Bengal School of Hindu law, in respect of the *yautuka* property of a woman, who dies without children, the very first heir is the husband. The grantor, therefore, laid down that if his daughter should die without any children, the property should not be taken by her husband or his heirs and certainly not by any second wife that might be taken by him. Under these circumstances, we are of opinion that the intention of the grantor was not to exclude female children of his daughter from the line of succession, as has been contended by the appellant. Whether having made an absolute gift in favour of his daughter, he could validly impose such a restriction is a matter which need not be considered on the present occasion. It is clear that the plaintiff, as the daughter of the grantee, is entitled to take the property by right of inheritance. The second ground, therefore, fails.

The result is that the decree of the District Judge is affirmed and this appeal dismissed with costs.

Appeal dismissed.

(11) 30 A. 84; 5 A. L. J. 67; 18 M. L. J. 7; 12 C. W. N. 231 (P. C.); 10 Bom. L.R. 59; 7 C. L. J. 131; 3 M.L. T. 144; 35 I. A. 17.
(12) 31 A. 308; 6 A. L. J. 420; 2 Ind. Cas. 474.
(13) 8 I. A. 46 at p. 61; 7 C. 304; 10 C. L. R. 349.
(14) 24 I. A. 76 at p. 88; 24 C. 834; C. W. N. 387.
(15) 5 I. A. 138 at p. 144; 4 C. 23; 3 C. L. R. 339.
(16) 9 B. L. R. 377; 18 W. R. 359; I. A. Sup. Vol. 47.

S. N. DAR
Vakil High Court.
SRINAGAR (Kashmir)

MADRAS HIGH COURT.

SECOND CIVIL APPEALS NOS. 325, 399, 311 AND 326 OF 1911.

October 25, 1912.

Present:—Mr. Justice Sundara Aiyar and Mr. Justice Sadasiva Aiyar.

IN NOS. 325 AND 399

SESHAGIRI AIYAR AND ANOTHER—APPELLANTS

versus

TIRUMALAI AMBALAM AND ANOTHER—RESPONDENTS.

IN NO. 311

SANKARAMA IYER AND ANOTHER—APPELLANTS

versus

SESHAGIRI AIYAR AND OTHERS—RESPONDENTS

IN NO. 326

SESHAGIRI AIYAR AND ANOTHER—APPELLANTS

versus

SANKARAMA AIYAR AND OTHERS—RESPONDENTS.

Service inams, *grant of—Construction of grant—* 'Sudda Inam', *meaning of—Grant of* melvaram *right —Enfranchisement of service* inams, *effect of—Abandonment by Government of right of resumption—Madras Act (II of* 1894).

The expression '*Sudda inam*,' appearing in a deed of grant of a service *inam*, does not show that the *inam* consisted of the land itself and not merely of the *melvaram*. The meaning of the expression is merely that there is nothing payable to Government in consideration of the *inamdar's* possession of the land.

The effect of the enfranchisement of a service *inam* under Madras Act II of 1894, where the Government merely gives up the right of resumption possessed by it and does not resume the *inam*, is that the title rests where it was before.

Second appeals against the decrees of the District Court of Madura, in A. S. Nos. 148, 154 and 155 of 1910, presented against those of the Additional District Munsif of Madura, in O. S. Nos. 17 and 16 of 1909, respectively.

FACTS.—Plaintiffs sued to recover possession of the suit land free from interference and obstruction by the defendants and with damages Rs. 160 for *Faslis* 1316 and 1317, or, in the alternative, for a declaration that, in case it be found that one-half of the *melvaram* produce alone of the suit land appertained to the 1st plaintiff's *karnam miras*, the plaintiffs were entitled to receive the *melvaram* produce accordingly and for a direction to the defendants to pay to plaintiffs Rs. 160 for the damages of *Faslis* 1316 and 1317 with costs of suit.

2. It was set forth in the plaint that the suit land and some other lands were given away by Karnatic Kings as emoluments of the *karnam miras* of Sathamangalam, a Jari village in the Madura *Taluk*, and enjoyed by plaintiffs' forefathers and then by the 1st plaintiff's father and after him on hereditary right by 1st plaintiff, that the suit land was leased out to defendants Nos. 1 and 2 on condition of paying to plaintiffs one half of the produce of the land remaining, after deducting the cultivation expenses and the *varam* due to defendants, that accordingly these defendants had been giving the *varam* annually to plaintiffs from 1902 when 1st plaintiff took charge of the *karnam* work after the demise of his father, up to February 1906, that when the *Inam* Deputy Collector came to the village for enfranchisement, these defendants made an untrue statement to the effect that these plaintiffs are entitled to the *melvaram* of the suit land (*i.e.*, one half of the produce) and that the then Deputy Collector ordered the issue of a joint title-deed in the names of these defendants, who were only cultivating for *varam* under the plaintiffs and that upon the plaintiffs appealing to the *Inam* Commissioner, the Commmissioner passed an adverse order on 6th November 1907. It further set forth that the above order was not valid as against the exclusive right of the plaintiffs to the suit land, that the defendants were bound at least to deliver to plaintiffs the *melvaram*, *i.e.*, a moiety of the produce at least, if it be held that the plaintiffs are entitled to such shares, that the defendants have not paid the *varam* due to plaintiffs under the lease since *Fasli* 1316 (February 1907) probably with the idea that they have obtained a new title to the land under the title-deed issued by the Deputy Collector and have not agreed to surrender the land to plaintiffs for cultivation.

The 3rd defendant was impleaded, as the 2nd defendant, subsequent to the said title-deed, conveyed *benami* to the 3rd defendant, one half of the western portion of the suit land, fully conscious of his defective title newly created. Cause of action arose on 6th

SESHAGIRI AIYAR *v.* TIRUMALAI AMBALAM.

November 1907, when the plaintiffs became aware of the *Inam* Deputy Collector's order.

3. The 2nd defendant allowed the suit to proceed *ex parte*.

4. Defendants Nos. 1 and 3 by Pleader ignored the plaintiffs' exclusive right to the land at any time and the lease set up by the latter in favour of the former. They also took objection to the so-called *benami* sale to the 3rd defendant, as set forth in paragraphs 9 and 10 of the plaint, and stated that the suit was bad for misjoinder of parties and causes of action, that the *melvaram* alone appertained to the *karnam miras*, that in *kudivaram* $\frac{1}{4}$ *kanwnies* of the eastern portion of the suit land were purchased on 22nd January 1900 from the owner of the *kudivaram* right with a *bona fide* intention and for valuable consideration and with 1st plaintiff's father's attestation to the document, that they have been in the enjoyment of this land ever since the purchase, that the remaining portion in the *kudivaram* belonged to the 2nd defendant by ancestral right, and that after the *melvaram* was enfranchised, he (2nd defendant) had the exclusive right to both the *kudivaram* and *melvarams*, which were subsequently sold to 3rd defendant for proper consideration and with a *bona fide* intention, that if it be held that both *varams* were *inams* of the *karnam mirasi*, the plaintiffs were estopped from filing this suit in a Civil Court under section 21 of the Madras Act III of 1895, that if it be held that the plaintiffs are entitled to the *melvaram*, their right was not sustainable under section 30 of the Madras Act II of 1894, as they claimed *melvaram* subsequent to the *Inam fysal* which was, in no way, irregular and fraudulent, that the suit was barred as it was brought one year after the title-deed, dated January 1906, that it was bad for misjoinder of the *Inam* Commissioner as a party to the suit, that the plaintiffs were not entitled to damages and that the damages claimed were excessive.

5. The following issues were recorded:

(*i*) Whether defendants are in possession under separate rights and whether the suit is bad for misjoinder of parties and of causes of action?

(*ii*) Whether the plaintiffs are entitled to the *kudivaram* as alleged in the plaint?

(*iii*) Whether the plaintiffs have been in possession of the *kudivaram* right at any time within the statutory period?

(*iv*) Whether the suit in this Court is barred under Madras Act III of 1895?

(*v*) Whether the plaintiffs' claim to the *melvaram* after the enfranchisement is barred by section 30 of Madras Act II of 1894?

(*vi*) Whether the suit is unsustainable so long as the *Inam* Commissioner's order is not cancelled?

(*vii*) Whether the suit is time-barred as not having been brought within a year from the date of the said order?

(*viii*) Whether the suit is bad for non-joinder of the *Inam* Commissioner?

(*ix*) Whether the plaintiffs are entitled to any and what damages?

(*x*) Whether the plaintiffs are estopped from bringing the suit as pleaded in paragraph 10 of the written statement?

The District Munsif found that plaintiffs were entitled to both the *kudivaram* and *melvaram* and decreed possession of the land to plaintiff.

On appeal, the District Judge reversed the Munsif's finding and held that the plaintiffs were entitled only to the *melvaram* in the following

JUDGMENT.—Appeal Suit No. 148 of 1910 is an appeal by the defendants Nos. 1 and 3 from the decree in Original Suit No. 17 of 1909 on the file of the lower Court, and the plaintiffs have filed an objection memo. Appeals Suits Nos. 154 and 155 are cross-appeals by the plaintiffs and defendants Nos. 1 and 2, respectively, in Original Suit No. 16 of 1909 on the file of the lower Court. These suits are closely connected with each other and refer to certain items of land, which were originally classed as "*karnam manibham*" or *karnam* service *inam* in the village of Sathamangalam, and have been recently enfranchised by the Revenue Authorities in the names of defendants in Original Suits Nos. 16 and 17 of 1909. The plaintiffs in both the suits are the present *karnam* of the village and his minor son. They sue

both for the *kudivaram* and *melvaram* rights in the items and contend that they should not have been enfranchised in the names of any of the defendants in the two suits.

2. The District Munsif has clearly made certain mistakes of law in his judgment. In paragraph 19 in his judgment in Original Suit No. 16 of 1909, he applies the ruling in *Venkatanarasimha Naidu* v. *Damdamudikatyya* (1) to the suit land, whereas that ruling has only application to lands in *zemindaris* and not to lands like the suit lands which are service *inams*. The ruling in *Marapu Tharulu* v. *Telukula Neelakanta Behara* (2) applies to an *inam* of this kind.

3. Another mistake which the District Munsif has made is that he seems to think that the possession of a tenant or his alienee becomes adverse to that of the landlord as soon as the tenant executes a document, which shows that he claims an adverse title. This is the principle on which the District Munsif has held in Original Suit No. 16 of 1909 that the plaintiffs have lost the *kudi* right in the items covered by that suit and have not lost it in the items covered by Original Suit No. 17 of 1909. In coming to these conclusions, the District Munsif has clearly overlooked the ruling in *Srinivasa Ayyar* v. *Muthusami Pillai* (3), where it is clearly laid down that "a tenant repudiating the title under which he entered becomes liable to immediate eviction at the opinion of the landlord, but that until the landlord indicates that he intends to exercise his option, the tenancy subsists."

4. The District Munsif, in my opinion, is further mistaken in his finding of fact on issue No. 2, which raises the question whether the original grant of the service *inam* consisted of the rent of the land only or of the land itself free of assessment. According to the plaintiffs' case, the *inam* was granted by the Carnatic Kings. There is no document to evidence the original grant. The earliest documents, which have been properly proved and which have any reference to these lands, are Exhibits B and B-1, *Jamabandi Chittas* for *Faslis* 1211, 1212. These were prepared long after the original grant. In these documents, the suit lands are described as Kanakku Subbier's rent-free *inam*. Exhibit B-2 is an extract from the Olugu account for *Fasli* 1215, which merely shows the areas of the plots and the measurements. Exhibit B-3 is the *inam* statement put in by Subbier for *Fasli* 1217 and shows the total extent of the lands in *cawnies* together with assessment. Then later on, we get Exhibits M and C which are respectively extracts of the *inam* statement and the *Inam* Register of the village which were prepared in 1863. These documents give the same extent and assessment of the lands. In column 6 of Exhibit C, reference is made to the *Chittas* of *Faslis* 1212 and 1217, and it is said that the grant is tax-free.

5 The District Munsif has assumed that the land itself must have formed the subject of the grant, because these documents describe the suit land as an *inam* and contain no mention of the fact that only the assessment of the land constituted the *inam*. The District Munsif in coming to this conclusion has overlooked the rulings which he himself quotes in paragraph 19 of his judgment from which it is clear that *prima facie* such *inams* should be taken to be assignments of the State share in the lands, *i.e.* of the assessment only. He has also overlooked the caution contained in the preamble to the Madras Inams Act VIII of 1869, in which it is remarked that "the terms of title-deeds granted by the *Inam* Commissioner in many cases appear to convey more extensive rights than could be legally given." The Act, therefore, provides that anything contained in any title-deed shall not be deemed to define, limit, infringe or destroy the rights of any description of holders or occupiers of the land or to affect the interests of any person other than the *inam* holder under the title-deed.

6. It was contended for the plaintiffs that because Exhibit B-3 and the subsequent documents, Exhibits M and C, show the assessment on the land was fixed, the assessment alone could not have constituted the *inam*; because if that were so, the *inamdars* would have been entitled to collect that assessment only and nothing more from the occupiers, whereas the defendants admit that they have

(1) 20 M. 299.
(2) 30 M. 502 at p. 503; 2 M. L. T. 470.
(3) 24 M. 246 at p. 250.

been paying half the produce as *melvaram* to the *inamdars*, *i. e.*, plaintiffs. This contention, however, entirely overlooks the fact that there is nothing to show that any assessment was fixed on the lands at the time of the original grant. It is true that even the earliest documents, B and B-1, refer to "*panams*" which seem to be the assessment on the land, but these documents are as recent as 1802 and the grant was made long before that time. It is a matter of common knowledge that money assessments were not in existence in early times in this district. It is probable that, in the time of the Carnatic Rulers, the State took as its share a portion of the produce, and that the grantees of the *inam* continued to take that share, although money assessments were fixed for lands in the village subsequently and the assessment which *inam* lands would be liable to, if not rent-free, was at that time entered in the registers. The argument of the plaintiffs' Pleader, that because a money assessment is mentioned in the accounts and because the plaintiffs have admittedly not been receiving that assessment but *melvaram* from the occupiers, the land must, therefore, have been granted as service *inam*, entirely falls to the ground. When the State share in land was granted as *inam*, the State had no longer any concern with the occupiers or *kudivaramdars* of the lands, and there was, therefore, no necessity to refer to them in the old accounts. The area and description of the land was entered in the accounts; the assessment it would bear if the assessment had not been granted as *inam* was also entered and the name of the *inamdar* was then entered. No other entry was necessary. No presumption arises from such entries that there were no *kudivaramdars* on the land having occupancy-rights. The State had nothing to do with these men after granting its share in the land to the *inamdar*, who had to make his own arrangements to get his share from the occupiers. There was no necessity, therefore, for the State account to refer to these occupiers at all.

7. Plaintiffs also rely on two old documents, Exhibits P and P-1, to show that the ancestor of Subbier was a cultivating tenant of the suit land at one time. I hold that these documents have not been proved to be public documents or to have come from proper custody and I reject them. The District Munsif himself has not based his judgment upon them. The burden of proving that the land itself constitutes the *inam* lies heavily on the plaintiffs, and not only do the admissible documents, [which] they rely on, not establish this fact, but it is clear from the 1st plaintiff's admission in Exhibit VII that he had no idea of putting forward such a case when he made the statement, Exhibit VII, on the 8th August 1905. It was only subsequently, when he learnt that the Revenue Authorities were going to enfranchise the *inams* in favour of the *kudivaramdars*, that he changed his attitude and contended that he was the owner of the *kudivaram* and not merely a *melvaramdar* as he admitted in Exhibit VII.

8. Further in his evidence, the 1st plaintiff admits, as pointed out in paragraph 29 of the District Munsif's judgment in Original Suit No. 16 of 1909, that he does not know how the defendants or their ancestors got into possession of any of the suit lands. The defendants in Original Suit No. 16 have been dealing with the *kudi* right as their own under Exhibits VI series so long ago as 1872. The mere fact that they refer to their right in the land as "Olavadai right" in Exhibit VI-b cannot be taken as an admission that they had no occupancy-right and were tenants-at-will, for, there is evidence to show that there is some doubt as to what the *ryots* mean by the expression "Olavadai right."

9. I should also observe that Exhibits O series, on which the District Munsif relies to prove the plaintiffs' right to the *kudivaram* right throw, no light on the subject. P. W. No. 1, the *hakdar* of the village, admits in his evidence that land-cess *pattas* like Exhibit O series, are always issued to the *melvaramdar* whether he has a *kudi* right or not.

10. In both the suits, I hold that the plaintiffs have not proved their title to the *kudivaram* right and are not entitled to oust the defendants from possession.

11. It was contended by the defendants' Vakil that as the *inams* are enfranchised and as a separate salary has been fixed for the *karnam*, the plaintiffs are entitled to nothing and that the *inam* title-deeds have been

rightly issued to the defendants. This contention is, however, clearly untenable and there is nothing in the Land Estates Act to support it. The effect of the enfranchisement of a service *inam* is clearly laid down in *Gunnaiyan* v. *Kamatchi Ayyar* (4). When it is enfranchised by the imposition of a quit-rent, the resumption by Government simply consists of so much of the assessment as is equal to the quit-rent, neither the land nor the assessment in excess of the suit rent being resumed. The enfranchisement only converts the *inam* into ordinary property. The *inam* title-deeds should clearly have been granted in this case to plaintiffs' family, who were the grantees of the *inam* and not to the occupying tenants. I agree with the District Munsif that it was not necessary for the plaintiffs to join the *Inam* Commissioner as a party to the suit or to pray in this suit for the cancelment of the *Inam* Commissioner's order. All that need be determined in these suits is the relative rights of the plaintiffs and the defendants in the suit lands. The plaintiffs are at liberty to obtain from the Revenue Authorities the grant of the necessary title-deed enfranchising the *inam* in their names.

12. In the result, I hold that in both the suits, the plaintiffs are entitled to the *melvaram* right and to collect *melvaram* from the defendants at the same rate as they have been hitherto collecting it subject to the payment to Government of the quit-rent fixed when the *inam* was enfranchised.

13. The District Munsif has disallowed the plaintiffs' costs on the ground that it was the misleading statement of the 1st plaintiff in Exhibit VII which led to the mistake committed by the *Inam* Commissioner and to the necessity for these suits. I am unable, however, to take this view. I think the plaintiff's original statement, Exhibit VII, represents what is really the fact, *viz.*, that he and his son are only *melvaramdars* of the suit land. The mistake in the issue of the *inam* title-deeds has been made by the Officers of the *Inam* Department. Although the plaintiffs have claimed too much in these suits by setting up a title to the land itself as well as to the *melvaram*, the defendants have also unreasonably opposed the plaintiffs' claim by contending that they had a right to nothing. I think the fairest way, therefore, would be to allow the plaintiffs proportionate costs throughout and direct the defendants to bear their own costs throughout.

14. In the result, the decrees of the lower Court will be modified in accordance with the above findings and in other respects they are confirmed and the appeals and the memorandum of objections dismissed.

The parties appealed to the High Court.

(IN Nos. 325, 326)

Mr. *S. Srinivasa Aiyar*, for the Appellants.

Mr. *C. V. Anantakrishna Aiyar*, for the Respondents.

(IN Nos. 311 and 399)

Mr. *C. V. Anantakrishna Aiyar*, for the Appellants.

Mr. *S. Srinivasa Aiyar*, for the Respondents.

JUDGMENT.

(IN SECOND APPEALS Nos. 325 AND 326 OF 1911).

So far as the principal question in Second Appeals Nos. 325 and 326 of 1911 is concerned, we see no reason to differ from the finding arrived at by the lower Appellate Court; the expression '*Sudda inam*' occurring in the documents referred to by the Appellate Court does not show that the *inam* consisted of the land itself and not merely of the *melvaram*. The meaning of the expression is merely that there was nothing payable to the Government in consideration of the *inamdar's* possession of the land. It is argued that the finding with regard to plaintiff's share of the profits cannot be sustained in law. The Appellate Court did not deal with the question in its judgment, but merely said that the memorandum of objections was dismissed. The District Munsif evidently intended to award the amount spoken to by Chokkalingam Pillay, the 2nd witness for the defendant. That witness stated that both *kudivaram* and *melvaram* together amounted to 10 *kalams* per acre. The District Munsif evidently made a mistake in making the calculation and thought that 10 *kalams* was the yield per *cownie* (which is about $1\frac{1}{3}$ acres). The decree, therefore, with respect to the *melvaram* due to the plaintiff must be corrected by awarding $15\frac{1}{2}$ *kalams* a year in Original Suit No. 16 of 1909 and $18\frac{1}{2}$ *kalams* in

(4) 26 M. 339 at p. 340.

ALLAHDAD KHAN *v.* SANT RAM.

Original Suit No. 17 of 1909. The price of a *kalam* was taken to be Rs. 5. The amount due to the plaintiff will be calculated at that rate.

The plaintiff will also be entitled to a decree for the *melvaram* from the date of the suit until the end of *Fasli* 1321. The lower Appellate Court will make an inquiry as to the amount due to the plaintiff for the period subsequent to the date of the plaint and pass a final decree for the amount found due. With this modification, these second appeals are dismissed with costs.

(IN SECOND APPEALS NOS. 311 AND 399 OF 1911).

Mr. Ananthakrishna Aiyar for the appellants in these cases argues that the plaintiffs are not entitled to any decree at all. His contention is that, when the Government enfranchised the lands, the plaintiff's interest in them ceased. In substance, his argument amounts to this: that the Government resumed the *inam* and made a fresh grant of the *inam* to the defendants at the same time enfranchising the *inam*. This is absolutely unsupported by the evidence on record. Exhibit III shows that the Government merely gave up the right of resumption that it possessed and did not resume the *inam*. The result of the enfranchisement, therefore, was that the title rested where it was before. Prior to the enfranchisement, there can be no doubt that the 1st plaintiff as *karnam* was entitled to the *melvaram* in the lands. That title was not in any way disturbed by the enfranchisement. These second appeals are also dismissed with costs.

Appeals dismissed.

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL NO. 43 OF 1912.

November 19, 1912.

Present:—Sir Henry Griffin, KT., Judge, and Mr. Justice Chamier.

ALLAHDAD KHAN AND OTHERS—DEFENDANTS—APPELLANTS

versus

SANT RAM—PLAINTIFF AND OTHERS—DEFENDANTS—RESPONDENTS.

Succession Certificate Act (VII of 1889), *ss.* 4, 16—*Assignee of holder of certificate, whether can maintain suit.*

The assignee of a person, to whom a Succession Certificate has been granted, cannot sue for the recovery of the debt assigned to him.

First appeal from the decision of the Second Additional Judge of Moradabad, dated the 18th of March 1911.

The Hon'ble Nawab *Abdul Majid*, for the Appellants.

Mr. *Muhammad Ishaq*, for the Respondents.

JUDGMENT.—This was a suit upon a mortgage made in favour of one Bahadur Khan by two persons who are now represented by the appellants and others. Bahadur Khan died leaving a son Farzand Ali and other heirs. Farzand Ali applied for a succession certificate in respect of several debts due to his father. Some of the other heirs stated that they had relinquished their rights in his favour and a certificate was issued to Farzand Ali who, some years later, assigned the mortgage-debt, together with his right to sue for the same, to the respondent Sant Ram. It is on the strength of that assignment that the present suit was brought. The claim was resisted upon several grounds, one of which was that Farzand Ali was not competent to transfer to another the right conferred upon him by the Succession Certificate to sue for the recovery of the debt. The Court below decided this and other questions against the appellants. Hence this appeal.

Apart from the provisions of the Succession Certificate Act, Farzand Ali, as one of the heirs of Bahadur Khan, could have sued upon the mortgage making as defendants the heirs of Bahadur Khan who declined to join as plaintiffs. He could also have assigned his interest in the mortgage to the respondent Sant Ram. Indeed the assignment in favour of Sant Ram may be regarded as having transferred to Sant Ram all Farzand Ali's rights under the mortgage although the assignment purports to have been made by Farzand Ali as holder of the succession certificate. But section 4 of the Succession Certificate Act provides that no Court shall pass a decree against a debtor of a deceased person for payment of his debt to a person claiming to be entitled to the

effects of a deceased person or to any part thereof except upon the production by the person so claiming of a certificate granted under that Act or of one or other of certain other documents which admittedly have not been produced in this case. It has been held by this Court in many cases, which we are bound to follow, that a debt secured by a simple mortgage is a debt within the meaning of the provision just quoted. A certificate under the Succession Certificate Act has been produced but it is in favour of Farzand Ali. The question is whether such a certificate is sufficient. The Act does not, in so many words, say that the certificate must be one in favour of the plaintiff but we think that that is the meaning of the provision. The declared object of the Act is to facilitate the collection of debts on successions and to afford protection to parties paying debts to the representatives of deceased persons. Section 16 of the Act protects a debtor of a deceased person, who pays the debt in good faith to the *person to whom the certificate was granted.* An assignee of the person to whom the certificate was granted does not appear to come within the section. From this, it would appear that the person to sue for the debt is the person to whom the certificate was granted. Notwithstanding the preamble to the Act, one of the objects of the Act seems to have been to prevent people from evading payment of the duty payable on certificates issued under Act XXVII of 1860. If that had been the sole object of the Legislature, there would have been much to say for the view taken by the Court below. But the main object must be taken to be that stated in the preamble. The Act is designed to enable debtors to know with certainty the person to whom they can safely pay a debt due to a deceased person. If we were to hold that any person may sue for the recovery of a debt due to a deceased person, provided that he produces a certificate having the debt specified in it, the debtor would have to trace the title of the plaintiff and we should re-introduce the confusion which the Act was designed to remove. If the plaintiff relies upon a grant of Probate or Letters of Administration, he must show that the grant was made to him and we see no reason why it should be otherwise in the case of a succession certificate. The result is that the plaintiff, in our opinion, was not entitled to maintain this suit.

It was suggested that we might adjourn the case in order that the plaintiff might apply for a certificate. We cannot allow this as the plaintiff cannot be permitted to convert a suit by him as assignee of Farzand Ali into suit by him as holder of a certificate authorising him to collect debts due to Bahadur Khan. The appeal is allowed and the suit is dismissed with costs including fees on the higher scale.

Appeal allowed.

MADRAS HIGH COURT.

CIVIL APPEAL No. 95 OF 1910.

November 1, 1912.

Present:—Mr. Justice Miller and Mr. Justice Abdur Rahim.

KARETTI BRAHMANAIKUDU—APPELLANT

versus

KARETI MAHALAKSHMI AND OTHERS—RESPONDENTS.

Hindu Law—Alienation by widow of whole property to next reversioner—Agreement by reversioner to re-convey portion of property—Consideration.

An alienation by a Hindu widow of the whole of her estate to the next reversioner on the latter's undertaking to re-convey a portion thereof to the widow or her nominee is valid, irrespective of whether any consideration actually passed or not.

Challa Subbiah Sastri v. *Palury Pattabiramayya*, 31 M. 446, applied.

Appeal against the decree of the Temporary Subordinate Judge of Guntur, in O. S. No. 31 of 1909.

Mr. *P. Nagabhushanam*, for the Appellant.

Mr. *V. Ramesam*, for the Respondents.

JUDGMENT.

MILLER, J.—In this case, the widow conveyed the whole of her estate to the next reversioner who, on the same day, re-conveyed a portion of it to the widow's brother. The question is, whether the conveyance by the widow is valid. It has been suggested in the argument before us that the conveyance to the widow's brother was *benami* for the widow herself and that, therefore, as to half or whatever was the proportion of the pro-

perty so conveyed, there was no real conveyance by the widow; consequently, the conveyance to the next reversioner was in reality only a partial conveyance to the next reversioner and is, on that ground, invalid. That particular case, I think, was not made in the Court below; but however that be, the evidence which has been read to us does not prove to my mind that the conveyance was not really to the brother. It may be that it was expected that the widow would share the benefit of it; but the conveyance is suggested even by some of the witnesses on the appellant's side to have been for the benefit of the brother and not of the widow herself. Taking that view, I take it to be established that what was transferred to *Kamanna* was the whole estate of the widow in consideration of his re-transferring part of it to her brother, and possibly in consideration also of a payment of Rs. 400, although the Subordinate Judge believes that Rs. 400 were not paid. Taking that to be so, it is then contended that the alienation is invalid by the reason that the conveyance to the reversioner was a conveyance for consideration. It seems to me that that contention is disposed of by the case of *Challa Subbiah Sastri* v. *Palury Partabiramayya* (1), where, in consideration of an undertaking by the next reversioner to re-convey a portion of the property, the widow conveyed the whole estate to that reversioner. In that case, the surrender or the alienation, if it can be so called, was held to be valid To my mind, there is no reason why that case should not be applied to this case. No doubt, there was no actual money passed in that case, while, here, it is open to us to find, although the Subordinate Judge has not so found, that money did actually pass. That, I think, makes no difference. What we have to see is whether the whole estate was transferred to the reversioner as was done in *Challa Subbiah Sastri* v. *Palury Pattabiramayya* (1). That being so, it seems to me that we must hold the transfer valid and dismiss the appeal with costs.

ABDUR RAHIM, J.—I am of the same opinion.

Appeal dismissed.

(1) 31 M. 446.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 372 OF 1912.

November 13, 1912.

Present:—Mr. Justice Rafique.

FATEH BAHADUR AND OTHERS—PLAINTIFFS—APPELLANTS

versus

LALTA PERSHAD AND OTHERS—DEFENDANTS—RESPONDENTS.

Agra Tenancy Act (II of 1901), s. 94—Co-sharers declining to join as co-plaintiffs for recovery of rent—Maintainability of suit by one co-sharer alone.

Under the Agra Tenancy Act, one of the several joint co-sharers can bring a suit for the recovery of rent to the extent of his share on the refusal by the other co-sharers to join him as co-plaintiffs.

Manohar Das v. *Manzur Ali*, 5 A. 40, referred to.

Second appeal from the decision of the District Judge of Farrukhabad, dated the 22nd of December 1911.

Mr. *Brij Nath Vyas*, for the Appellants.

Dr. *Satish Chandra Banerji*, for the Respondents.

JUDGMENT.—Nand Kumar and Kumar Bahadur owned the village of Ismailpur in equal shares. The shares of the two were known as ten *biswas* each. On January 3rd, 1905, Nand Kumar and Kumar Bahadur executed a lease of the village in favour of Lalta Pershad reserving an annual rent of Rs. 195. On July 5th, 1907, Nand Kumar executed a deed of gift in favour of his three minor sons, the plaintiffs-appellants, in respect of 9 *biswas* and 15 *biswansis* share out of his 10 *biswas* share in Ismailpur. On October 8th, 1910, the plaintiffs appellants instituted a suit in the Court of the Assistant Collector of Farrukhabad to recover their share of rent for 1315 to 1317 *Faslis*. It was alleged in the plaint that they had sued for their share only as the other co-sharers, *viz.*, Nand Kumar and Kumar Bahadur, had declined to join them in the suit for which reason the latter had been made co-defendants with Lalta Pershad. Lalta Pershad alone resisted the suit. He stated in defence that the rent for the years in suit had been paid to Nand Kumar and that the rate of rent given in the plaint was incorrect. During the pendency of the case, Lalta Pershad raised a further plea to the effect that the paintiffs-appellants, as members of a joint undivided Hindu family, could not sue alone. The Assistant Collector passed a decree in favour of the plaintiffs-appellants ignoring the plea of

Lalta Pershad of non-maintainability of the suit, which was raised by him at a late stage in the case. The latter preferred an appeal to the District Judge who framed three additional issues and remanded the case. One of the issues remanded for trial was whether the plaintiffs-appellants could sue alone. The Assistant Collector held that they could sue alone. Lalta Pershad filed objections to the finding of the Assistant Collector. The learned District Judge disposed of the appeal on one point only, *viz.*, whether the suit was maintainable by the plaintiffs-appellants alone. He found that issue against the plaintiffs-appellants on the authority of the case of *Manohar Das* v. *Munzur Ali* (1). In second appeal, it is contended that the ruling, relied on by the learned District Judge, is no more applicable, as under the new Agra Tenancy Act, one out of several joint co-sharers can bring a suit for the recovery of rent to the extent of his share on the refusal by the other co-sharers to join him as co-plaintiffs. In the present case, the plaintiffs-appellants sued in respect of their share, stating in paragraph 5 of the plaint, that both Nand Kumar and Kumar Bahadur had declined to join as co-plaintiffs in the suit. The allegations made in paragraph 5 of the plaint were never challenged by Lalta Pershad, or Kumar Bahadur and Nand Kumar. Clause 3 of section 194 of Act II of 1901 distinctly supports the contention of the appellants. I, therefore, hold that the suit of the plaintiffs-appellants is maintainable. I set aside the decree of the lower Appellate Court and remand the case under Order XLI, rule 23, to the lower Appellate Court for disposal according to law. Costs of this appeal will be paid to the appellants. The Court-fee will be refunded.

Appeal allowed.

(1) 5 A. 40.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 833 OF 1911.

October 1, 1912.

Present:—Mr. Justice Sankaran Aiyar and Mr. Justice Sadasiva Aiyar.

PERIATHAMBI GOWNDAN—APPELLANT

versus

PERIYA GOWNDAN—RESPONDENT.

Estoppel—Grant by Government—Suit for possession by grantee—Expression of intention not to claim land prior to grant—Whether amounts to estoppel—Fraud.

A mere disclaimer by a person of his preferential right to acquire land, made to a rival applicant, will not estop him from suing to recover possession after it was actually granted to him by Government, in the absence of a deliberate fraud practised by him on Government or on the rival claimant.

Secretary of State for India in Council v. *Bandeppa of Konikondla*, 32 M. 399, 5 M. L. T. 31; 19 M. L. J. 203; 1 Ind. Cas. 76, explained.

A person, who, as adjoining owner, had a preferential right to the grant of a certain land by Government, expressed his intention not to claim that the land should be allotted to him:

Held, that such disclaimer at a time when he had no right to the land would not work as an estoppel unless he was guilty of the exercise of deliberate fraud on his rival or the Government.

Second appeal against the decree of the District Court of Salem, in A. S. No. 123 of 1910, preferred against that of the Additional District Munsif of Salem, in O. S. No. 863 of 1909.

Messrs. *T. Subramania Aiyar*, *T. Rangachariar* and *T. M. Krishnaswami Aiyar*, for the Appellant.

Mr. *T. R. Venkatarama Sastri*, for the Respondent.

JUDGMENT.—The defendant in the suit applied, for the grant of certain land, to the Revenue Officers of Government in 1903. The plaintiff, who was an adjoining owner and who, according to *darkhast* rules, had a preferential claim to have the land allotted to him, then stated that he did not want it. The Revenue Inspector required the defendant to clear the land of prickly pear. While inquiries for allotting the land were in progress, the defendant spent a considerable amount of money on the land. Subsequently, when the *darkhast* inquiry was resumed, the plaintiff broke faith with the defendant and made an application for the land. Unfortunately, the Revenue Authorities granted it to him and ignored the claims of the defendant. The plaintiff, having got a *patta* from Government, insti-

tuted, this suit for recovery of possession from the defendant.

Both the lower Courts disallowed his claim on the ground that plaintiff was estopped by his previous disclaimer from setting up a claim to recover the land. We are unable to uphold this view. The plaintiff, at the time that he expressed his intention not to claim that the land should be allotted to him, had no right to it. His suit is based on title subsequently acquired by him by grant from Government. Government has not repudiated the grant made to the plaintiff. There is, therefore, in our opinion, no legal answer to the plaintiff's claim for recovery of the land. An observation contained in *The Secretary of State for India in Council* v. *Bundeppa of Konakondia* (1) has been read to us on behalf of the respondent. It is stated that in *Collector of Salem* v. *Ranagppa* (2) that a person, who has obtained a *patta* from Government, would acquire a valid title, in the absence of any fraud on Government or on the defendant, a rival claimant. There may possibly be cases to which that proposition might be applicable. It is possible that a fraud practised on a particular party might entitle that party to oppose the plaintiff's claim to enforce his legal right. But there was no fraud in this case as found by both the lower Courts and we are not able to find any defence to the plaintiff's claim.

We must, therefore, reverse the decrees of the lower Courts and give the plaintiff a decree for the recovery of the land sued for. We disallow the claim for mesne profits prior to the date of suit as the claim is not pressed. The lower Appellate Court will hold an inquiry as to the amount of mesne profits which the plaintiff is entitled to from the date of suit to the date of delivery of possession and pass a final order for the amount that may be found due. The plaintiff is also entitled to costs from the defendant throughout on the value of the land.

Appeal allowed.

(1) 32 M. 300; 5 M. L. T. 31; 19 M. L. J. 206; 1 Ind. Cas. 76.

(2) 12 M. 404.

CALCUTTA HIGH COURT.

REGULAR CIVIL APPEALS NOS. 52 TO 55 OF 1911.

August 8, 1912.

Present:—Sir Ashutosh Mookerjee, KT., Judge, and Mr. Justice Holmwood.

Maharaja RAM NARAYAN SINGH BAHADOOR—PLAINTIFF—APPELLANT

versus

KRISHNA CHANDRA GHOSE AND OTHERS—DEFENDANTS—RESPONDENTS.

Chota Nagpur Tenancy Act (VI B. C. of 1908), ss. 81 cl. (n), 91—Suit by zemindar against jagirdar for possession—Whether suit barred by section 91—Section 81 cl. (n) whether includes coal in mine not opened—Minerals lying on surface of soil—Scope of suit referred to in clause (b) of section 91—Jurisdiction of Civil Court, presumption to be made in favour of—Dismissal of suit under section 91, whether necessary—Stay of suit till final publication of Record of Right—Section 91, sub-section (1) Proviso, relief to be obtained under—No relief by appointment of Receiver or by grant of injunction.

The first eight defendants were *jagirdars* under the plaintiff. Defendant No. 9 was the manager of their estate under the Chota Nagpur Encumbered Estates Act of 1876. The remaining defendants had obtained a prospecting lease from the manager to open up mines and quarries. The plaintiff, stating that the *jagirdars* were incompetent to grant a lease in respect of mines and quarries as they had no underground rights, sued for recovery of possession and injunction.

No written statement was filed, but the defendants took exception to the competency of the suit on the ground that it was barred under section 91 of the Chota Nagpur Tenancy Act of 1908.

Held, that the suit was not barred by section 91; that clause (*a*) of the section was not applicable, *first* because as the defendants had not yet filed their written statement, it was impossible to ascertain what matters were in issue between the parties to the suit, and *secondly*, because none of the questions covered by clause (*n*) of section 81 arose directly or indirectly for determination in the suit as framed; that clause (*b*) of section 91 was not applicable, because the suit could not be deemed as one for alteration of the rent or the determination of the status of any tenant.

Clause (*n*) of section 81 does not include coal contained in a mine which has not yet been opened, it refers to minerals lying on the surface of the soil which may be taken by any person, tenant or not. Clause (*b*) of section 91 does not refer to a suit where the question of the status of the tenant arises only indirectly for consideration.

Every presumption should be made in favour of the jurisdiction of a Civil Court, and it should not be taken away except by express words or by necessary implication.

Mavoulu Seetharam Naidu v. *Doddi Rami Naidu*, 33 M. 203; 6 Ind. Cas. 137; 7 M. L. T. 181; 20 M. L. J. 91

RAM NARAYAN SINGH v. KRISHNA CHANDRA GHOSE.

and *Winter* v. *Attorney General*, L. R. 6 P. C. 378 at p. 380; 43 L. J. P. C. 65; 24 W. R. 327, relied upon.

Section 91 does not mean that the suit, if instituted, shall be dismissed; the proper course to follow in such a contingency is to adjourn the trial of the suit till the final publication of the Record of Rights.

Rendall v. *Blair*, 45 Ch. D. 139, at p.[157; 59 L.J. Ch. 641; 63 L. T. 265; 33 W. R. 689, *Azmat Ali* v. *Lalli Begum*, 8 C. 423; *Alim-ud-din Khan* v. *Hira Lal Sen*, 23 C. 87; *Jijaji* v. *Balkrishna*, 17 B. 169; *Bandu* v. *Jambu*, 12 Bom. L. R. 801; 7 Ind. Cas. 986; *Jagat Tarini Dasi* v. *Nabogopal Chaki*, 34 C. 305 at p. 311; *Sarat Chandra Banerjee* v. *Apurba Krishna Roy*, 11 Ind. Cas. 187; 14 C. L. J. 55; 15 C. W. N. 925 and *Chandu Lal* v. *Awad*, 21 B. 351, referred to.

A plaintiff can, under the proviso to sub-section (1) of section 91, obtain relief only when waste or damage had been actually committed. He is entitled merely to prohibit the continuance of waste or damage: he cannot demand a prohibition of the commission of the waste or damage, and under the proviso, no relief can be granted either by the appointment of a Receiver or by the grant of a permanent injunction.

Appeals from the decrees of the Sub-Judge of Hazaribagh, dated November 14th, 1910.

Dr. *Rash Behary Ghose*, Babus *Basanta Kumar Bose*, *Pro ash Chandra*, *Mitra*, *Susil Madhab Mallik* and *Biraj Mohan Majumdar*, for the Appellant.

Mr. *Chakravarti*, Babus *Ram Charan Mitra* and *Manmatha Nath Mukherjee*, for the Respondents.

JUDGMENT.—This is an appeal on behalf of the plaintiff, the Raja of Ramgarh, in a suit for recovery of possession of land, for damages, for perpetual injunction and for incidental reliefs. The first eight defendants are alleged to be *jagirdars* under the plaintiff. The ninth defendant is the manager of the estate of the first eight defendants under the Chota Nagpur Encumbered Estates Act of 1876. The remaining defendants, ten in number, are members of the firm of Bird and Company, who have obtained a prospecting lease from the manager with a view to open up mines and quarries. The case for the plaintiff is that the *jagirdars* are incompetent to grant a lease or a license in respect of mines and quarries as they had no underground rights whatever; he further asserts that the *jagirdars* held under the condition that if they failed to pay rent according to the prescribed instalments or disputed lawful orders and rules, the villages would be forfeited. It is also stated that the defendants have granted a prospecting lease in respect of a village named Damri, which is not included in their *jagir*. On these allegations, the plaintiff seeks a decree for ejectment and mesne profits; he further prays that a perpetual injunction may issue on the lessee defendants restraining them from prospecting for coal and from opening mines and quarries There is also a prayer for the issue of a temporary injunction and for the appointment of a Receiver *pendente lite*. The suit was commenced on the 8th October 1909. The defendants entered appearance and from time to time obtained adjournments to enable them to file their written statement. No written statement, however, was filed, and on the 9th August 1910, the defendants took exception to the competency of the suit on the ground that it was barred under section 91 of the Chota Nagpur Tenancy Act of 1908. The Subordinate Judge gave effect to this objection and dismissed the suit with costs. The substantial question in controversy in this appeal, consequently, is whether the suit as framed is barred under that section.

Section 91 provides that when an order has been made under section 80 or under any law in force before the commencement of the Act, directing the preparation of a Record of Rights, then notwithstanding anything contained in the preceding sections of the twelfth Chapter of the Act, no Deputy Commissioner or Civil Court shall, until six months after the final publication of the Record of Rights, entertain any suit or application in which there is in issue, either directly or indirectly, the existence or non-existence, in the area to which the Record of Rights applies, of any right referred to in clause (*n*) of section 81 or for the alteration of the rent, or the determination of the status of any tenant in such area. In the case before us, it is not disputed that in respect of a portion only of the subject-matter of the litigation, an order has been made for the preparation of a Record of Rights. It is obvious, therefore, that if the construction adopted by the Subordinate Judge be well founded, the objection to the competency of the suit is valid, only in respect of a portion of the disputed property. From this point of view,

the suit ought not to have been dismissed in its entirety.

The real question in controversy, however, is whether the objection is valid in respect of any portion of the subject-matter of the litigation. On behalf of the appellant, it has been contended that neither clause (*a*) nor clause (*b*) of the first sub-section of section 91 is applicable; not clause (*a*), *first*, because as the defendants have not yet filed their written statement, it is impossible to ascertain what matters are in issue between the parties to the suit, and *secondly*, because none of the questions covered by clause (*n*) of section 81 arises, directly or indirectly, for determination in the suit as framed; nor clause (*b*), because the suit cannot be deemed as one for alteration of the rent or the determination of the status of any tenant in such area.

In so far as clause (*a*) is concerned, it plainly does not present any bar to the maintainability of the suit. Before that clause can be applied, the Court must ascertain what matters are in issue between the parties. Here the plaintiff has made allegations which have not yet been challenged by the defendants. No doubt, the plaintiff apprehends that upon certain points, his case will not be acceptable to the defendants. But that does not, with any approach to certainty, indicate what will ultimately be the actual matters in issue between the parties. It may be conceded, as explained in *Gobind Mohan Das* v. *Kunja Behari Das* (1), that the Court may sometimes be in a position to ascertain the matters in question in the suit, before the issues have been framed, and even before the written statements have been filed, though ordinarily, this can be done only after the pleadings have been filed. Let it be assumed, therefore, for a moment that clause (*n*) may be applied before the written statement has been filed by the defendant, the question still remains whether any of the matters covered by clause (*n*) of section 81 will be in controversy directly or indirectly in this litigation. Now, section 81 clause (*n*) refers to the right of any person, whether a landlord or tenant or not, to take forest produce from jungle land or waste land or to graze cattle on any land in any village in the area to which the Record of Rights applies. The term "forest produce" is defined as follows in section 3 clause (XI): "Forest produce," unless there is anything repugnant in the subject or context, includes the following, whether taken from a forest or not, that is to say, peat, surface-soil, rock and minerals, including iron-stone, coal, clay, sand and lime-stone (when taken by any person for his own use). It is plain that clause (*n*) of section 81 does not include coal contained in a mine which has not yet been opened; such coal cannot be described in any sense of the term as forest produce from jungle lands or forest lands. It has been suggested, however, that the extended meaning given to the expression 'forest produce' in clause (*e*) of section 3, shows that coal may be included thereunder. This argument is obviously unfounded. Clause (*e*) mentions peat, surface-soil, rock and minerals (including iron-stone, coal, clay, sand and lime-stone when taken by any person for his own use). It cannot be reasonably argued, nor, indeed, has it been seriously contended, that the lessee-defendants, when they open a mine, can be deemed to take coal for their own use; the clause refers obviously to minerals lying on the surface of the soil which may be taken by any person, tenant or not. It is clear, therefore, that the right mentioned in clause (*n*) of section 81 cannot be directly or indirectly in controversy in this litigation; and this is the view which commended itself to the Subordinate Judge.

In so far as clause (*b*) is concerned, it has not been suggested that the suit is one for alteration of the rent. But it has been argued that the suit is one for determination of the status of a tenant in an area in respect of which preparation of the Record of Rights has been directed. In this connection, we must not overlook a remarkable difference in the phraseology of the two clauses (*a*) and (*b*); clause (*a*) speaks of a suit in which there is in issue, either directly or indirectly, the existence or non-existence of certain rights: clause (*b*), on the other hand, speaks of a suit for the determination

(1) 10 C. L. J. 407 at p. 411; 4 Ind. Cas. 364; 14 C. W. N. 147.

of the status of a tenant. This difference in phraseology must be taken to have been intentional; clause (*b*), therefore, does not refer to a suit where, as here, the question of the status of the tenant arises only indirectly for consideration. In no sense of the term, can the present suit be deemed for the determination of the status of the defendants as tenants under the plaintiff; nor can the question raised be regarded as a question about the status of the defendants as tenants. There is no question that the defendants are *jagirdars* and the lessees under them cannot obviously have higher rights than their lessors. The different classes of tenants, recognised by the Chota Nagpur Tenancy Act, are defined in section 4 and it is clear that, in the present case, the plaintiff does not invite the Court to determine to which of these classes the tenancy of the defendants belongs. The real point in controversy is, whether the defendants as *jagirdars* possess any mining rights; to put it plainly and broadly, the question is, whose property is the underground coal? The plaintiff asserts that the defendants as *jagirdars* do not possess any mining rights. What position will be taken up by the lessee-defendants, has not been disclosed by them up to the present stage; but if we assume that their contention will be that the *jagirdars* defendants were entitled to the coal, it cannot be successfully argued that the suit is for the determination of the status of the defendants as tenants. The conclusion follows that neither clause (*a*) nor clause (*b*) of sub-section (1) of section 91 bars the suit as framed. In this connection, we must remember that, as pointed out in the case of *Mavoulu Seetharam Naidu* v. *Doddi Rami Naidu* (2), it is an elementary principle of law that every presumption shall be made in favour of the jurisdiction of a Civil Court and that it shall not be taken away except by express words or by necessary implication [see also *Winter* v. *Attorney-General* (3)]. In the case before us, the jurisdiction of the Civil Court has not been taken away by the express words of the statute, nor can it be deemed to have been taken away by necessary implication. On the other hand, it is extremely unlikely that the Legislature should have intended that questions of this description should be determined by the Revenue Authorities under section 81 of the Chota Nagpur Tenancy Act of 1908.

We may finally observe that even if the view taken by the Subordinate Judge had been well founded, he ought not to have dismissed the suit. Section 91, where it is applicable, merely provides that the Civil Court shall not *entertain* a suit of a particular description. That does not mean that the suit, if instituted, shall be dismissed. The proper course to follow in such a contingency is to adjourn the trial of the suit till the final publication of the Record of Rights. The view we take is supported by the principle recognised in *Rendall* v. *Blair* (4); *Azmat Ali* v. *Lalli Begum* (5); *Alimuddin Khan* v. *Hira Lal Sen* (6); *Jijaji* v. *Balkrishna* (7); *Bandu* v. *Jambu* (8); *Jagat Tarini Dasi* v. *Nabogopal Chaki* (9) and *Sarat Chandra Banerji* v. *Apurba Krishna Roy* (10) and does not militate against the decision in *Chandu Lal* v. *Awad* (11). The Subordinate Judge plainly failed to appreciate the true nature of the suit and when he considered that the proviso to the first sub-section of section 91 of the Chota Nagpur Tenancy Act afforded ample relief to the plaintiff, he overlooked that the plaintiff could thereunder obtain relief only when waste or damage had been actually committed. The plaintiff is entitled under that proviso merely to prohibit the continuance of waste or damage; he cannot demand a prohibition of the commission of the waste or damage. It is further clear that under the proviso, no relief can be granted either by the appointment of a Receiver or by the grant of a temporary injunction. The suit, in our opinion, is in

(2) 33 M. 203; 6 Ind. Cas. 137; 7 M. L. T. 181; 20 M. L. J. 91.
(3) 6 P. C. 378 at p. 380; 44 L. J. P. C. 65; 24 W. R. 327.
(4) 45 Ch. D. 139 at p. 157; 59 L. J. Ch. 641; 63 L T. 265; 38 W. R. 689.
(5) 8 C. 422.
(6) 23 C. 87.
(7) 17 B. 169.
(8) 12 Bom. L. R. 801; 7 Ind. Cas. 986.
(9) 34 C. 305 at p. 311; 5 C. L. R. 270.
(10) 14 C. L. J. 55; 15 C. W. N. 925; 11 Ind. Cas. 187.
(11) 21 B. 351.

its essence a suit for recovery of possession of land and although, incidentally, in the course of the trial, questions may arise as to the rights of the defendants as *jagirdars*, the suit is clearly not barred under section 91 of the Chota Nagpur Tenancy Act.

The result is that this appeal is allowed, the decree of the Subordinate Judge set aside and the case remitted to him in order that it may be tried on the merits. The appellant is entitled to his costs in this Court. We direct, under section 13 of the Court Fees Act, that the Court-fees paid on the memorandum of appeal be refunded to the appellant.

It is conceded that this judgment will govern the other appeals (Regular Civil Appeals Nos. 53 to 55 of 1911). Similar orders will be drawn up in each of them.

As the suits were instituted so far back as the 8th October 1909, the Subordinate Judge will take up the cases for disposal as early as practicable. Let the records be sent down at once.

Appeals allowed; Cases remanded.

CALCUTTA HIGH COURT.

REGULAR CIVIL APPEAL No. 10 OF 1910.

August 16, 1912.

Present:—Sir Ashutosh Mookerjee, Kt., Judge, and Mr. Justice Beachcroft.

BHOJOHARI DAS ADHIKARI AND OTHERS—DEFENDANTS—APPELLANTS

versus

BHAGABATI DASI AND OTHERS—PLAINTIFFS—RESPONDENTS.

Merger—Proprietor possessing nij jote *lands—Interest of proprietor, sale of—Whether right to* nij jote *subsists—Mortgage of interest of mortgagor—Express reservation—Presumption—Construction of deed—Deed to be construed in favour of grantee.*

When a proprietor is in possession of *nij jote* lands, it cannot be said that he has, in respect of such lands, an interest subordinate to the proprietary interest, so that when his interest as proprietor disappears, along with it must disappear his interest in the *nij jote* lands.

Joy Dutt Jha v. *Bayee Ram Singh*, 7 W. R. 40, relied upon.

It is a maxim in law that every man's grant shall be taken by that construction of law which is most forcible against himself. Therefore, the words of a deed executed for a valuable consideration ought to be construed, as far as they properly may, in favour of the grantee.

Neill v. *Devonshire*, (1882) 8 App. Cas. 135 at p. 149, 31 W. R. 622, relied upon.

Therefore, when a person effects a mortgage of his interest in the mortgaged property, unless there is express reservation, the presumption would follow that he has given by way of security all interests of whatever kind he possessed in the land.

Gour Chandra Gajapati v. *Mukunda Deb*, 9 C. W. N 710, relied upon.

Appeal from the decree of the first Sub-Judge of Midnapur dated September 29th, 1909.

Babu *Troylokya Nath Chakravarti*, for the Appellants.

Babus *Nil Madhab Bose* and *Khirode Narayan Bhunia*, for the Respondents.

JUDGMENT.—This is an appeal on behalf of some of the defendants in a suit to enforce a mortgage security. Dhananjoy Roy, the mortgagor, now represented by his widows, the first two defendants, executed four successive mortgages. The earliest in point of time was executed on the 19th March 1889, in favour of the third defendant one of the appellants in this Court. The second transaction was in favour of one Hare Krishna Maity and took place on the 28th July 1892. This was followed by a mortgage in favour of Titu Charan Dass on the 29th April 1894. The last mortgage was in favour of the plaintiff on the 21st November 1899, and it is stated that out of the consideration for this mortgage, the claim of the third mortgagee was satisfied. The third defendant who is the first mortgagee sued to enforce his security and obtained a decree, on the 24th May 1895. To this decree the parties were the mortgagor and the second and third mortgagees. In execution of this decree, he purchased, on the 22nd March 1897, a parcel No. 16, which has been released in his favour by the Court below. He subsequently obtained a supplementary decree under section 90 of the Transfer of Property Act and, on the 11th July 1900, purchased the right, title and interest of the mortgagor in the five parcels now in dispute. The second mortgagee, Hare Krishna Maity, also sued to enforce his security and obtained a decree on the 24th November 1902; to this decree, the parties were the mortgagor, and the third and fourth mort-

gagees, of whom the last is the plaintiff in the present suit. In execution of this decree the properties were purchased by the decree-holder on the 20th March 1905. The third mortgagee, Titu Charan Das, sued to enforce his security and obtained a decree on the 5th August 1897. To this decree, the only party was the mortgagor. The plaintiff, as the fourth mortgagee, now seeks to enforce his security, and the substantial point in controversy between the parties at this stage is, whether this mortgage can be enforced against five parcels mentioned in schedule to the plaint, namely, Nos. 12, 13, 14, 15 and 17. The contention of the appellant is that the mortgagor had a two-fold right in these lands, namely, a *chakdari* right (or the interest of a tenure-holder) and a *jotedari* right (or the interest of an occupancy-*ryot*), that the superior interest alone was covered by the previous mortgages, while the subordinate interest is covered by her mortgage, and that, consequently, her right in these parcels as mortgagee has not been affected in any way by the sales in execution of the decrees on the previous mortgages. This claim is resisted on a two-fold ground, namely, *first*, that the mortgagor had no *jotedari* right in these parcels independent of his *chakdari* right; and *secondly*, that if he had a two-fold right, his whole interest was included in the previous mortgages, so that the interest of the plaintiff as fourth mortgagee of the occupancy-right alone was extinguished when she failed to redeem as directed by the decree obtained by the second mortgagee, from whom the third defendant-appellant has subsequently taken a settlement. The Subordinate Judge has overruled these contentions and made a decree in favour of the plaintiff. That decree has been assailed in this Court on the grounds just mentioned. In our opinion, the decision of the Subordinate Judge cannot be supported. The evidence does not establish that the mortgagor had a two-fold right in the disputed parcels. No direct evidence has been adduced in support of the theory that the mortgagor had a two-fold right in these parcels of lands, namely, a superior interest as *chakdar* or tenure-holder and a subordinate interest, as *jotedar* or occupancy-*raiyat*. There is no indication in the evidence that at any time in the history of these parcels, there were in two different persons two distinct rights of the character mentioned. If there had been such evidence available, the question would have arisen, when did the two distinct interests combine in the same person and what was the legal effect thereof. It is not suggested that the mortgagor had any co-sharers in the property and that he could, by any possibility as a share-holder in the *chakdari* interest, have acquired also the interest of a subordinate tenant and kept it alive. Presumably, therefore, if the two interests existed, when they vested in the plaintiff, the principle of merger would have applied. But whether by any device the two interests, after they have been vested in the same person, could have been kept alive and distinct, is a matter which we need not consider in the present case, because there is no foundation laid in the evidence either to prove the existence of two distinct interests, or to show that if two distinct interests existed, they were vested in the mortgagor or his predecessor-in-interest. Our attention, however, has been drawn to the deposition of one of the witnesses for the third defendant, who stated that after purchase by that defendant, rent was paid to the mortgagor as *chakdar*. The passage in question is by no means clear and is not sufficient to establish the existence of a *jotedari* right independent of, and subordinate to, the *chakdari* right. The learned Vakil for the plaintiff-respondent has laid much stress upon the recitals in the successive mortgage-bonds and upon the description of the property conveyed thereby. In our opinion, these descriptions do not lend any support to the theory that there was a *jotedari* right independent of the *chakdari* right. On the other hand, the description in the second mortgage indicates that the whole of the interest of the mortgagor in the property described as the *chak* of 200 *bighas* was transferred to the mortgagee. As was pointed out by this Court in the case of *Joy Dutt Jha* v. *Bayee Ram Singh* (1), when a proprietor is in possession of *nij jote* lands, it cannot be said that he has in respect of such lands, an interest subordinate to the proprietary interest, so that when his interest as proprietor disappears, along with it must disappear his interest in the

(1) 7 W. R. 40.

BHOJOHARI DAS ADHIKARI *v.* BHAGABATI DASI.

nij jote lands. It is further clear from the decision in *Gour Chandra Gajapati* v. *Mukunda Deb* (2) that when the mortgagor effected a mortgage of his interest in the *chak*, unless there was express reservation, the presumption would follow that he had given by way of security all interests of whatever kind he possessed in the land; for in the words of Lord Coke, "it is a maxim in law, that every man's grant shall be taken by construction of law most forcible against himself, which is so to be understood that no wrong be thereby done," (Co. Litt. 183, a, b,) or, as Lord Selborne puts it, "the words of a deed, executed for a valuable consideration, ought to be construed, as far as they properly may, in favour of the grantee [*Neill* v. *Devonshire*, (3)]. Upon an examination of the successive mortgages, it is manifest that there was no reservation made by the mortgagor in any of them of an interest in the property described as *chak*. We must hold, therefore, that even if it were established that the mortgagor had a *jotedari* right, subordinate to *chakdari* right, his entire interest was transferred to the second mortgagee, so that when the plaintiff failed to redeem as directed by his decree, his interest in the disputed parcels was extinguished. In this view of the matter, it is clear that the plaintiff is not entitled to enforce her security as against plots Nos. 12, 13, 14, 15 and 17.

We may add that it was suggested on behalf of the respondents that this position cannot be assumed by the third defendant, because the settlement alleged by him from the purchaser at the sale in execution of the decree on the second mortgage, has not been established. It cannot be disputed that the third defendant, by virtue of his purchase of the disputed plots at a sale in execution of a money-decree against the mortgagor, did not acquire an interest superior to that of the plaintiff; he can succeed, only on the strength of the title, if any, acquired by the purchaser at the sale in execution of the decree on the second mortgagee. The question, therefore, does arise whether the third defendant has established his alleged settlement from the purchaser. In our opinion, the reasons given by the Subordinate Judge for the adverse view taken by him, are by no means conclusive. The alleged settlement is supported by the representatives of the second mortgagee and the surrounding circumstances make such a settlement very probable. The third defendant had purchased these parcels on the 11th July 1900; he had subsequently to face the claim of the plaintiff. The only way, in which he could protect himself, was by acquisition of a title from the representatives of the second mortgagee. This he asserts, he has done, and there is no good reason why he should not be believed. We are, therefore, of opinion, that for the purposes of the litigation it has been proved that the third defendant is entitled to challenge the title of the plaintiff.

It is worthy of note that if the third defendant had failed to establish his title, the plaintiff would have been met by a fresh difficulty. The plaintiff was bound to bring on the record the representatives of the second mortgagee; if the third defendant is not such representative, the suit has been improperly constituted. It must, therefore, either fail, or be re-tried after all the necessary parties have been brought on the record.

The result is, that the appeal by the third defendant must be allowed and the decree of the Subordinate Judge modified. The plaintiff will be entitled to proceed in execution of her decree against the properties other than those exempted by the lower Court, namely, plots Nos. 1 and 16 as also the plots now exempted, namely, Nos. 12, 13, 14, 15 and 17. This appellant is entitled to the costs of this appeal. We assess the hearing fee at five gold *mohurs*. The appeal of the eleventh defendant will, however, stand dismissed with costs. We assess the hearing fee against him in favour of the respondent at three gold *mohurs*. The appeal by the other defendants will also stand dismissed, but without costs. The decree of the Court below, except in so far as it is varied, will stand confirmed.

Decree modified.

(2) 9 C. W. N. 710.
(3) (1882) 8 App. Cas. 135 at p. 149; 31 W. R. 622.

KRISHNA AIYAR v. SHAMANNA.

MADRAS HIGH COURT.
CIVIL APPEAL No. 41 OF 1910.
October 4, 1912.
Present:—Mr. Justice Ayling and Mr. Justice Napier.
KRISHNA AIYAR AND ANOTHER—DEFENDANTS—APPELLANTS
versus
SHAMANNA AND OTHERS—RESPONDENTS.

Contract—Specific performance of contract of sale—Guardian or manager binding minor's share—Hindu Law—Enforceability of contract against minor's interest—Document, construction of—Evidence of surrounding circumstances—Award of damages—Specific Relief Act (I of 1877), s. 19.

In determining what interest passes to a vendee under a sale-deed executed to him by the managing member of a joint Hindu family, it is competent to Courts to go beyond the language of the document, if necessary, and look to the surrounding circumstances to see whether the executant purported to convey only his personal interest or the family interest.

Balwant Singh v. *R. Rockwell Clancy*, 34 A. 296; (1912) 1 M. W. N. 462; 11 M. L. T. 344; 9 A.L.J. 509; 15 C. L. J. 475; 16 C.W.N. 577; 14 Bom. L. R. 422; 23 M. L. J. 18; 14 Ind. Cas. 629, explained.

Moll Sclutta & Company v. *Luchuri Chand.* 25 C. 505 and *Simbhu Nath Pande* v. *Golap Singh*, 14 C. 572; 14 I. A. 77, referred to.

The managing member of a Hindu family has power, in proper circumstances, to bind the minor's interest, in a contract by him for the sale of the joint family property and specific performance can be given against that interest.

Mir Sarwarjan v. *Fakhurddin Mahomed Chowdhri*, 39 C. 232; 21 M. L. J. 1146; 16 C. W. N. 74; (1912) 1 M. W. N. 22; 9 A. L. J. 33; 15 C. L. J. 69; 14 Bom. L. R. 50; 13 Ind. Cas. 331; *Wagela Raj Sinji* v. *Sheikh Masludin*, 11 B. 551; 14 I. A. 89; *Jugul Kishori Chowdhrani* v. *Ananda Lal Chowdhuri*, 22 C. 545, explained.

Gharibulla v. *Khalak Singh*, 25 A. 407; 5 Bom. L. R. 478; 7 C. W. N. 681; 30 I. A. 165, distinguished.

Krishna Aiyar v. *Krishnaswami Aiyar*, 23 M. 597, referred to.

The Court can also, in such a case, award damages in the alternative, though not asked in the plaint.

Appeal against the decree of the District Court of North Arcot, in O. S. No. 47 of 1907.

Messrs. *S. Srivivasa Aiyanyar* and *B. Sitaram Rau*, for the Appellants.

Mr. *T. R. Vencatrama Sastri*, for the Respondents.

JUDGMENT.—This is an appeal from the judgment of the District Court of North Arcot in a suit for specific performance of a contract.

The defendants Nos. 1 to 5 were the members of a joint family of which the 5th defendant was the father and the 1st defendant the eldest son. Defendants Nos. 6 and 7 were persons who had taken from the 5th defendant a sale of the property in question after the date of the contract sued on. The contract is dated the 27th August 1906 and by it the property was agreed to be sold for Rs. 2,375 and it was executed by the 1st defendant and witnessed by the 5th defendant. The sale to defendants Nos. 6 and 7 of the same item of property is dated the 20th of September 1906 and was for a sum of Rs. 2,900. The District Judge has given a decree to the plaintiff directing defendants Nos. 1 to 3 and the 2nd defendant as guardian of the 4th defendant to execute a sale-deed to the plaintiff and put the plaintiff in possession and with other reliefs has given a declaration that the sale-deed to the 6th and 7th defendants was void and ineffectual as against the plaintiff. The 5th defendant is dead. Defendants Nos. 6 and 7 appeal and their contentions are as follows:—(1) that prior to the date of the agreement in favour of the plaintiff, there was an oral agreement between them and the other defendants, dated the 22nd August 1906, to sell the property to them for the sum of Rs. 2, 275, (2) that at the date of the sale to them, there was no subsisting contract between the plaintiff and the other defendants, (3) that the plaintiff's contract is not binding on any party but himself, because (*a*) he was not the managing member, (*b*) even if he was *de facto* manager, it was not made with the express consent of the 2nd and 3rd defendants as alleged in the plaint and the 4th defendant being a minor, specific performance cannot be had against him with the result that the plaintiff could only bind the 1st defendant on his contract in which circumstances the Court would not grant the specific relief sought for but would only award damages. We will take these contentions in order and see how far they are proved and are an answer to the plaintiff's claim.

We are unable to accept the evidence of the alleged oral agreement of the 22nd August 1906. Mr. K. Srinivasa Aiyangar relies chiefly on the fact that defendants

Nos. 6 and 7 purchased stamp papers soon after the date of the alleged agreement and also on the fact that that agreement is recited in the sale-deed. The story, however, is utterly improbable on the face of it. The 6th and 7th defendants allege that they were in negotiation for this property for a month prior to the alleged oral contract, that they originally having offered Rs. 2,000 and the family insisting on Rs. 2,500, at the end of the month they eventually agreed to pay Rs. 2,275. If this be so, it is inconceivable that they should have subsequently paid Rs. 2,900 for the same property instead of insisting on their contract being carried out. According to their own case, the negotiations for the oral contract were carried on with the 5th defendant, the father, whom they themselves alleged to be the managing member, and lastly it is unlikely that after such protracted negotiations, the agreement should not have been reduced to writing. We have no doubt that the idea of this oral contract was first conceived on the 20th of September 1906, when the sale-deed was executed.

For the contention that there was no subsisting contract at the date of the sale, reliance is sought to be placed on a discussion that is said to have taken place between the plaintiff and the defendants Nos. 1 to 5 on the 5th of September, on which date he undoubtedly asked the 1st defendant to execute a sale-deed and we are asked to hold that he abandoned his right to the execution of the deed, stated that he was going away to Nellore for his father's ceremony and that he would resume negotiations when he returned, but that if he did not return shortly, they could sell the property to anybody else. We have examined the whole of the evidence very carefully and do not find that this contention is proved. We are satisfied that what took place with regard to the plaintiff's contract is as follows: The 1st defendant, undoubtedly, entered into a contract with the plaintiff on the 27th August 1906 for the sale of the lands, which contract was witnessed by the 5th defendant, but we do not believe that this was made with the express consent of defendants Nos. 2 and 3 as the evidence called for the plaintiff would have us believe. On September 5th, when the plaintiff demanded his sale-deed, the 1st defendant informed him that the 2nd and 3rd defendants would not agree. The plaintiff then recognised that the agreement to sell to him was executed by the 1st defendant only and was not binding on defendants Nos. 2, 3 and 4. He did not abandon his contract but he hoped to get the consent of defendants Nos. 2 and 3 by paying a little more and left them to go to Nellore intending to make that arrangement when he returned. Mr. T. Rangachariar for the plaintiff contended that the 1st defendant was the *de facto* managing member, the father being old and ill, having resigned the management, and that even if express consent is not found, there was necessity proved which makes the contract binding on the junior members, while Mr. Srinivasa Aiyangar *contra* contended that the 1st defendant did not intend to convey more than his own interest and that even if he did intend to do so, the document does not purport to convey more than his own interest and *lastly*, that necessity was neither set up in the plaint nor proved and, therefore, the family interest would not pass. In support of the second proposition, he relies on a recent decision of the Privy Council in *Balwant Singh* v. *R. Rockwell Clancy* (1). This case, however, does not support his proposition. The decision did not turn on the words of the document but on the surrounding circumstances which were examined by the Court to ascertain the true intent of the document. In that case, the executant was shown to have been claiming the property as the owner of an impartible *Raj* and the document itself recites this claim. The case is an authority for the exactly opposite proposition that surrounding circumstances must be looked to, to see whether the executant purported to convey his interest or the family interest. This was expressly decided by a Full Bench of five Judges in a case reported as *Kanti Chunder Goswami* v. *Bisheswar Goswami* (2). It is true that in *Simbhu Nath Pande* v. *Golap Singh* (3), their Lordships of the Privy Council say that a purchaser, who is bargaining for the entire family estate, would

(1) 34 A. 296; (1912) 1 M. W. N. 462; 11 M. L. T. 344; 9 A. L. J. 509; 15 C. L. J. 475; 16 C. W. N. 577; 14 Bom. L. R 422; 23 M. L. J. 18; 14 Ind. Cas. 629.
(2) 25 C. 585; 2 C. W. N. 241.
(3) 14 C. 572; 14 I. A. 77.

hardly be satisfied with a document purporting to convey only the right and interest of the father, but their Lordships used that as one test only of the intention of the parties. We cannot, therefore, accept the contention that this agreement purported only to convey the 1st defendant's interest. We have no doubt that when the 1st defendant executed that document, he wished the plaintiff to believe that he was conveying the whole family interest in the property. But on the question of necessity, we can find no evidence of pressure. What is required to justify such a sale has been laid down long ago in *Hanooman Persaud Pandey* v. *Musammat Babooee Munraj* (4): "The actual pressure on the estate, the danger to be averted, or the benefit to be conferred upon it, in the particular instance, is the thing to be regarded." There is no evidence of the condition of this estate or of any threatened proceedings or even pressure of creditors and it further tells very strongly against the plaintiff that within a month from the date of this agreement, the family was able to obtain Rs. 525 more for the same property: such an agreement on that ground alone could not in this case be upheld as being for the benefit of the estate. We, therefore, find that neither consent nor necessity has been made out.

The question, whether specific performance can be had against a minor of a contract made on his behalf to sell property has been argued at great length. Mr. Srinivasa Aiyangar relied on a decision of the Privy Council reported as *Mir Sarwarjan* v. *Fakhr-ud-din Mahomed Chowdhuri* (5), and another reported as *Waghela Raj Sanji* v. *Shekh Masludin* (6) and the case of *Jugul Kishori Chowdhurani* v. *Anunda Lal Chowdhuri* (7). If this is the law, it cannot be denied that it will have a very serious effect on Hindu families. There are very few joint families, one member of which at least is not a minor. If, therefore, a specific performance cannot be had on a contract by such a family to sell property there can be no contract for the sale of land entitling the other party to specific performance. We have examined the case in *Mir Surwarjan* v. *Fakhr-ud-din Mahomed Chowdhuri* (5) very carefully and are satisfied that that is not what their Lordships decide. The language relied on is at page 237 and it is as follows: "Their Lordships are of opinion that it is not within the competence of the guardian of a minor to bind the minor or the minor's estate by a contract for the purchase of immoveable property." The first thing that appears is that this is not a case of a contract made by a managing member purporting to bind the whole family but by the guardian of a minor and the manager of his estate. The family in that case were Muhammadans in each of whom including the minor was vested a separate though undivided share of the property, and what was considered was the power of such guardian-manager to bind the minor or his property by a contract for the purchase of immoveable property. It is obvious that the question which is vital to sale by a managing member, namely necessity cannot arise in a contract for the *purchase*, not for the sale, of immoveable property. The Guardians and Wards Act (VIII of 1890), section 27, expressly provides that a guardian may do all acts that are reasonable and proper for the protection and benefit of the property, but that where a guardian is appointed by the Court, he shall not dispose of immoveable property except in the case of necessity or for an advantage to the ward and then only by permission of the Court. The Act clearly contemplates such necessity arising, as, of course, it frequently does, and as no guardian of the property of a minor, who is a member of a joint Hindu family, can be appointed with reference to his share in the family property, [*vide Gharib ul-lah* v. *Khalak Singh* (8)], it follows that the restriction in the Act cannot be applied. The decision is only an authority for the exact proposition quoted, namely, that the guardian and manager of a minor's property cannot bind him by a contract for the purchase of immoveable property. The case above referred to *Gharib-ul-lah* v. *Khalak Singh* (8), is one in which a mortgage by the *karta* of a family and

(4) 6 M. I. A. 393; 18 W. R. 81.

(5) 39 C. 232; 21 M. L. J. 1156; 16 C. W. N. 74; (1912) 1 M. W. N. 22; 9 A. L. J. 33; 15 C. L. J. 69; 14 Bom. L. R. 5; 13 Ind. Cas. 331.

(6) 11 B. 551; 14 I. A. 89.

(7) 22 C. 545.

(8) 25 A. 407; 5 Bom. L.R. 478; 7 C.W.N. 681; 30 I. A. 165.

the guardian mother of a minor was considered by the Court; and their Lordships held that the execution by the guardian of the minor was a nullity but that execution by the *karta*, that is, the managing member, bound the minor. It is true that this was a completed transfer but we can find no principle which would uphold a transfer against the minor but avoid the transaction where it had not got beyond the stage of contract. *Krishna Ayyar* v. *Krishnasami Ayyar* (9), relied on by Mr. Srinivasa Aiyangar is not an authority for that proposition. The other decision of the Privy Council *Waghela Rajsanji* v. *Shekh Masludin* (6), lays down that it will be a very improper thing to allow a guardian to make covenants in the name of his ward and that in so doing, the guardian exceeded her powers with the result that a suit founded upon the personal liability of the minor must fail. This decision has no bearing whatever on the power of a managing member to bind a minor by a contract for sale of his interest for necessity.

We hold, therefore, that a managing member has power in proper circumstances to so bind the minor's interest and specific performance can be given against that interest. In the present case, however, we are satisfied, on the evidence especially with regard to Exhibit H series, that the 1st defendant was not the managing member and so not entitled to bind the interest of any one but himself. The fact that the 5th defendant witnessed the agreement is of no materiality now as he is dead and his interest in the estate has disappeared. In the view that we take that the contract only binds the 1st defendant's share, Mr. Rangachariar does not ask for specific performance as to his share nor should we grant it in the circumstances of this case. He, however, claims damages against the 1st defendant's representative. He has not asked for damages in his plaint but we are of opinion that they can be awarded under section 19 of the Specific Relief Act and we assess the damages at the difference between the sum for which the 1st defendant agreed to sell the property (Rs. 2,375) and Rs. 2,900 which is shown by the subsequent sale-deed to be the value of the property. He is also entitled to Rs. 25 expended by him in purchasing the stamp paper and Rs. 20 paid by him at the date of the agreement. Defendants Nos. 6 and 7 will have their costs throughout from plaintiff. The plaintiff will have his costs from the 8th respondent as legal representative of the 1st defendant. The other defendants will bear their own costs throughout.

(9) 23 M. 597.

CALCUTTA HIGH COURT.

ORIGINAL CIVIL SUIT No. 61 OF 1911.

February 28, 1912.

Present:—Mr. Justice Fletcher.

LODNA COLLIERY Co. LD.—PLAINTIFF

versus

BIPIN BIHARI BOSE—DEFENDANT.

Letters Patent (Cal.), cl. 12—High Court—Jurisdiction—"Suit for land"—Trespass—Wrongful breaking through mine and carrying away coal—Covenant to keep barrier between lessor and lessee—Privity of contract between lessor and sub-lessee—Cause of action—Suit for damages for erection of buttresses.

A suit to recover damages for breaking through plaintiff's mine or land and carrying away coal belonging to the plaintiff, is a suit for land or immoveable property within the meaning of clause 12 of the Calcutta Letters Patent.

Such a suit is founded on the ordinary case of a trespass *quare clausum fregit* and necessitates the decision of the question of title as to the coal.

Rajmohan Bose v. *East India Railway Co.*, 10 B. L R. 241, followed.

The venue of a suit on a covenant by reason of a privity of estate is local.

A., an under-lessee, covenanted that he would leave a certain barrier as was provided in the under-lease. Subsequently, *A.* assigned his rights or granted an under-lease to *B.*, who granted an under-lease to *C.* The representative of the original lessor sued *C.* for damages for breach of the covenant to leave the barrier and for damages to which plaintiff would be put in erecting masonry buttresses to protect his mine:

Held, (1) that there was no privity of estate between *C.* and the plaintiff, that *C.* was not personally liable on the covenant in the original sub-lease, and that the plaint did not disclose any cause of action against *C.* on the covenant in the original sub-lease;

(2) that the claim for damages for erecting masonry buttresses was a claim for land, within the meaning of clause 12 of the Letters Patent.

Mr. *L. P. E. Pugh* (with him Messrs. *W. H. Knight*, *N. Sircar* and *W. M. Cubitt*), for the Plaintiff.

Mr. *S. P. Sinha* (with him Messrs. *B. C. Mitter* and *B. L. Mitter*), for the Defendant.

LODNA COLLIERY CO. LD. v. BIPIN BEHARI BOSE.

JUDGMENT.—This is a suit brought by the plaintiff Company against the defendant, Bipin Bihari Bose, to recover first of all the sum of Rs. 90,902-8, or for an inquiry as to the amount of the plaintiff Company's coal raised by the defendant and sold to the plaintiff Company and the moneys so realized by the defendant with such proper deduction as the Court may direct; and *secondly*, for discovery from the defendant of the quantity of the plaintiff Company's coal so raised or disposed of; *thirdly*, for interest by way of further damages; *fourthly*, for Rs. 1,21,012-6 as damages for breach of contract and injury to the plaintiff Company's colliery; and, *fifthly*, unless the defendant should undertake to protect and secure the plaintiff Company's workings by masonry buttresses to be erected to the satisfaction of the plaintiff Company's servants and surveyors, for a further sum of Rs. 4,000 as damages.

Now, in the first paragraph of the plaint, it is set out that the plaintiff Company is the proprietor of a colliery and is the owner under a permanent *mokurari pottah* or lease of *Mouza* Lodna in Manbhum, subject as to a portion thereof to an under-lease or *dur-mokurari pottah* granted by predecessors-in-title of the plaintiff Company in favour of one Golab Chandra Sircar of a portion on the North-West of the said *mouza*. In the second paragraph is set out that by the terms of the said under-lease, dated the 7th *Assin* 1303 B. S., corresponding with the 22nd September 1896, it was agreed that the boundary should be demarcated between the portion of the said *mouza* retained by the grantors and the portion underleased as aforesaid and that a barrier or block of coal 30 feet in width should be maintained between the two portions of the said *mouza* and that neither party should work 15 feet of coal on each side of the boundary line, and that if either party encroached on the barrier and in consequence the other party should sustain any loss, then the encroaching party should make good the other's loss. The third paragraph alleges that no such boundary was actually laid down by and between the original parties to the said under-lease but, subsequent to the purchase of the said *mouza* and an assignment of the *pottah* under which the same was held on the 5th June 1897 to Alfred Morrison Turner, George Hampson Morrison, Henry Blois Hawkins Turner, and Charles Edward Smyth, the boundary was on the 20th July 1897 delineated, laid down, and marked by the agents and representatives of the said A. M. Turner, G. H. Morrison, H. B. H. Turner and C. E. Smyth on the one hand and of the said Golab Chandra Sircar on the other hand, and a plan showing the said boundary was signed by both parties. In the fourth paragraph, the plaint alleges that the plaintiff Company is the assignee of those named gentlemen. Then in the fifth paragraph the plaintiff Company alleges that Golab Chandra Sircar assigned his rights in or granted an under-lease of his portion of the said *mouza* so delineated as aforesaid to one Ram Lal Singh, and that the said Ram Lal Singh granted an under-lease of the same portion of the *mouza* to the defendant who there carries on a colliery known as the North Burrakar Colliery. In the sixth paragraph, it is alleged that the plaintiffs and defendant dwell and carry on business and personally work for gain in Calcutta. The seventh paragraph alleges that the defendant has so conducted his mining operations at the North Burrakar Colliery that he has cut into and removed portions of the coal forming the barrier agreed to be left between his North Burrakar Colliery and the plaintiff Company's Lodna Colliery, and has cut and carried away coal from the 15 feet agreed to be left on the north of the boundary line in breach of the agreement contained in the said under-lease, and has also cut and carried away coal from the south or plaintiff Company's portion of the barrier, and has further cut through the said barrier, and cut and carried away the plaintiff Company's coal on the said side of the said barrier. Then the eighth paragraph alleges that the plaintiff Company is unable to state the exact dates and times when the defendant cut into and through the said barrier, but the fact that an encroachment had been made was only recently discovered by the plaintiff Company and the plaintiff Company believes and charges that all the said conversions of the plaintiff Company's coal and trespasses in the plaintiff Company's property and the defendant's breach of contract in not maintaining the said barrier, have taken place within two years

prior to the filing of the plaint. Then the 9th paragraph alleges that the plaintiff Company had an arrangement under which the plaintiff Company bought from the defendant the whole of the output of the defendant's colliery at prices which during the last two years were Rs. 4-12 in 1909 and Rs. 3 in 1910, and the plaintiff Company alleges that they are entitled to charge the defendant for the coal belonging to the plaintiff Company abstracted by the defendant from the plaintiff Company's property and sold to the plaintiff Company at the highest rate paid by the plaintiff Company for such coal during the past two years. In the 10th paragraph it is alleged that the amount of coal, so far as the plaintiff Company has been able to ascertain, amounts to 17,314 tons of steam coal and 5,774 tons of slack, and the plaintiff Company claims from the defendant the sum of Rs. 90,902-8 in respect of the same, which is the first amount claimed in the prayer. Then the 11th paragraph says that by reason of the wrongful act of the defendant in cutting through the said barrier, the plaintiff Company has further sustained loss and damages in that it has become necessary for the safety and preservation of the plaintiff Company's colliery to leave another barrier of coal as shown on the plan thereto annexed to the south of the coal belonging to the plaintiff Company worked out by the defendant, of the width of 30 feet. By reason of the wrongful acts of the defendant and the necessity for leaving a new barrier, an area of land containing approximately 32,641 tons of steam coal and 10,849 of slack of similar qualities to that raised by the defendant and sold to the plaintiff Company has become unworkable and cannot be utilized by the plaintiff Company. The value of such coal and slack, less the cost of working and raising it, is Rs. 1,21,012 6, and the plaintiff Company claims the said sum as damages inasmuch as the plaintiff Company's colliery has been injured and damaged by the defendant to that extent. In the 12th paragraph of the plaint is set out that at one portion of the defendant's colliery where his workings adjoin the plaintiff Company's workings and the defendant has cut through to the plaintiff Company's workings, there is a portion where the plaintiff Company's workings can only be rendered safe by the insertion of *pucca* buttresses at a cost of about Rs. 4,000. In the 13 paragraph, it is alleged that the plaintiff Company's causes of action arose at Lodna on dates within three years.

Now, the question that has been argued at the present stage is, does this plaint disclose a cause of action, which this Court can try? In my opinion, it does not. First of all, the case as to the carrying away of coal is founded on the ordinary case of a trespass *quare clausum fregit*, that is, the defendant broke through and entered the plaintiff Company's mine or land and carried away coal belonging to the plaintiff Company. That it seems to me is the nature of the suit. Now a suit of that nature seems, so far as I can gather from the decisions of this Court, to be one that would be considered as a suit for land or immoveable properties within the meaning of the clause 12 of the Letters Patent of this Court. I think there is a great deal to be said if the matter could be treated as *res integra* in the argument put forward by Mr. Knight; but suits for land are well defined by the decisions of this Court. The Bombay High Court has taken the other view; and it seems to me to be a much more likely one in respect of suits for land or other immoveable properties. But the matter has been considered over and over again in this Court.

Now, applying the principles laid down in the decisions of this Court to the suit in question, it seems to me that, in so far as the plaintiff seeks to recover damages for the defendant having broken into his close and carried away his coal, it will become necessary that the title in respect of that coal must be gone into, whether the defendant had the right to break through or not. In so far as that portion of the case is concerned, I do not think that having regard to the decisions, that have been dealt with very fully and with great ability by both Mr. Sinha and Mr. Knight, that I can decide otherwise than that this is a suit for land. The decisions of the Appellate Court are binding upon me, and I cannot go behind them. It seems to me that so far as the same is a suit to recover damages arising out of an action for trespass to land, that is a suit for land; in one of the cases cited, Garth, C. J., expressly refers to a suit for trespass as being a suit for land. In England, it has always been considered as a suit for land.

The case of *Rajmohun Bose* v. *East Indian Railway Co.* (1), which Mr. Knight has relied on, was a very different case. In that case, a man sued the East Indian Railway Company for carrying on a forge and other works on land adjoining his. That was not a suit for trespass to land, but it was really a suit in respect of nuisance, and that case is wholly distinguishable. In so far as this suit seeks to recover damages by reason of the defendant having broken into close and carried away the plaintiff Company's coal, I am of opinion this is a suit for land.

The other point put forward by Mr. Knight was that in the original under-lease, Golab Chandra Sircar had covenanted that he would leave the barrier as was provided in the under-lease. Now, Golab Chandra Sircar, according to the allegation in the plaint, had either assigned his rights in, or granted an under-lease to, one Ram Lal Singh and Ram Lal Singh granted an under-lease to the defendant. That is the allegation in the plaint. So whichever way we take it, there is no privity of contract or estate between the defendant and the plaintiff Company. The plaintiff Company obviously could not sue the defendant on any covenant contained in Golab Chandra Sircar's under-lease, either on the ground of privity of estate or otherwise. Another point might arise if the defendant were the assignee of Golab Chandra Sircar, and that is whether that would be a suit for land. So far as I remember, it was always held in England that the venue of a suit on a covenant by reason of a privity of estate was local. The defendant is not personally liable on any of the covenants contained in the under-lease to Sircar. It seems to me that so far as it is a suit founded upon the terms contained in the under-lease, the plaint does not disclose any cause of action, because the defendant is not personally liable to perform the terms of the under-lease to Golab Chandra Sircar. That would dispose of the case so far as the plaintiff's claim for breach of contract is concerned.

The next portion of the case is as to a sum of Rs. 4,000 which is claimed as damages that the plaintiff will be put to in erecting masonry buttresses unless the defendant erects such buttresses to the satisfaction of the plaintiff Company's servants or their surveyors. That sum is claimed on the footing that damage has been caused by reason of the wrongful act of the defendant in cutting through the said barrier; that stands on the same footing as the carrying away of the coal. It depends on the question, was the defendant justified in cutting through the barrier and carrying away the coal in the same manner suggested? That is the way it is claimed and that is the only ground on which the defendant can be made liable. It seems to me that the sum of Rs. 4,000 stands on exactly the same footing as the sum of Rs. 90,902-8, which is claimed in respect of the coal which the defendant is alleged to have carried away from the plaintiff's land. That being so, that portion of the action, in so far as it seeks to recover the sum of Rs. 4,000, comes within the meaning of a suit for land. The Court could not be able to award the plaintiff that sum of Rs. 4,000 without deciding the question of the title to the barrier of coal which the defendant is alleged to have broken through and so caused damage to the plaintiff Company. On this ground, I think the plaint in this suit does not disclose any cause of action which this Court is competent to try. The plaint must, therefore, be returned to the plaintiff Company. As to costs, the plaintiff Company must pay the costs of these proceedings as of a hearing. The plaintiff Company will pay the defendant the costs of this suit including all reserved costs on scale No. 2.

(1) 10 B. L. R. 241.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 123 OF 1912.

June 18, 1912.

Present:—Mr. Justice Robertson.

SHAMAN AND OTHERS—PLAINTIFFS—APPELLANTS

versus

ARI JANG—DEFENDANT—RESPONDENT.

Limitation—Custom—Alienation by widow—Next heirs not contesting alienation—Suit for possession by remote heirs after death of nearer heirs—Starting point of limitation—Limitation Act (IX of 1908), Sch. I, Arts. 140, 141, 144.

On the death of *N.*, his widow *S.* succeeded to the land in suit and she sold it in 1890. On her death

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H. was entitled to claim the land. He did not claim it nor did his son *D. D.*'s widow too made no claim and died in 1907. Plaintiff, after her death, became entitled to the land and sued for possession:

Held, that the right to sue accrued to the plaintiff on the death of *D.*'s widow and the suit was consequently not barred.

Sundar v. *Salig Ram*, 26 P. R. 1911; 34 P. L. R. 1911; 33 P. W. R. 1911; 9 Ind. Cas. 300, followed.

The anomalous condition of the law pointed out.

Second appeal from the order of the Divisional Judge, Hoshiarpur Division, dated the 21st June 1911, affirming that of the Munsif, second class, Kangra, dated the 23rd March 1911, dismissing plaintiffs' claim.

Rai Bahadar Lala *Sukh Dial*, for the Appellants.

Mr. *Pestonji*, for the Respondent.

JUDGMENT.—The land in suit originally belonged to one Nichal, who was the common ancestor of the plaintiff and the last male owner who held the property by the name of Nazro. On the death of Nazro, his widow Surtu succeeded and she sold the land in dispute to her son-in-law in 1890. On her death Hans, whose relationship will be seen from the pedigree-table, was entitled to claim the land. He did not claim it nor did his son, Diwan. Diwan left a widow *Musammat* Parbati, who made no claim. *Musammat* Parbati died in 1907 and the plaintiff Shamu then became entitled to the land and he now claims it, on the ground that the alienation by Surtu was not a valid one.

The learned Divisional Judge has held that time began to run against the plaintiff from the death of *Musammat* Surtu. This view might have claimed considerable support before the passing of the decision by the Full Bench in *Sundar* v. *Salig Ram* (1). Under that ruling, it is quite clear that time can only be held to have run against Shamu, plaintiff, from the date of the death of *Musammat* Parbati, as according to the decision in that case, the fact that time had run against Hans and Diwan and *Musammat* Parbati is immaterial, Shamu, plaintiff, not having derived his rights from Hans or Diwan, but from the common ancestor. It is unnecessary to enter into my personal view on the subject as the ruling of the Full Bench is perfectly clear and must be followed.

The only remedy for the anomalous conditions produced by this view of the law, a view which may be logically deduced from the premises laid down by previous authorities but which probably never formed any part of Customary Law as known to the people, such Customary Law being by no means logical, lies in legislation. The results, as stated by the learned Judge who passed that ruling, will, undoubtedly, in many cases, be to produce difficulty and injustice which can only be remedied now by legislation on the lines of the Punjab Limitation Act I of 1900. Provisions analogous to those contained in that Act dealing with the widow's estate would probably be very beneficial to the community. That, however, is a matter for the legislation.

Following *Sundar* v. *Salig Ram* (1), I hold that the suit was not barred by limitation and I return it for decision on the merits. Of course, it may be that the consent of Hans or the near reversioner living at the time, if given in good faith, may be a bar to the suit, but this matter and other matters must be decided by the lower Court according to law Judgment announced.

Case remanded.

(1) 26 P. R. 1911; 34 P. L. R. 1911; 33 P. W. R. 1911; 9 Ind. Cas. 300.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL No. 2 OF 1909.

September 4, 1912.

Present:—Mr. Justice N. Chatterjea and Mr. Justice Richardson.

NAGENDRA LAL CHOWDHURY—DEFENDANT—APPELLANT

versus

Srimati RAJA BIBI AND OTHERS—PLAINTIFFS—RESPONDENTS.

Bengal Tenancy Act (VIII of 1885), s. 75—Limitation, special—"Exacted", meaning of—Suit for refund of excess amount realised by landlord without claiming penalty—Limitation applicable to suit—Limitation Act (XV of 1877), Sch. II, Art. 14—Patni Regulation (VIII of 1819), s. 14—Collector's power to determine summarily rent of tenure then payable—No power to determine rent payable in future.

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The plaintiffs alleged that they held a *patni taluq* on payment of certain money rent to the defendants, but that the latter took proceedings under the Patni Regulation for realisation of the value of certain paddy rents which, they said, were payable for the *taluq*, and the plaintiffs, in order to save their tenure from sale, deposited the amount claimed by the defendants. The plaintiffs accordingly sued for a declaration that the *taluq* bore money rent and not paddy rent, and for refund of the amount realised from them in excess of the proper rent:

Held, (1) that the suit was not barred by the special limitation prescribed by section 75 of the Bengal Tenancy Act, as that section had no application to the suit: *first*, because the excess rent realised from the plaintiff in proceedings under the Patni Regulations could not be said to have been exacted by the *zemindars* within the meaning of the section, which evidently contemplated exactions by means other than process of law; and *secondly*, because the section did not take away the right of a person, from whom rent had been realised in excess, to recover such excess amount from the landlord, apart from the provisions of the section, within the ordinary period of limitation;

(2) that the suit was not barred under Article 14 of the Limitation Act, because under section 14 of the Patni Regulation the Collector could make only a summary investigation if the *talukdar* contested the *zemindar's* demand for any arrear, that the determination of what was the rent payable for the tenure in future was beyond the scope of the Collector's power, and that the plaintiffs did not require to set aside any act or order of the Collector.

Raghu Nath Prasad v. *Kaniz Rasul*, 24 A. 467; A. W. N. (1902) 116 and *Parbati Nath Dutt* v. *Raj Mohun Dutt*, 29 C. 367; 6 C. W. N. 92, distinguished.

Section 75 merely enables a tenant to recover from his landlord certain penalty in addition to the amount or value of what is exacted, if the suit is brought within six months from the date of exaction, and the limitation provided by the section does not bar a suit to recover the excess amount where no penalty is claimed.

Appeal from the decree of the Sub-Judge of Chittagong, dated September 18th, 1909 affirming that of the Munsif of Hathazari, dated August 19th, 1907.

Babu *Dhirendra Lal Kastagir*, for the Appellants.

Babu *Manmatha Nath Roy* for Babu *Mahendra Nath Roy* and Babu *Biraj Mohan Majumdar*, for the Respondents.

JUDGMENT.

N. CHATTERJEA, J.—The plaintiffs-respondents hold certain permanent *taluqs* under the defendants-appellants who are the *zemindars*. The plaintiffs alleged that they hold the *taluks* on payment of certain money rents to the defendants; but that the latter took proceedings under Regulation VIII of 1819 in two successive years for realisation of the value of certain paddy rents which they said were payable for the *taluks*, and the plaintiffs in order to save their tenures from sale deposited the amount which the defendants claimed as the rents payable. The plaintiffs accordingly sued for a declaration that the *taluks* bear money rents as stated in the plaints, and not paddy rents, and for refund of the amount realised from them in excess of the proper rent under the proceedings under Regulation VIII of 1819.

Both the Courts below have decreed the suits, and the defendants have appealed to this Court, and the only question raised in these appeals is whether the suits are barred by limitation.

It is contended on behalf of the appellants that the suits are barred by the special limitation prescribed by section 75 of the Bengal Tenancy Act and by Articles 14, 91, 92 and 93 of the general Limitation Act.

We are of opinion that section 75 of the Bengal Tenancy Act has no application to these suits for two reasons: *first*, because the excess rent realised from the plaintiffs in the proceedings under the Patni Regulation cannot be said to have been exacted by the *zemindars* within the meaning of section 75 of the Bengal Tenancy Act, which evidently contemplates exactions by means other than process of law, and *secondly*, because the section does not take away the right of a person, from whom rent has been realised in excess, to recover such excess amount from the landlord apart from the provisions of the section within the ordinary period of limitation. The section merely enables a tenant to recover from his landlord certain penalty in addition to the amount or value of what is exacted, if the suit is brought within six months from the date of the exaction, and we are of opinion that the limitation provided by the section does not bar a suit to recover the excess amount where no penalty is claimed.

We are also of opinion that Articles 91, 92 and 93 of the Limitation Act do not bar these suits. It appears that the defendants produced certain unregistered *kabuliats* before the Collector which showed that the paddy rents were payable for the tenures. The Courts below have held that these *kabuliats* were not genuine. It has been contended on behalf of the appellant that the plaintiffs cannot get the declaration that money rents are payable for the tenures without setting aside the *kabuliats* or getting

them declared as forgeries. But even assuming that it is necessary for the plaintiffs to do so in order to succeed in these suits, there is nothing to show that the facts entitling the plaintiffs to have the *kabuliats* cancelled or set aside were known to them more than three years before the suits were instituted. On the contrary, the facts found in the case go to show that the plaintiffs became aware of the *kabuliats* for the first time when they were produced before the Collector in 1905, and the suits were instituted in February 1907. The suits, therefore, cannot be barred by Article 91, and for similar reasons, they cannot be barred by Articles 92 and 93 of the Limitation Act.

Then as to Article 14 of the Limitation Act—so far as the suits are for declaration that money rents as stated in the plaints and not paddy rents are payable for the tenures, we think the suits do not come under Article 14. Under section 14 of the Patni Regulation, the Collector has power to make only a summary investigation if the *talukdar* contests the *zemindar's* demand of any arrear as specified in the notice advertised. The determination of what is the rent payable for a tenure is beyond the scope of the Collector's power. It may be that the Collector, in order to determine whether the *zemindar's* demand of the arrears is correct or not, has to consider the rent payable, but the investigation and his award have reference only to the particular demand and he has no power to decide what is the rent payable for the tenure in future. In these particular cases, the Collector did not come to any clear finding as to what was the rent payable, and merely directed the amount deposited to be paid over to the *zemindar*. But, even if it be held that he did so by implication, we are of opinion that his order merely amounts to a finding that the demand of arrears for the particular period was correct and cannot stand in the way of a suit for a declaration as to the proper rent payable for the tenures.

We accordingly hold that Article 14 of the Limitation Act does not apply to the suits in so far as a declaration is sought that the rents payable for the tenures were money rents as stated in the plaints.

The next question is whether Article 14 applies to the suits in so far as the plaintiffs seek a refund of the amounts realised by the *zemindar* under the Collector's order. The plaintiffs do not in express terms seek to set aside any act or order of an Officer of Government in his official capacity, but if it is necessary to set such an order aside before the plaintiffs can get a refund of the money, the mere fact that plaintiffs have not prayed for the setting aside of the order would not prevent the application of Article 14. We have, therefore, to see whether it is necessary for the plaintiffs to get the order of the Collector set aside in order to get a refund of the excess amount realised by the *zemindar* under the Collector's order.

Now, the award of the Collector under section 14 of the Patni Regulation is passed only after a summary investigation into the *zemindar's* demand if the *talukdar* contests it, and merely regulates the "ulterior process" as laid down in that Regulation. That section provides that if the summary investigation be not disposed of before the date fixed for the sale and the amount demanded by the *zemindar* is not deposited, the sale will not be estopped and the only remedy left to the *talukdar* is to bring a regular suit for reversal of the sale and for damages. Where, however, the award is made before the date of the sale, we think the *zemindar* takes the amount under the award of the Collector, subject to the liability to a civil suit. The Collector's award may be based upon a *kabuliat* which is contested by the *talukdar* (as in the present case) and when the *patnidar* succeeds in getting the *kabuliat* declared invalid in a suit, in the Civil Court, the basis of the Collector's order is gone. The Collector's order, in its nature, is merely provisional and made for a particular purpose, *viz.*, for determining in a summary way the amount on payment of which the sale is to be prevented under the Regulation and is not a conclusive adjudication of the amount which may be justly due from the *talukdar* and the determination of which may depend upon matters which may be beyond the powers of the Collector to adjudicate, and which must, therefore, be adjudicated upon in a suit such as the present. There is no provision for setting aside such an award, and we are of opinion that the award of the Collector is no impediment to bringing a regular suit to contest the demand of the *zemindar* and there is no necessity for setting aside such an award.

NAGENDRA LAL CHOWDHURY v. RAJA BIBI.

The learned Pleader for the appellant relied upon the case of *Raghu Nath Prasad* v. *Kaniz Rasul* (1). In that case, a sale took place in execution of a decree, which had been transferred to the Collector under the provisions of section 320 of the Civil Procedure Code, which was, however, set aside by the Collector on the application of the judgment-debtor and the Collector's order was confirmed on appeal by the Commissioner. The auction-purchaser brought a suit to have the sale in her favour confirmed more than a year after the Collector's order was passed, and it was held that inasmuch as the plaintiff's claim involved the setting aside of the Collector's order setting aside the sale, the suit was barred by Article 14. But the Collector's order setting aside the sale could be set aside by a suit, and so long as that order was not set aside, a suit could not be maintained for having the sale confirmed. That case is, therefore, distinguishable from the present.

The other case relied on, *Parbati Nath Dutt* v. *Raj Mohun Dutt* (2), is also distinguishable. In that case, a party to a proceeding before the Collector under the Estates Partition Act (VIII of 1876) contended that certain land measured as part of the estate under partition was not part of that estate but appertained to his *howla*. The Revenue Authorities, however, decided the question against him under section 116 of the Act, and it was held that a suit brought by him after one year from the date of the order for a declaration that the disputed land was part of his *howla*, was barred by Article 14 of the Limitation Act But, as pointed out in that case, the order under section 116 which was binding on the plaintiff could not be set aside except as provided by section 150, and section 150 provided that any person aggrieved by an order under section 116 may bring a suit to modify it or set it aside and Article 14 of the Limitation Act prescribes a period of one year for the bringing of such a suit. That case, therefore, is also distinguishable but it may be noted that in a later case *Shyama Sundari Dasya* v. *Mahomed Zarip* (3), the learned Judges declined to express any opinion upon the question whether the case of *Parbati Nath Dutt* v. *Raj Mohun Dutt* (2) is or is not open to criticism even with reference to the provisions of Estates Partition Act.

On the whole, we are of opinion that the claim for refund of the excess amounts realised by the defendants in the proceedings under the Patni Regulation is not barred by Article 14 of the Limitation Act, and that the suits are not barred by limitation on any of the grounds urged on behalf of the appellant.

The appeal is accordingly dismissed with costs.

RICHARDSON, J.—I concur generally with my learned brother.

The only real difficulty is whether Article 14 of the Schedule to the Limitation Act is applicable to any of the reliefs claimed in the suit. As to that Article, I agree in the first place that the Collector's order in its scope was confined to the particular demand with which the order dealt and that the present suit, as a suit for the determination of the true conditions of the contract between the *patnidar*, plaintiffs and the *zemindar* defendants, is certainly not subject to the limitation prescribed by the Article and is within time.

On the other point which arises in this connection, I also agree though not without hesitation. The sum deposited by a *talukdar* under section 14 of the Patni Regulation is deposited merely for the purpose of preventing the threatened sale and regard being had to the language of the section, I am disposed to concur in the view that whether the amount is in whole or in part ultimately paid over to the *zemindar* or returned to the *talukdar*, the Collector's order in relation to the question which party has a better right to the money is not within the purview of Article 14. The order determines that no sale shall take place. For that purpose, it is final and conclusive subject to such further proceedings as it may be open to either party to take in the Civil Courts. That being the nature of the order and the function which it serves, it seems unnecessary to have it set aside as a preliminary to the recovery of the money by means of a civil suit brought by the party other than the party to whom it is returned or paid over. In other words, the order raises no barrier which must be removed before such a suit can be instituted.

Appeal dismissed.

(1) 24 A. 467; A. W. N. (1902) 116.
(2) 29 C. 367; 6 C. W. N. 92.
(3) 9 C. L. J. 91; 3 Ind. Cas. 693.

PUNJAB CHIEF COURT.

CIVIL REVISION PETITION No. 261 OF 1912.

October 12, 1912.

Present:—Mr. Justice Chevis.

SHAM SINGH—PLAINTIFF—PETITIONER

versus

PREM SINGH AND OTHERS—DEFENDANTS—RESPONDENTS.

Estoppel—Vendor denying his title—Possession not permissive—Question of fact—Revision—Evidence Act (I of 1872), s. 115.

That a certain person's possession is not permissive is a finding of fact and, consequently, cannot be questioned in revision.

A person selling a property is not estopped from denying the correctness of his title so far as the claim of a third person is concerned, but such a vendor is not to be trusted when he is playing the vendee false by supporting that claim.

Petition, under section 70 (*a*) of Act XVIII of 1884, as amended by Act XXV of 1899, for revision of the order of the District Judge, Ludhiana, dated the 4th day of January 1912, reversing that of the Munsif, 1st class, Ludhiana, dated the 26th day of October 1911, decreeing the claim.

Pandit *Ram Bhaj Datta*, for the Petitioner.

Mr. *Nihal Chand Mehra*, for the Respondents.

JUDGMENT.—There are two clear facts in this case:—

(1) That plaintiff's uncle was owner of the house in 1850.

(2) That subsequently Narain Das, *patwari*, occupied the house for some years and then died and was succeeded in occupation by his widowed daughter-in-law.

Now the *patwari's* brothers have sold the house to Prem Singh and Partab Singh, and plaintiff claims possession.

The first Court held that the *patwari* and his daughter-in-law had occupied with plaintiff's permisson. When, I admitted this case to a hearing I was under the impression that the District Judge had not upset this finding, but on re-consideration I find that he has not agreed with the first Court. Taking the witnesses produced by the plaintiff *seriatim*, he refuses for various reasons to rely on any of them. The *patwari's* brothers are, he says, estopped from denying the correctness of their title. I do not agree with this, but I certainly think their evidence is not to be trusted, for according to themselves they have sold a house in which they had no rights and are now playing the vendees false by supporting the plaintiff.

I am unable on revision to upset findings of fact. Taking it then that the plaintiff has failed to prove that the possession of the *patwari* and *Musammat* Ananti was with permission of the plaintiff, I think the District Judge is right in holding that plaintiff has failed to prove an existing title.

I dismiss this application but pass no order as to costs.

Application dismissed.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 930 OF 1911.

October 9, 1912.

Present:—Mr. Justice Sundara Aiyar and Mr. Justice Sadasiva Aiyar.

GARIKIPATI PAPARAYUDU—PLAINTIFF—APPELLANT

versus

GARIKIPATI RATTAMMA AND OTHERS—DEFENDANTS—RESPONDENTS.

Reversioner—Declaratory suit—Offer to pay—Conditional decree.

In suits by reversioners regarding the alienations of widows, the uncertainty, regarding the person who would be entitled to succeed the widow, is no ground for refusing a declaration regarding the character of the alienation. When the alienation is declared invalid there is no reason why a charge should not be declared in favour of the alienee on equitable grounds for the amount for which necessity has been proved. It is not necessary that there should be an offer in the plaint before a conditional decree can be passed and the alienee given a charge for the amount.

Second appeal against the decree of the Court of the Subordinate Judge of Kistna at Ellore in Appeal Suit No. 426 of 1910, preferred against that of the Court of the District Munsif of Tanuku, in O. S. No. 674 of 1909.

Mr. *P. Narayanamurthi*, for the Appellants.

Mr. *A. Vsivanathier*, for the Respondents.

JUDGMENT.

SUNDARA AIYAR, J.—This is a suit by a Hindu reversioner for a declaration that two sales made by the widow of the last owner, the 1st defendant in the suit, to the 2nd and 3rd defendants, respectively, are not valid beyond the life-time of the widow. The sales were admittedly made for the discharge of the widow's husband's debts. The attack against them was based

GARIKIPATI PAPARAYUDU v. GARIKIPATI RATTAMMA.

on the ground that the prices settled for the sales were very inadequate. Both the lower Courts have dismissed the suit on the ground that the plaintiff not having offered to pay to the purchasers the consideration money which was used for the discharge of the husband's debts, the suit is not maintainable. The decision is rested on the authority of *Singam Setti Sanjivi Kondayya* v. *Draupadi Bayanna* (1). That case, no doubt, supports the proposition that such an offer should be made by the party seeking to set aside a sale. But the decision of the Privy Council in *Bhagwat Dayal Singh* v. *Debi Dayal Sahu* (2) is authority for the position that the suit should not fail on the mere ground of the absence of an offer in the plaint and that a conditional decree might be passed. The case before the Privy Council was one in which the suit was instituted after the death of the alienor and the plaintiff was entitled to possession at the time of the suit. There can be no doubt that a reversioner suing for possession after the death of the widow can only get a decree on condition of paying whatever portion of consideration for the sale by the widow is held to be binding on the estate. In *Singam Setti Sanjivi Kondayya* v. *Droupadi Bayanna* (1), two decisions of the Bengal High Court are relied on. In one of them, *Mutteeram Kowar* v. *Gopaul Sahoo* (3), the suit was instituted after the reversioner had become entitled to possession, and there can be no doubt that he could not claim a decree except on condition of paying the amount. The case probably went too far in laying down that there should be an offer in the plaint to make payment of any amount that was binding on the reversioners. The other case is *Phool Chund Lall* v. *Rughoobuns Suhaye* (4). It was decided in 1867, before the enactment of the Specific Relief Act, section 42 of which lays down the conditions under which declaratory decrees might be granted. One of the illustrations to that section shows that a Hindu reversioner might institute a suit for a declaration that a transaction entered into by a Hindu widow is not binding on the reversioner. According to the new view of the Privy Council in *Isri Dut Koer* v. *Musammat Hansbutti Koerain* (5), a decision in a suit instituted by one reversioner may not be binding on another person who may happen to be the actual reversioner when the widow dies; see also *Musamma Chand Kour* v. *Partab Singh* (6). But there can be no doubt that notwithstanding this inconvenience a suit by a presumptive reversioner at the time of the alienation for a declaration of its invalidity is maintainable. In *Phool Chund Lall* v. *Rughoobuns Suhaye* (4), the judgment was partly rested on the ground that the plaintiff did not ask that the Court should put the vendee (alienee) in the same position as if he had obtained a mortgage for the amount which was binding on the reversioner. This suggests that the Court might declare the sale invalid but at the same time declare that the vendee has a charge for the portion of the consideration paid by him which is binding on the reversioner. Sir Barnes Peacock, no doubt, points out that a declaration that a reversioner may obtain possession on the death of the widow on condition of paying a certain sum of money ought not to be made because the plaintiff who institutes a suit for declaring an alienation invalid may not survive the widow and it would be optional with the actual reversioner, who becomes entitled to the estate on the widow's death, to recover possession or not, but, as already observed, this inconvenience arising from the fact that the plaintiff may not be the actual reversioner who succeeds the widow exists equally whether the decree is one altogether setting aside or upholding a sale or one pronouncing it invalid as a sale but declaring a charge in favour of the alienee. The law as to declaratory suits was not the same when *Phool Chund Lall* v. *Rughoobuns Suhaye* (4) was decided as it has been after the enactment of the Specific Relief Act. And the decision in that case, therefore, cannot safely be relied on in cases arising under the present Act. In *Mahomed Shamsool Hooda* v. *Shewakram* (7), where a person having a reversion sued to set aside a sale made by a life-owner, their

(1) 31 M. 153; 3 M. L. T. 251; 18 M. L. J. 11.
(2) 35 C. 420 (P. C.); 12 C. W. N. 393; 10 Bom. L. R. 230; 7 C. L. J. 335; 5 A. L. J. 184; 18 M. L. J. 100; 3 M. L. T. 344; 14 Bur. L. R. 49.
(3) 11 B. L. R. 416; 20 W. R. 187.
(4) 9 W. R. 107.
(5) 10 I. A. 150; 10 C. 324; 13 C. L. R. 418.
(6) 15 I. A. 156; 16 C. 98.
(7) 2 I. A. 7; 14 B. L. R. 226; 22 W. R. 409.

Lordships of the Privy Council felt no difficulty in passing a decree that on the death of the life-owner, the plaintiff would be entitled to possession on payment of the portion of consideration for the sale which was binding on him. Their Lordships did not decide whether the estate would on the death of the life-owner pass to any one as the owner of a vested reversion or to the person entitled to succeed under the Hindu Law as reversioner on the termination of the life-estate. That decision, therefore, would be authority for the position that even if the reversioner has no vested interest, a decree might be passed that the reversioner would be entitled to possession of the property after the death of the life-owner on his complying with certain conditions whatever that may be. It is difficult, having regard to the ruling of the Privy Council in *Isri Dut Koer* v. *Musammat Hansbutti Koerain* (5), that the uncertainty regarding the person who would be entitled to succeed the widow, is a ground for refusing a declaration regarding the character of the alienation; and if an alienation may be declared to be altogether valid or altogether invalid notwithstanding the uncertainty about the reversion, there seems to be no apparent reason why a declaration should not be made that the alienation is invalid as a whole but that on equitable grounds the alienee should have a charge declared in his favour. In *Gobind Singh* v. *Baldeo Singh* (8), a decree was given declaring that the reversioner would be entitled to possession on payment of a certain sum of money which was binding on the reversioner. The proper form of the decree, however, would appear to be to make merely a declaration that the alienee has a charge for a certain sum of money. The question whether a decree in such a form could not be passed was not considered in *Singam Setti Sanjivi Kondayya* v. *Draupadi Bayanna* (1). The decrees of the lower Courts must be reversed and the suit remanded to the Court of first instance for fresh disposal according to law. Costs up to date will abide the result.

SADASIVA AIYAR, J.—It is now settled law that a widow inheriting the husband's estate obtains only a qualified interest in her husband's properties. It is further settled law that the nearest contingent reversioners can bring suits attacking the widow's alienations in her life-time. To say under these circumstances that the suit of an honest reversioner, who admits that the alienation was partially justified, should be at once dismissed as a suit for a conditional declaration while a suit by a dishonest reversioner, who seeks to have the alienation wholly declared void as against the reversioner, should be tried to the end seems to be anomalous. On principle, I do not see why a declaration that a sale is wholly void should be treated on a better footing than a declaration that the sale is void as a sale and can only be treated as a charge for a certain amount on the property alienated. The very object of allowing a suit by a contingent reversioner has been unfortunately (if I may be permitted to say so) defeated to a very large extent by the decisions which are binding on us to the effect that a decree passed in favour of or against such a reversioner is not binding on a remoter reversioner. I might be permitted to hope that the Legislature should see fit to enact that the decree in a suit *bona fide* brought and litigated by the then nearest reversioner is binding on the remoter reversioners. In the result, I concur in the decree proposed by my learned brother.

Decree reversed.

(8) 25 A. 320; A. W. N. (1903) 57.

PUNJAB CHIEF COURT.

FIRST CIVIL APPEAL No 64 OF 1896.

March 26, 1898.

Present:—Sir William Clarke, Kt., Chief Judge, and Mr. Justice Reid.

KARORI MAL—PLAINTIFF—APPELLANT

versus

Musammat JAWALA DEVI—RESPONDENT.

Custom—Hindu Law—Alienation—Gift by widow of Sarin Khatri *of Lahore of her husband's estate in favour of his daughter—Incompetency of reversioners to challenge gift.*

Among Sarin *Khatris* of Nayar *got* of Lahore emigrated from Kunjah in the Gujrat District, no special custom, contrary to Hindu Law, exists by which collaterals exclude daughters. All Sarin *khatris* of Lahore City follow Hindu Law in matters of succession.

KARORI MAL *v.* JAWALA DEVI.

Amin Chand v. *Ghasita Mal*, 143 P. R. 1882; followed.

As by Hindu Law a daughter is an heir, a gift by a widow of a Sarin *Khatri* of Lahore of her husband's separate moveable and immoveable property in favour of his daughter, cannot be challenged by his collaterals, as it simply amounts to an acceleration of succession.

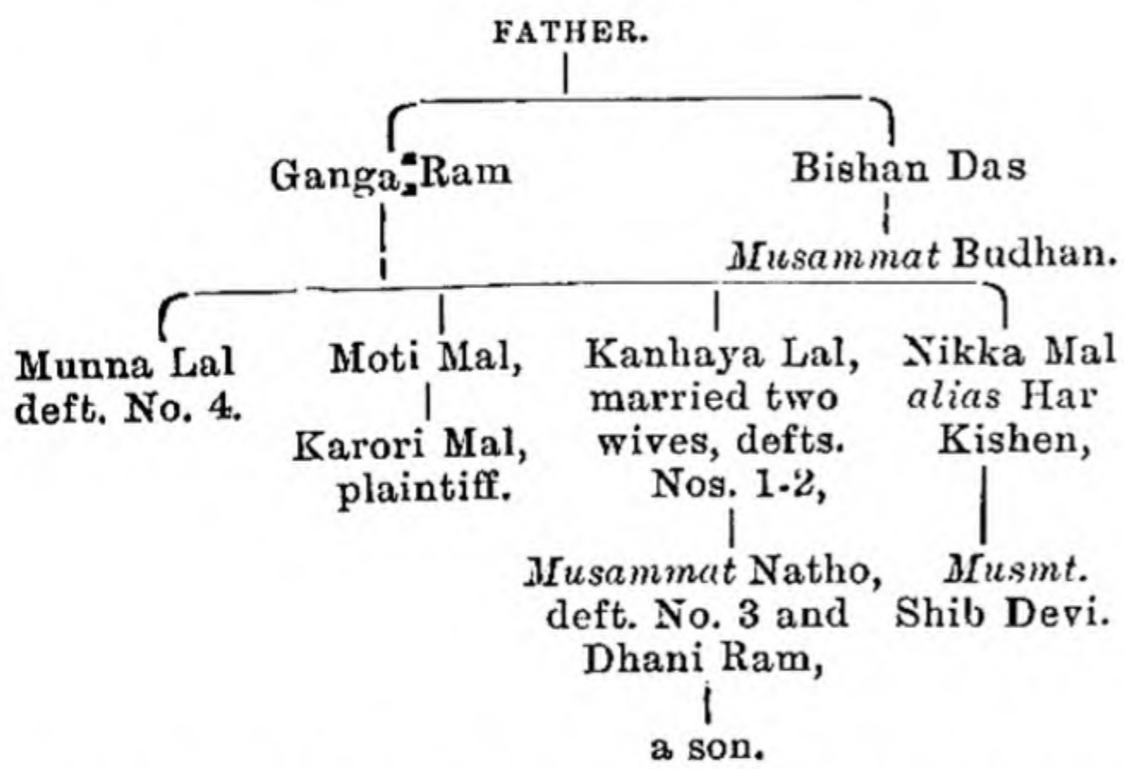
Barkat Ram v. *Jagat Ram*, 249 P.W.R. 1912; 17 Ind. Cas. 379, followed.

First appeal from the order of the District Judge, Lahore, dated the 23rd day of December 1895, dismissing plaintiff's suit.

Messrs. *Madan Gopal* and *Jaishi Ram*, for the Appellant.

Mr. *K. P. Roy*, for the Respondent.

JUDGMENT.—Kanhya Lal, a Sarin *Khatri* of Lahore, died some 25 years ago, leaving moveable and immoveable property valued at Rs. 20,000. On 1st November 1882, the widows executed a gift of the whole estate in favour of his daughter. Plaintiff sues for a decree declaring that the gift shall not affect his reversionary rights.



The District Judge has held that by Hindu Law the daughter and daughter's son are the heirs of Kanhya Lal and that plaintiff has failed to prove any custom on the subject, that Hindu Law is, therefore, binding on the parties, and that the gift has surely accelerated the succession, and that plaintiff, therefore, has no right of suit. This was the main ground on which the District Judge dismissed the suit. Plaintiff appeals and his Counsel puts forward the argument that the custom binding on the parties, is not the custom of the *Khatris* of Lahore, not even the custom of the Sarin *Khatris* of Lahore, but the custom of the Sarins of *got* Nayar of Kunjah in the Gujrat District—plaintiff's great-grandfather emigrated from there and the family has been living in Lahore for three generations. The Sarin *Khatris* are a large tribe, long dwelling in Lahore, and a *Mohalla* is named after them. The evidence shows that there are more than 50 *gots* of Sarins in Lahore, and if every *got* is to set up the customs of its place of origin, there will be no custom of the Sarins of Lahore. It will require very strong proof that a family residing in Lahore for three or four generations, like plaintiff, had not adopted the custom of the Sarins of Lahore. Not only is there no evidence on the point, but the point was never raised, till now, neither in the pleadings, nor in the evidence, nor in the grounds of appeal, and what is more, plaintiff himself said:—"The customs of Sarin *Khatris* of Lahore are the customs we observe." We, therefore, hold that plaintiff is bound by the customs of the Sarin *Khatris* of Lahore.

The question then arises, do the Sarin *Khatris* follow a different custom from the other *Khatris* of Lahore? Objection has been taken that plaintiff had not sufficient opportunity to prove the custom of the Sarin tribe, but, we think that he had full opportunity.

On 20th July 1895, before Mr. Robinson plaintiff alleged that the custom of his subdivision was not the same as of other *Khatris* of Lahore, and was given 17th August to prove this.

On 17th August, plaintiff's Pleader said he was prepared to prove that according to the custom of the tribe to which he belongs, a daughter does not succeed in presence of a nephew, but urged that this was not the real issue, and wanted this point argued whether that was the real issue.

Mr. Robinson rejected this contention and recorded plaintiff's evidence, and on 17th August after the evidence of seven witnesses was recorded, plaintiff said he would only call one more witness, who was subsequently examined by commission. Plaintiff, therefore, had full opportunity of producing all his evidence.

On the question whether the Sarins have a different custom from other *Khatris*, we notice that Mr. Grey for plaintiff in his replication did not take up any definite position. He said:—"Our claim is based on the Hindu Law and Custom."

Paira Mall, witness No. 1 for plaintiff, says

that Sarins (he is one himself) are governed by law and not by custom.

Amir Chand, witness No. 2 for plaintiff, says he knows nothing about custom relating to succession of collaterals in presence of daughters.

Puran Chand, witness No. 3 for plaintiff, says collaterals exclude daughters. The daughter of his uncle Davi Dial is married to plaintiff. He gave four instances, but they all broke down on analysis. In fact, none of the instances given by plaintiff has stood analysis as showing the collaterals exclude daughters, and in the case of plaintiff's own family, it is shown that the daughters of Bishan Das and Har Kishen (*vide* genealogical tree) inherited the houses of their fathers in presence of collaterals.

Pandit Bhan Dutt, witness No 6, says among *Khatris*, all *Khatris* follow the same custom, as to succession.

Diwan Raj Kumar, witness No. 8, says I cannot say that the custom of our brotherhood is different from that of the other class of *Khatris*.

We hold that plaintiff has failed to prove that the Sarins follow a different custom from the other *Khatris* of Lahore.

With regard to the custom of the *Khatris* of Lahore, *Amichand* v. *Ghasita Mal* (1) is in favour of the daughters, and still more so the case of *Dass Mall* v. *Mai Malawi*, decided by Mr. R. Clark, District Judge, on 13th December 1884. It is argued that there is no initial presumption that high caste Hindus in towns are bound by law rather than custom and a large array of authority is quoted in support of this proposition.

However that may be, it lies on plaintiff to prove the custom and heavily so in the face of the judgments referred to above.

We find that plaintiff has failed to prove any custom either among *Khatris* or Sarin *Khatris* or *got* Nayar of Sarin *Khatris* by which collaterals exclude daughters.

It is next argued that even granting that collaterals are excluded by daughters and daughters' sons, it is still open to plaintiff to sue for the declaration and authority is quoted in support of this contention. As regards the Punjab cases quoted, we do not think that cases of agriculturists following the Customary Law are in point. The rights of collaterals in respect of land under the Customary Law are peculiar and cannot be applied to persons bound by Hindu Law. On this question, we are bound to follow the Full Bench ruling of this Court, *Barkat Ram* v. *Jagat Ram* (2).

The question referred was:—"Whether the plaintiffs, the nephews of Dhari Mal, are entitled to bring a suit against the defendant to contest his adoption by Dhari Mal in view of the fact that the defendant, even if held not to be the adopted son of Dhari Mal, is, as the son of Dhari Mal's daughter, entitled to succeed to Dhari Mal's estate as full proprietor on the death of the (defendant's) mother."

The answer of the Full Bench was in the negative. There is this difference in the two cases that there was a case to set aside adoption and this is a case to set aside a gift, but we hold that on the principles laid down in that case, plaintiff is not entitled to bring this suit. Our view of the case obviates the necessity of going into the question of limitation

We dismiss the appeal with costs. Pleader's fee Rs. 250.

Appeal dismissed.

(1) 143 P. R. 1882.

(2) 249 P. W. R. 1912; 17 Ind. Cas. 379.

ALLAHABAD HIGH COURT.

EXECUTION SECOND APPEAL No. 912 OF 1912.

November 15, 1912.

Present:—Mr. Justice Chamier.

DOST MUHAMMAD—JUDGMENT-DEBTOR—APPELLANT

versus

ALTAF HUSAIN KHAN AND OTHERS—APPLICANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 146—Representative of decree-holder—Transferee of decree-holder's interest during pendency of suit, whether can execute decree.

M. sued for the recovery of some immoveable property. By a compromise, *M.* was awarded a portion of the property. Before a decree could be passed in terms of the compromise, *M.* transferred his interest in the property to *A.* *A.* did not apply to bring himself on the record. After the decree was passed, *A.* applied to execute the decree as representative of *M.*:

Held, that he was not a representative within the meaning of section 146 of the Code of Civil Procedure and, as his name was not on the record, he could not execute the decree.

Execution second appeal from the decision of the District Judge of Ghazipur, dated 8th of May 1912.

Mr. *Gobind Prashad*, for the Appellant.

Mr. *Muhammad Ishaq*, for the Respondents.

JUDGMENT.—One Muhammad Said sued for some immoveable property. On February 2nd, 1911, a compromise was arrived at according to which Muhammad Said became entitled to a part of the property. On February 21st, 1911, he transferred to one Altaf Husain all the property to which he was entitled under the compromise. Altaf Husain did not apply to the Court to enter his name on the record in place of that of Muhammad Said and on March 25th, 1911, a decree was passed on the compromise in favour of Muhammad Said. Altaf Husain has now applied to execute the decree. The Munsif rejected the application; but the District Judge reversed his order. Hence this appeal. There is no doubt that Altaf Husain ought to have taken steps to have his name entered in the record of the case. But it is urged on his behalf that he is the representative of Muhammad Said and that the District Judge was right in regarding him as the transferee of the decree. It seems to me that it is impossible to treat Altaf Husain as transferee of the decree for the document on which he relies was executed before the decree was passed. His learned Vakil falls back on section 146 of the Code of Civil Procedure, which provides that where any proceeding may be taken or application made by or against any person, then the proceeding may be taken or the application may be made by or against any person claiming under him. This section appears to me to be irrelevant. It was evidently intended to apply to the case of a representative who has succeeded to the position of the person whom he claims to represent. Altaf Husain has not acquired the rights of a decree-holder and I must hold that the application for execution cannot be maintained by him. I allow the appeal, set aside the decree of the lower Appellate Court and restore that of the Court of first instance with costs here and in the two lower Courts.

Appeal allowed.

MADRAS HIGH COURT.

CIVIL SUIT No. 53 OF 1910.

(August 5, 1912.

Present:—Mr. Justice Wallis.

COTHA KRISHNASAWMY CHETTY—PLAINTIFF

versus

T. SITARAM CHETTY AND ANOTHER—DEFENDANTS.

Instalment-bond—Limitation Act (IX of 1908), *s.* 14, *Sch. I, Arts.* 74, 75 120—*Non-payment of instalments not amounting to default—Waiver—Evidence Act (I of* 1872), *s.* 115—*Estoppel—Inconsistent action in Court.*

In a dispute between plaintiff and defendant as regards their shares in a particular business, the matter was referred to arbitration; an award was passed by which the defendants executed, on 12th December 1904 to plaintiff, an instalment bond payable by monthly instalments. The bond also provided that if the amounts of three instalments be allowed to fall into arrear, the balance of principal and interest then due would at once be recoverable without reference to the instalments. The defendants paid the instalment till May 1906. The instalment for May was returned by the plaintiff as also that for June. In August, the plaintiff filed a suit to set aside the award but the award was upheld by the first Court on 26th February 1908 and by the Appellate Court on the 19th January 1910.* In the course of the appeal, plaintiff's Vakil applied to the Court that a decree for the unpaid instalments on the promissory-note might be given. The defendants, through their Vakil, stated they did not deny their liability to pay and that they had always been ready and willing to pay and got the application rejected. After the termination of the appeal, the plaintiffs brought this suit for the recovery of the instalments due under the pro-note. Defendants contended that the amount was barred by limitation under Article 75:

Held, (1) that in the circumstances, there was no default by the defendants in paying the instalments of May, June or July or subsequently before the suit, which could have caused the whole amount to be due:

(2) that there had also been waiver by the plaintiff of the condition that on failure of payment of three instalments, the whole should become due;

(3) that time would run under section 74 of the Limitation Act from the due date of each instalment;

(4) that section 14 of the Limitation Act would not enable the plaintiff to deduct the period, during which he had been conducting the previous suit and appeal, in computing the period of limitation because there was no defect of jurisdiction or any other cause of a like nature and the cause of action was not the same;

(5) that the defendants were estopped, by reason of what passed when the Appellate Court's judgment was being delivered in the previous suit, from setting up this bar of limitation;

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* See *Cotha Krishnasawmy Chetty* v. *Thatha Seetharam Chetty*, (1910) 1 M. W. N. 53; 5 Ind. Cas. 374; 7 M. L. T. 355.

(6) that the plaintiffs were entitled to interest on the instalments due as there was nothing that amounted to a true legal tender of those instalments.

Section 115 of the Evidence Act is by no means an exhaustive exposition of the law of estoppel.

A person, who, without mistake induced by the opposite party, has taken a particular position deliberately in the course of a litigation, must act consistently with it; and this principle will apply to a suit other than the one in which the action is taken, where the second suit grows out of the judgment in the first.

Mr. *T. R. Ramachandra Iyer*, for the Plaintiff.

Mr. *C. P. Ramaswami Iyer*, for the Defendants.

JUDGMENT.—This is a suit instituted by the plaintiff to recover certain instalments due on a bond which was executed in his favour by the defendants under an award made in a dispute between the plaintiff and the defendants as to the share which he was entitled to in their business. Under the award, the defendants executed a promissory-note, which is Exhibit A, dated 12th December 1904, by which the sum of Rupees thirty thousand (Rs. 30,000) only, with interest at 9 per cent. per annum, was payable by monthly instalments of Rs. 1,000, the first instalment being due on the 15th January 1905, and each instalment being payable with interest on the unpaid portion of the principal. If the amount of three instalments be allowed to fall into arrears, the balance of principal and interest then due shall at once be recoverable without reference to the aforesaid provision for instalments.

The defendants duly paid the instalments under the bond including the instalment of May 1906. But the cheque they sent was returned to them.

Then they wrote to the plaintiff a letter, Exhibit C, dated 13th May 1906, inquiring the reasons for the refusal; and in answer to that, the plaintiff's Solicitors wrote Exhibit D of the 22nd May 1906, in which they said that the whole settlement was a fraud upon the plaintiff and that he was not going to be bound by it. Again, in June 1906, the defendants appear to have tendered the instalment for that month which was returned to them and in July they wrote the letter—Exhibit E—mentioning that previous two instalments have been returned and asked whether the plaintiff "would not in future receive payments tendered for the instalments of the bond. So that we may cease to go through the farce of sending a cheque every month only to be returned." To that letter, they received no answer but in the following month, a suit was filed by the plaintiff to set aside the whole award and recover the share of the business, to which he claimed to be entitled. That suit was eventually dismissed by a decree of the Appellate Court, confirming the decree of this Court. Then the plaintiff demanded the payment which was due to him under the instalment note but payment was refused; when the present suit was filed, the defendants pleaded that the claim had become barred by limitation. Now the plaintiff contends in this suit, in the first place, that the suit had not become barred either wholly, or in part, both of which contentions were urged by the defendants.

Secondly, the plaintiff says that the defendants are estopped from raising this contention by reason of what passed in Court on the delivery of the judgment of the Appellate Court.

I will deal with the question of limitation first. The defendants contended that they had made default in payment of the instalment in May 1906, that thereupon under the note, the whole sum had become due and that under Article 75 of the Limitation Act the whole claim was barred. Now Article 75 is not quite in the same form in the present Act as in the Act of 1877, because in the Act of 1877 it was:—"On a promissory-note or bond payable by instalments which provides that if default be made in payment of one instalment the whole shall become due" whereas in the present Act it is "If default be made in payment of one or more instalments, the whole shall become due." The present wording applies accurately to the present note which provides that the whole shall become due only in the event of three instalments being in arrear. Now the date from which time begins to run is when the first default is made unless the payee waives the benefit of the provision and then when fresh default is made in respect of which there is no such waiver. In the present case, I am entirely unable to accept the contention of the defendants, which they now raise for their own purpose, that they committed any defaul

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in May, June, or July or subsequently before suit, which could have caused the whole to be due. The evidence shows that they made payments both in May and June and inquired again whether there would be any use making a payment in July to which the plaintiff had chosen to return no answer and for this reason, that he was prosecuting a claim which was altogether inconsistent with the acceptance of this bond and possibly feared that he might in some way be damaging his position in the other litigation if he did accept. I hold that there is the clearest evidence of waiver by the plaintiff of the condition, that on failure of payment of three instalments, the whole should become due. And I hold further, that until the institution of this suit which followed very closely on the judgment of the Appellate Court, there never had been any failure to pay three instalments which was not waived, I hold that Article 75 is inapplicable, as there was no default which was not waived. There was a great deal of argument whether if you take the Article in its old form, it would apply to the case; whichever form you take, I hold that Article 75 does not apply, because there has been no failure, to pay three instalments which was not waived. If that be so, then it seems to me Article 74 must apply and if Article 74 applies, then, on a promissory-note where payment is made by instalments, time begins to run upon the expiration of the first payment as to the part and as to the other parts on the expiration of the respective terms of payment. It is admitted, I think, if this Article applies, the suit is not barred as to the payments for February, March, April, May and June, five instalments, so that, in any event, the plaintiff would be entitled to recover five instalments.

Mr. Ramachandra Aiyar addressed me several ingenious arguments with a view of taking this case not only out of Article 75 but also out of Articles 74, 80 and 115 with a view of bringing it under Article 120. I am not going to deal with these Articles beyond saying that he did not succeed in convincing me. He also contended that the suit was a suit under section 14 of the Limitation Act on the ground that the time during which the plaintiff was prosecuting his case in the other suit ought not to count. But section 14, to my mind, does not refer to such a case as this. It says:—"In computing the period of limitation prescribed for any suit, the time during which the plaintiff has been prosecuting with due diligence another civil proceeding, whether in a Court of first instance, or in a Court of Appeal, against the defendant, shall be excluded where the proceeding is founded upon the same cause of action and is prosecuted in good faith in a Court which, from defect of jurisdiction, or other cause of a like nature, is unable to entertain it." The Court is not unable to entertain that suit from defect of jurisdiction or other cause of a like nature and that suit was not, in my judgment, upon the same cause of action as the present suit and, therefore, that section has no applicability. There were various courses which were open to the plaintiff by which he could have prevented this suit from becoming barred as to any of the instalments. He might have received the payment under protest, or he might have simply asked for an acknowledgment of liability, or he might have sued for each instalment before it became barred and asked that the suit should be adjourned, pending the decision of the other suit. He did not choose to adopt any of these courses and, therefore, I am of opinion that there has been nothing to stop time from running under the Limitation Act.

It was further contended that there had been an acknowledgment within the meaning of section 19 of the Limitation Act in the affidavit Exhibit G, which was filed by one of the defendants. Paragraph 3 was relied on, but I cannot find any acknowledgment of liability. There is a mere recital that "the plaintiff had received instalments payable under the decision from 1904 to 1906."

I will now deal with the second part of the case, whether the defendants are estopped, by reason of what passed when the Appellate Court's judgment was being delivered, from setting up this bar of limitation at all. When judgment came to be delivered in the Appellate Court, confirming the decree of this Court dismissing the plaintiff's suit, his Vakil applied that at any rate, judgment might be given for him in that suit for the amount of the unpaid instalments on the promissory-note which is the subject of this suit. Now the defendants might have, perhaps did argue that it

was not open to the Appellate Court in that suit to grant any such relief and that no such relief ought to have been granted. They did not, however, stop there. For the purpose of inducing the Appellate Court to reject that application, they stated, through their Vakil, that, to use the words of the judgment: "The defendants do not deny their liability to pay and they submit they have been always ready and willing to pay but they contend that no decree should be passed in this suit." Now it was perfectly open to the defendants to submit that no decree should be passed in that suit against them on this instalment bond. But was it open to them, for the purpose of getting that application rejected, to state to the Court that they did not deny their liability and had always been ready and willing to pay and then when they got the application rejected upon that basis, as soon as ever they were asked to pay, to turn round and plead that before that application had been made, the suit had become entirely barred? No precedent has been cited before me which exactly corresponds to this case, probably, I cannot help thinking, because rarely if ever have defendants taken so ill-advised a course as they have taken in this case. It seems to me that it would be a lamentable thing if it were open to parties to play fast and loose with the Court in this manner. It may very well be that if the defendants had made no admission at all, exactly the same result would have followed and the application would have been dismissed. But I am not the Appellate Court; I cannot put myself in their place. I cannot say what effect it might or might not have had upon the Court if no such admission had been made. I know that the admission was made in the defendant's interest with regard to the application then before the Court and that they authorized the eminent Vakil who appeared for them to make it, though even that is challenged in the pleadings. One knows very well that Mr. Sundara Iyer would never have made such an admission unless he had been authorized to make it. As I already said, I find myself in this position, that it is impossible for me to say whether the result of the application would have been the same if no such admission had been made.

Mr. Ramachandra Iyer endeavoured to bring this case within the wording of section 115 of the Evidence Act. I confess, I find some difficulty in following him. But that is by no means an exhaustive exposition of the law of estoppel. And in such a case as this, we can, with advantage, I think, refer to the very learned and authoritative treatise of Mr. Bigelow, a high authority not only in this but in other branches of law. In his treatise on the Law of Estoppel I find that he does not refer to any case precisely like this, because, as I am inclined to think happily, no such case could be found where parties had gone back in this unblushing way on the admissions, which they make to the Court—but the principles, which he lays down, appear to me to cover the case and if any precedent is wanted, I am prepared to make one. Now at page 717, Mr. Bigelow deals with what he calls "Inconsistent positions in Court" and he says:—"If parties in Court were permitted to assume inconsistent positions in the trial of their causes, the usefulness of Courts of Justice would in most cases be paralysed; the coercive process of the law available only between those who consented to its exercise could be set at naught by all. But the rights of all men, honest and dishonest, are in the keeping of the Courts, and consistency of proceeding is, therefore, required of all those who come or are brought before them. It may accordingly be laid down as a broad proposition that one who, without mistake induced by the opposite party, has taken a particular position deliberately in the course of a litigation must act consistently with it; one cannot play fast and loose. Thus, if Counsel seeks to amend his pleadings, and his request is granted upon a condition and the amendment made accordingly, he cannot thereafter object to the condition, supposing at all events that it was competent to him to accept it." Then he gives some other authority. He goes on to say that "the principle under consideration will apply to another suit than the one in which the action was taken, where the second suit grows out of the judgment in the first. It is laid down, that a defendant, who obtains judgment upon an allegation that a particular obstacle exists, cannot, in a subsequent suit, based upon such allegation, deny its truth." It appears to me that it would be opposed to good conscience to allow defendants who,

for the purpose of resisting an application against them, have stated that they did not deny their liability and were always ready and willing to pay to turn round immediately afterwards and allege that long before the date of their admission, the suit had become barred by limitation. In my opinion, there must be a finding for the plaintiff on the 3rd issue, "Are the defendants estopped from denying their liability as alleged in paragraph 17-C of the plaint?" The result is that there must be a judgment for the plaintiff.

There is another question as to interest, namely, whether in view of the action of the plaintiff in returning the instalments, interest should run against him. It is not contended that there was anything that amounted to a true legal tender of these instalments and that being so, I must decide, following a decision of my own in which the point was discussed in Civil Suit No. 53 of 1907, that interest will continue to run. There must, therefore, be a judgment for the plaintiff for the amount claimed with interest and costs.

Plaint decreed.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 1202 OF 1911.

November 14, 1912.

Present:—Mr. Justice Chamier.

SAMPAT RAI—PLAINTIFF—APPELLANT

versus

RAM PERSHAD—DEFENDANT—RESPONDENT.

Appeal, second—Question of fact—Reasonable compensation.

The question as to what is reasonable compensation is a question of fact and cannot be interfered with in second appeal by the High Court.

Annamalai Chetty v. *Veerabadram Chetty*, 26 M. 111; *Musammat Dhuman* v. *Syed Abdulla Khan*, 6 A. L. J. 381; 1 Ind. Cas. 760; 31 A. 333, relied upon.

Second appeal from a decree of the District Judge of Meerut, dated the 26th August 1911.

Dr. *Tej Bahadur Sapru*, for the Appellant.

Dr. *S. C. Banerji*, for the Respondent

JUDGMENT.—This was a suit for redemption of a mortgage made in March 1908. The sum advanced was Rs. 900. The arrangement was that the mortgagor would pay the mortgagee twelve annual instalments of Rs. 100 and a thirteenth instalment of Rs. 50. In default of payment of any instalment, the whole was to become due with interest at two per cent. per mensem compounded yearly. The plaintiff, who purchased the property from the mortgagor in June 1910, sent the mortgagee Rs. 300 in September 1910 which the mortgagee accepted. The plaintiff followed this up with a tender of Rs. 950 in full discharge of the mortgage. This was refused and the present suit was brought on October 1st, 1910, the plaintiff paying Rs. 950 into Court. The first Court held that the mortgagee had waived his right to insist upon the penal clause and made a decree accordingly. On appeal, the District Judge held that there had been no waiver and he made a decree for redemption on payment of the principal sum with interest at two per cent. per mensem compounded yearly up to the date of suit and thereafter at the rate of 12 per cent. per annum. In this appeal, the first point taken is that the mortgagee must be deemed to have waived his right to insist on the penal clause. In my opinion, no waiver has been proved in this case. Before the mortgagee received the sum of Rs. 300, he had indicated in Court an intention to insist upon enforcing the penal clause. The plaintiff, when sending the money to the mortgagee, did not say that he was sending it on account of the first three instalments. He merely sent it on account of the mortgage. It cannot be held that the mortgagee, by accepting the money, waived his rights under the mortgage. The next point taken is that the amount of compensation awarded is unreasonable. In my opinion, it is most unreasonable to award, as the District Judge has in the present case, compensation at the rate of five times the interest originally agreed upon. But I cannot interfere. The question what is reasonable compensation is a question of fact. It was treated as a question of fact by the Madras High Court in *Annamalai Chetty* v. *Veerabadram Chetty* (1). The question is not unlike that considered by this Court in *Musammat Dhuman* v. *Syed Abdulla Khan* (2). The next point taken

(1) 26 M. 111.

(2) 6 A. L. J. 381; 31 A. 333; 1 Ind. Cas. 760.

is that the lower Appellate Court should not have allowed on taxation the fee paid to the mortgagee's Pleader in the Court of first instance. The respondent does not resist the contention that this sum should be struck out. It is quite clear that the fee was paid long after the first hearing of the suit. The last ground of appeal fails in view of my decision that waiver has not been established. The result is, that this appeal is allowed in part. The amount of fee paid to the respondent's Pleader in the Court of first instance will be struck out. The parties will pay and receive costs in proportion to failure and success.

Decree modified.

ALLAHABAD HIGH COURT.
SECOND CIVIL APPEAL No. 525 OF 1912.
November 23, 1912.
Present:—Mr. Justice Rafique.
Musammat SUNDAR AND OTHERS—DEFENDANTS—APPELLANTS
versus
Musammat SARASWATI—PLAINTIFF AND ANOTHER—DEFENDANT—RESPONDENTS.

Adverse possession—Plea of limitation—Onus on plaintiff to prove that his suit is within time—Auction-purchaser—Symbolical possession—Limitation to run from date of symbolical possession.

When a suit for possession is met by a plea of adverse possession during the limitation period, the question of limitation becomes a question of title and the plaintiff must first, *prima facie*, furnish proof of subsisting title at the date of the commencement of his suit before the defendant is required to establish his adverse possession.

Parmanand Misr v. *Sahib Ali*, 11 A. 438; A. W. N. (1889) 155; *Inayat Husen* v. *Ali Husen*, 20 A. 182; *Mazhar Husain* v. *Behari Singh*, 28 A. 760; A. W. N. (1906) 234; 3 A. L. J. 567; *Musafir Rai* v. *Musammat Laggan Barta Kuar*, 2 A. L. J. 62; A. W. N. (1905) 14, relied upon.

Where an auction-purchaser at a Court sale has obtained symbolical possession, he or his assigns may sue the judgment-debtor for actual possession within 12 years from the date of obtaining such symbolical possession.

Gopal v. *Krishna Rao*, 25 B. 275, *Mahadeo* v. *Parshram*, 25 B. 358, relied upon.

Second appeal from the decision of the Additional Judge of Bareilly, dated the 22nd of December 1911.

Mr. *Govind Prashad*, for the Appellants.
Mr. *M. L. Agarwala*, for the Respondents.

JUDGMENT.—One Mool Chand was a co-sharer in the village of Sunderpur in the District of Bareilly. He died leaving him surviving five sons, one of whom was called Kundan. Kundan's share was sold in 1897 in execution of a decree against him and was purchased by one Basant Rai. The latter obtained symbolical possession through Court on 5th February 1898.

On the 31st of December 1898, on the verification of the *khewat* during the recent Settlement, Mool Chand's share was sub-divided into 200 shares and four shares only were allotted to Kundan. On the 25th of January 1910, Basant Rai executed a deed of sale in favour of *Musammat* Saraswati Kuar in respect of the share he had purchased at auction sale in 1897.

On the 28th of June 1910, *Musammat* Saraswati Kuar instituted the suit, out of which this appeal has arisen, for the recovery of $89\frac{1}{3}$ shares on the allegation that Kundan was entitled to $93\frac{1}{3}$ shares out of 200 shares of his father by right of inheritance and purchase at auction sale in execution of a decree against his father prior to 1897. It was further stated in the plaint that Basant Rai had purchased at auction sale of 1897 in execution of the decree against Kundan the entire share of the latter—that is $93\frac{1}{3}$ out of 200 shares, and had obtained and remained in possession and enjoyed profits of the share so purchased up to within a few years of the institution of the suit of *Musammat* Saraswati in spite of the order in the Settlement, awarding four shares only out of 200 to Kundan. The cause of action was, however, alleged to have accrued on 31st December 1898, the date of the erroneous order in the Settlement describing the share of Kundan as 4 out of 200. The suit was brought after the death of Kundan in the Court of the Munsif of Havali Bareilly against the mistress of Kundan, a brother of the latter, the widow of another brother, two transferees and Basant Rai, the auction-purchaser. The claim was resisted by all the defendants except Basant Rai. It was denied that Kundan had a larger share than what was allotted to him on the verification of the *khewat* or that he was a purchaser of any portion of his father's property in execution of a decree against the latter. It was also denied that Basant Rai had ever obtained actual possession of Kundan's share or had purchased and enjoyed the profits of anything

Musammat SUNDAR *v.* SARASWATI.

more than what was allotted to Kundan on 31st December 1898, that is, 4 out of 200. The plea of limitation was also urged in bar of the claim. The learned Munsif found that Kundan was entitled to 66⅔ shares out of 200 shares and that Basant Rai had purchased 66⅔ shares at the auction sale in 1897. But as Basant Rai had obtained symbolical possession only and had not enjoyed profits of 66⅔ shares, the claim was barred as to 62⅔ shares having been brought more than 12 years after the delivery of symbolical possession but Saraswati preferred an appeal to the District Judge which was disposed of by the Additional Judge. The latter held that as the contesting defendants had set up adverse possession, it was for them to prove it and as they had failed to establish their plea of adverse possession, the claim was within time. The learned Additional Judge accepted the appeal and reversing the decree of the first Court decreed the claim for 62⅔ shares.

The contesting defendants have come up in second appeal to this Court. They contend that the onus lay on the plaintiff-respondent in the first instance to show that she had a subsisting title not barred by the law of limitation at the time of the institution of her suit. She had no such title. Her vendor obtained symbolical possession only and was never paid profits over more than four shares. Time began to run in respect of the 62⅔ shares in suit from the date of the delivery of symbolical possession to Basant Rai and the claim in respect of 62⅔ shares is barred. On behalf of the plaintiff-respondent, the argument is that the defendants appellants pleaded limitation presumably on the allegation of adverse possession and they must establish their plea. It is denied that time began to run in respect of 62⅔ shares in suit from the date of the delivery of symbolical possession to Basant Rai. He became by his purchase of Kundan's share a co-sharer with the defendants-appellants. The mere non-payment of profits of the entire share of Kundan to Basant Rai or the plaintiff-respondent, which is not admitted, would not render the possession of the rent-collecting co-sharers, the defendants-appellants, adverse. The admission that profits at least of four shares have been paid up to within a few years of the institution of the plaintiff-respondent's suit would in any case run limitation.

I think that the contention of the defendants-appellants must prevail both as regards the question of burden of proof and as to the date from which time should be calculated for the purpose of limitation.

It has been consistently held by this Court that when a suit for possession is met by a plea of adverse possession during the limitation period, the question of limitation becomes a question of title and the appellant must first furnish *prima facie* proof of subsisting title at the date of the commencement of his suit before the defendant is required to establish his adverse possession; Vide *Parmanand Misr* v. *Sahib Ali* (1); *Inayat Husen* v. *Ali Husen* (2); *Mazhar Husain* v. *Behari Singh* (3); *Musafir Rai* v. *Musammat Laggan Barta Kuar* (4).

The onus was, therefore, on the plaintiff-respondent to show by some *prima facie* evidence that she had a subsisting title not extinguished by the law of limitation at the time she brought the suit.

There is no evidence that Kundan was in possession of 66⅔ shares or that Basant Rai or the plaintiff-respondent had been paid within limitation profits on the 66⅔ shares.

The payment of profits on four shares only would not save limitation with regard to the remaining 62⅔ shares.

The case might perhaps have been different if the payment of profits on four shares had been in part payment of the profits of 66⅔ shares, in other words, if Kundan's right to 66⅔ shares had been conceded, or his possession within limitation over them proved and a portion of the profits only paid. The appellants have all along contended that all that Kundan got in his father's property was 4 shares out of 200 and that he was never in possession of anything more. Nor is there any evidence that Kundan was in possession of more than four shares. The contention that Basant Rai by his purchase of 1897 became a co-sharer with the appellants and that the mere non-payment of profits would not render the possession of

(1) 11 A. 438; A. W. N. (1889) 155.
(2) 20 A. 182.
(3) 28 A. 760; A. W. N. (1906) 234; 3 A. L. J. 567.
(4) 2 A. L. J. 62; A. W. N (1905) 14.

the rent-collecting co-sharers adverse until an adverse right was asserted is not borne out by authority. The argument of the plaintiff-respondent overlooks two facts, namely, that only symbolical possession over the shares of Kundan was given to Basant Rai and that there is no evidence that Kundan was ever in possession within limitation of anything more than four shares. The fact that Kundan was legally entitled to more than four shares in his father's property would not affect the question of limitation. It has been held that when an auction-purchaser at a Court sale has obtained symbolical possession, he or his assigns may sue the judgment-debtor for actual possession within 12 years from the date of obtaining such symbolical possession, Vide *Gopal* v. *Krishna Rao* (5), *Mahadeo* v. *Parshram* (6).

The plaintiff-respondent admittedly brought the suit more than 12 years after the delivery of symbolical possession to her vendor, Basant Rai. Her claim is, therefore, clearly barred by limitation. The appeal prevails. The decree of the lower Appellate Court is set aside and that of the first Court is restored. Costs of all the Courts are allowed to the defendants-appellants.

Appeal allowed.

(5) 25 B. 275.
(6) 25 B. 358.

ALLAHABAD HIGH COURT.
SECOND CIVIL APPEAL No. 558 OF 1912.
November 19, 1912.
Present—Mr. Justice Griffin.
GAURI RAI AND OTHERS—PLAINTIFFS—APPELLANTS
versus
MANOHAR TELI AND OTHERS—DEFENDANTS—RESPONDENTS.

Agra Tenancy Act (II of 1901), s. 202, scope of—Procedure—Question not material—Mortgage unregistered.

A. brought a suit for redemption of a particular plot of land mortgaged by an unregistered mortgage-deed. The sum secured under the mortgage was Rs. 100. The defendant pleaded that he was an occupancy-tenant of the land and not a mortgagee.

Held, that in view of the fact that the mortgage was an unregistered one and could not, therefore, be enforced, section 202 of the Agra Tenancy Act had no application.

Second appeal from a decree of the District Judge of Gorakhpur, dated the 30th January 1912.

Mr. *Haribans Sahai*, for the Appellants.

Mr. *Iswar Saran*, for the Respondents.

JUDGMENT.—The appellants in this case alleged that they were the occupancy-tenants of two plots Nos. 358 and 181, and that they had mortgaged these plots by two separate mortgages to defendants. They sued for redemption. This suit has been decreed with regard to plot No. 181, but it has been dismissed by both the Courts below with regard to plot No. 358. The lower Appellate Court finds as a fact that there was no legal mortgage over this plot, inasmuch as the mortgage alleged was for a sum of over Rs. 100 and the document was not registered. The plaintiffs come in second appeal to this Court. The defendants had denied the existence of a mortgage over plot No. 358 and alleged that they were the sub-tenants of the plaintiffs in respect of that plot. It is contended in second appeal that in view of the pleadings of the defendant, it was incumbent on the Courts below to require the defendants to institute a suit in the Revenue Court within three months for a determination of the question whether or not they were the tenants of plot No. 358. The provisions of section 202 of the Tenancy Act lend support to this plea. The suit was one relating to an agricultural holding instituted in a Civil Court and the defendants pleaded that they held the land as the tenants of the plaintiffs. In the memorandum of appeal to the Court below, one of the grounds taken was that the defendants should have been required to institute a suit in the Revenue Court for the determination of their status. This plea was not noticed in the judgment of the Court below. The second paragraph of section 202 sets out that "if the defendant fails to comply with the order, the Court shall decide the question against him." We have to see what would be the result if the defendants failed to institute a suit in the Revenue Court. The decision of the Court upon the plea would be that the defendants had failed to prove that they are the tenants of the plot in suit. That decision would not help the plaintiffs, as on the suit as framed they had failed to prove the existence of a mortgage. If, however, the procedure required by section

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202 of the Tenancy Act had been carried out and the defendants had instituted a suit in the Revenue Court, it would have been the duty of the Civil Court to dispose of the suit according to the decision of the Revenue Court. Again, we have to see what would be the decision if the Court held that the defendants were tenants and (2) if it held that they were not tenants. In either alternative, the plaintiffs could not get a decree in respect of plot No. 358 inasmuch as they failed to prove the mortgage sued upon. It would, therefore, appear that the question remitted to the Revenue Court for decision must be vital question in the case. Where, as in this case, the decision of the Revenue Court would have no effect on the decision of the Civil Court, the provisions of section 202, in my opinion, have no application. The appeal is dismissed with costs.

Appeal dismissed.

ALLAHABAD HIGH COURT.
SECOND CIVIL APPEAL NO. 352 OF 1912.
November 13, 1912.
Present:—Sir Henry Richards, KT., Chief Justice, and Mr. Justice Tudball.
MAHABIR PERSHAD AND ANOTHER—DEFENDANTS—APPELLANTS
versus
RAM LOCHAN TEWARI—PLAINTIFF—RESPONDENT.

Pre-emption—Rishtadar karibi *not co-owner with the vendor—No right to pre-empt.*

The pre-emptive clause in the *zamima khewat* of a village ran as follows: —"When any sharer wishes to transfer his rights, he can transfer first to a near relative (*rishtadar karibi*), after him to a distant relative (*rishtadar baidi*), and after him to sharers in the village (*shurkain deh*). In the event of those persons refusing, the transferor shall have power to sell or mortgage to whomsoever he pleases. Sharers (*hissadaran*) and sharers in the village (*shurkain deh*) shall be considered to have preference on condition that they are willing to pay the same price as a stranger is paying":

Held, that under the above clause, a near relative, who was not a co-sharer of the vendor in the same *mahal*, had no right to pre-empt.

Second appeal from the decision of the District Judge of Gorakhpur, dated the 23rd of January 1912.

Dr. *Tej Bahadur Sapru* (with him Mr. *Parmeshwor Dyal*), for the Appellants

Dr. *Satish Chandra Banerji*, for the Respondent.

JUDGMENT.—This appeal arises out of a suit for pre-emption. The village is now divided into five *mahals*. A certain individual, proprietor in one *mahal*, made an exchange with the proprietors in another *mahal* of certain plots of land. The plaintiff is a co-sharer in a third *mahal*, that is to say, in the events which have happened he is neither a co-sharer with the transferor nor with the transferee. The plaintiff adduced in support of his case the *zamima khewat* of 1233 *Fasli*. This document provides as follows: "When any sharer wishes to transfer his rights, he can transfer first to a near relative (*rishtadar karibi*), after him to a distant relative (*rishtadar baidi*), and after him to sharers in the village (*shurkain deh*). In the event of those persons refusing, the transferor shall have power to sell or mortgage to whom he pleases." Then follow these words: Sharers (*hissadaran*) and sharers in the village (*shurkain deh*) shall be considered to have preference on condition that they are willing to pay the same price as a stranger is paying."

Oral evidence to the same effect was given.

Both the Courts below have given the plaintiff a decree. Assuming for the purposes of this appeal that pre-emption extends to a case like the present, namely, that of a mere exchange of certain specified plots, and assuming also in favour of the plaintiff that the entry in the *zamima khewat* is sufficient to establish the existence of some custom of pre-emption, the question remains whether or not the evidence is sufficient to establish a custom of pre-emption which gives a right to a person who is not a co-sharer at all with the transferor. We have already pointed out in many cases how closely connected with pre-emption is the question of co-ownership. In our opinion, a custom giving a right to a person who is not a co-owner with the transferor is extremely improbable and unlikely. In the present case, the concluding words of the extract from the *Wajib-ul-arz*, in our judgment, clearly show that the right which the document was recording was a right prevailing amongst co-owners. In the events which have happened, as already mentioned, the plaintiff is no

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longer a co-owner with the transferor, although it is true that he is a near relation. Under these circumstances, we consider that the evidence was not sufficient to establish the existence of a custom under which the plaintiff is entitled to pre-empt the property.

We accordingly allow the appeal, set aside the decree of both the Courts below and dismiss the plaintiff's claim with costs in all Courts including in this Court fees on the higher scale.

Appeal accepted.

ALLAHABAD HIGH COURT.
SECOND CIVIL APPEAL No. 719 OF 1912.
November 23, 1912.
Present:—Mr. Justice Chamier.
POORAN SINGH—DEFENDANT—APPELLANT
versus
JAI SINGH AND OTHERS—PLAINTIFFS—RESPONDENTS.

Occupancy-tenancy, transfer of—Civil Procedure Code (Act V of 1908), ss. 102, 115—Small Cause suit—Second appeal—Revision—Money-bond and lease of holding.

P. executed a bond in favour of *J.* for Rs. 400 and on the same day gave him a lease of his occupancy holding in which it was provided that the rent was to be retained by *J.*, on account of interest payable under the bond. *J.*, having been ejected from the occupancy holding, brought a suit for the recovery of Rs. 400 due under the bond. The Munsif dismissed the suit, but the District Judge on appeal decreed the suit. Defendant preferred a second appeal:

Held, (1) that the transaction carried out by means of the two documents, *viz.*, simple money-bond and the lease of the occupancy holding, was illegal and the plaintiff could not sue for the recovery of the money due under the bond;

Bhikham Singh v. *Har Prasad*, 19 A. 35; A. W. N. (1896) 167; *Murlidhar* v. *Prem Raj*, 22 A. 205; *Depan Rai* v. *Ram Khelawan Rai*, 7 A. L. J. 330; 5 Ind. Cas. 557; 32 A. 383, *Khaja Ikram-ullah Khan* v. *Moti Chand*, 8 A. L. J. 826; 33 A. 695; 11 Ind. Cas. 17, followed.

Bahoran Upadhya v. *Uttamgir*, 8 A. L. J. 931; 33 A. 779; 12 Ind. Cas. 112, distinguished.

(2) that as the District Judge had decreed the plaintiff's suit in appeal and as the suit was one of the nature cognizable by the Small Cause Court, no second appeal lay to the High Court;

(3) that as the District Judge had not failed to exercise a jurisdiction vested in him or exercised a jurisdiction not vested in him or acted in the exercise of his jurisdiction illegally or with material irregularity, the High Court could not interfere in revision.

Second appeal from the decision of the District Judge of Shahjahanpur, dated the 9th of May 1912.

Mr. *Muhammad Ishaq Khan* (with him Mr. *Ibn Ahmed*), for the Appellant.

Dr. *Satish Chandra Banerji*, for the Respondents.

JUDGMENT.—On June 14th, 1907, the defendant gave the plaintiffs a bond for Rs. 400 and on the same day gave them a lease of his occupancy holding in which it was provided that the rent was to be retained by the plaintiffs on account of the interest payable under the bond. It was conceded by the plaintiffs in the Courts below and it is also obvious that the two documents should be read together and that the intention was to make an usufructuary mortgage of the holding. The plaintiffs entered into possession of the holding but were ejected by the Revenue Authorities. In the present suit, the plaintiffs claim a decree for the principal sum due under the bond. The Munsif dismissed the suit holding that the contract was illegal having been designed to render the provisions of the Tenancy Act nugatory as, no doubt, it was. On appeal, the District Judge held that as the defendant had caused the plaintiffs to be ejected from the holding, he was bound to re-pay the amount advanced on the bond so that both parties might be restored to the positions occupied by them before the transaction. In my opinion, the decision of the District Judge was erroneous. If the transaction had been carried out by means of a single document, it is clear on the authorities that no suit would have lain to enforce payment of the mortgage money or any part of it, see the decisions in *Bhikham Singh* v. *Har Prasad* (1), *Murlidhar* v. *Pem Raj* (2), *Depan Rai* v. *Ram Khelawan Rai* (3) and *Khaja Ikram-ullah Khan* v. *Moti Chand* (4). The fact that the parties with a view to evading the provisions of the Tenancy Act carried out the transaction by means of two documents can make no difference. The learned District Judge has relied upon the decision in *Bahoran Upadhaya* v. *Uttamgir* (5) in support of the view which he took. That case seems to me to have no bearing upon the present case. There the plaintiff

(1) 19 A. 35; A. W. N. (1896) 167.
(2) 22 A. 205.
(3) 7 A. L. J. 330; 5 Ind. Cas. 557; 32 A. 383.
(4) 8 A. L. J. 826; 33 A. 695; 11 Ind. Cas. 17.
(5) 8 A. L. J. 931; 33 A. 779; 12 Ind. Cas. 112.

was asking the Court to restore him to the possession of an occupancy holding which he had mortgaged to the defendant and it was held that he was not entitled to a decree except on re-paying the sum borrowed from the defendant upon the mortgage. In the present case, there is no question of putting the plaintiffs upon terms and there is no room for the application of any equity. The plaintiffs are seeking to enforce an illegal contract as in several of the cases cited above. The present case seems to be covered by the authorities and I must hold that the suit should have been dismissed.

But the claim is for a simple money decree for Rs. 400 and the question arises whether a second appeal is not barred by section 102 of the Code of Civil Procedure. *Prima facie* the suit is of a nature cognizable by Courts of Small Causes and the learned Counsel for the defendant-appellant is unable to show that the suit falls within any of the Articles of the second Schedule to the Provincial Small Cause Courts Act. He referred to Article 6, but that Article applies only to suits for foreclosure for sale or for redemption of a mortgage. The present suit is clearly not a suit of the kinds contemplated by Article 6. Counsel for the appellant in the last resort asked me to treat this appeal as an application for revision under section 115 of the Code of Civil Procedure and he contended, on the authority of the case of *Ross Alston* v. *Pitambar Das* (6), that this Court could set aside the decision of the District Judge in the present case in the exercise of its revisional jurisdiction. Elsewhere, I have declined to follow the decision just mentioned but I should have felt myself obliged to follow it in this Court, if it were not for the fact that it is commonly regarded as having gone too far and has in several cases not been followed in this Court. Moreover, the question decided by the Subordinate Court in that case is different from that decided in the present case. In my opinion, the District Judge did not fail to exercise a jurisdiction vested in him or exercised a jurisdiction not vested in him or act in the exercise of his jurisdiction illegally or with material irregularity.

It is merely a case of what I consider an erroneous decision of a question of law and this Court cannot interfere in revision. It is, therefore, useless for me to treat this appeal as an application in revision. I dismiss the appeal as barred by the provisions of section 102 of the Code of Civil Procedure. The appellant must pay the respondent's costs.

Appeal dismissed.

(6) 25 A. 509; A. W. N. (1903) 104.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 59 OF 1912.

November 14, 1912.

Present:—Mr. Justice Chamier.

DEOKINANDAN PERSHAD AND OTHERS —DEFENDANTS—APPELLANTS

versus

BINDESHWARI PARSHAD AND OTHERS—PLAINTIFFS—RESPONDENTS.

Landlord and tenant—Non-payment of rent for over 12 years—Presumption—Adverse possession.

The mere non-payment of rent by a tenant is generally insufficient to show that the tenant has acquired proprietary title against his landlord. A denial of landlord's title must be shown. But non-payment of rent, if proved to have continued for a *very long* period, might give ground for the inference that the landlord had been ousted or had transferred his right to the tenant.

Where *parjawat* (a kind of ground-rent) was not paid by the tenant or collected by the landlord for fifty years but the amount of the *parjawat* was very small, *i. e.*, only 2 pice per mensem :

Held, that the tenant could not be taken to have been in adverse possession of the site of the house.

Sheo Dayal v. *Ganga*, 14 Ind. Cas. 324; *Anroop Misir* v. *Kedar Pande*, 15 Ind Cas. 338, referred to.

Gangadhar v. *Parashuram*, 29 B. 300; 7 Bom. L. R. 252, distinguished.

Second appeal from the decision of the Subordinate Judge of Ghazipur, dated the 21st of November 1911.

Mr. *Haribans Sahai* (with him Mr. *Muhammad Ishaq Khan* and Dr. *Surendra Nath Sen*), for the Appellants.

Mr. *Parmeshwor Dyal* (with him Messrs. *B. E. O'Conor* and *G. W. Dillon*), for the Respondents.

JUDGMENT.—This was a suit for declaration of title to the sites of four houses in *Mohalla* Nawabganj in the town of Ghazipur and for three years' arrears of *parjawat*, a kind of ground-rent. The plaint was amended by the addition of a prayer for "proprietary possession" of the land as it was feared that the claim for a declaration

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of title might be held to be barred by limitation. The Courts below have agreed in giving the plaintiffs a decree for proprietary possession and for the arrears of *parjawat*.

The grounds of appeal are many, but two points only have been pressed before me, namely, that the claim to a decree for proprietary possession is not maintainable and that the whole claim is barred by the long continued adverse possession of the defendant.

It has been found that the plaintiffs are the proprietors of the land and that they or rather their predecessors have received *parjawat* from the holders for the time being of the houses, but the *parjawat* has not been paid for a great many years. One of the Munsifs before whom this case came says that the *parjawat* has not been paid for the last 20 or 30 years. The Subordinate Judge says it has not been paid for many years. As far as I can see, there is no clear evidence of the payment of the *parjawat* during the last 50 years except possibly in the plaintiffs' account books which the Subordinate Judge has accepted but which have not been translated or referred to by Counsel in this Court. It has been held in many cases that mere non-payment of rent by a tenant is generally insufficient to show that the tenant has acquired proprietary title against his *zemindar* and that a denial of the landlord's title must be shown. *Sheo Dyal Singh* v. *Ganga* (1) and *Anroop Misr* v. *Kedar Pande* (2) are recent cases on the point. But I apprehend that non-payment of rent, if proved, to have continued for a *very long* period might give ground for the inference that the landlord had been ousted or had transferred his right to the tenant just as in the case of tenants-in-common, exclusive possession of one tenant in-common for a very long period may furnish ground for the inference that the others have been ousted by him or have transferred their rights to him. See *Fisher & Taylor* v. *Prosser* (3), referred to in *Gangadhar* v. *Parasharam* (4). In the present case, I do not think that such an inference should be drawn from the non-payment of the *parjawat*. The amount of the *parjawat* is very small only 2 pice per mensem for each house. Probably the landlords did not care to collect it regularly and by degrees gave up collecting it altogether.

On the whole, I am of opinion that the decisions of the Courts below are right upon this point and that it should not be inferred from the facts that the defendants have been in adverse possession of the sites of their houses. But from this it follows that the plaintiffs have not been ousted from such possession as they are entitled to and should not be given a decree for possession. The plaintiffs will have a decree for the *parjawat*, the rest of the claim is dismissed.

The parties will pay their own costs throughout.

Appeal dismissed.

(1) 14 Ind. Cas. 324.
(2) 15 Ind. Cas. 338.
(3) (1774) 1 Cowper 217.
(4) 29 B. 300; 7 Bom. L. R. 252.

PUNJAB CHIEF COURT.
SECOND CIVIL APPEAL NO. 723 OF 1911.
November 7, 1912.
Present:—Mr. Justice Rattigan.
NIDHAN SINGH—DEFENDANT—APPELLANT
versus
SHAM SINGH AND OTHERS—PLAINTIFFS—RESPONDENTS.

Construction of deed—Adoption—Power to widow to adopt son—Reversioner acceding assent for consideration.

The deeds and contracts of the people of India should be liberally construed. The form of expression, the literal sense, is not to be so much regarded as the real meaning of the parties which the transaction discloses.

In construing such deeds and contracts, regard must be had to all the attendant circumstances of the transaction.

A. died leaving a widow *B.* and a mother *C.* After *A.*'s death, *B.* and *C.* executed a deed of adoption, by which they adopted one *D.*, as the son of *A.*, reciting in the deed that the adoption was in compliance with the expressed wishes of *A.* *E.*, one of the reversionary heirs of *A.*, sued for a declaration that the deed of adoption was invalid against his reversionary interests and obtained a decree to that effect. Subsequently, *E.* executed an agreement by which he gave *B.* and *C.* authority to adopt any one they liked (*mutbanna apna muqarrir kar leven*) and, as a consideration for this concession, *E.*

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received immediate possession of a large portion of *A.*'s estate. Accordingly, *B.* and *C.* again adopted *D.*, saying "*mutbanna apna qarar de kar iqrar karte hain ke D. mazkur hamara mutabanna hai.*"

After the death of *E.*, *B.* and *C.*, *E.*'s grandson, *F.*, sued for possession of his share in the estate of *A.*:

Held, (1) that the intention of the parties must not be gathered from the strict terms used in the agreement and the deed of adoption but that the circumstances of the case must also be considered;

(2) that the intention of the parties was that the widows should appoint an heir to the last male-holder of the estate, *A*;

(3) that the adoption was binding on *E.* and his heirs.

Second appeal from the order of the Divisional Judge, Ferozepore Division, dated the 19th May 1911, reversing that of the Munsif of the 1st class, Ferozepore, dated the 7th February 1911, dismissing plaintiffs' claim.

Rai Sahib Pandit *Sheo Narain*, for the Appellant.

The Hon'ble Mr. *Shadi Lal*, for the Respondents.

JUDGMENT.—This judgment will also dispose of Civil Appeal No. 724 of 1911 (*Nidhan Singh* v. *Dip Singh*).

The pedigree table of the parties is set out in the judgment of the Divisional Judge and is admittedly correct. The facts, so far as they are material for present purposes, are as follows:

One Sher Singh, son of Bhup Singh, died in 1881, leaving a fairly large estate. After his death, his widow, *Musammat* Mahtabo, and his mother *Musammat* Mano, appear to have succeeded to the estate on the usual life-tenure. On the 9th October 1884, the two ladies executed a deed of adoption which recited that defendant, Nidhana, had been adopted by the deceased Sher Singh during his life-time and that the executants drew up the document in question in order to give effect to the expressed wishes of the deceased by whose authority they purported to be acting. Two of the reversionary heirs, Sarup Singh, the grandfather of the present plaintiff, Sham Singh, and Mangal Singh, the father of the plaintiffs, Dip Singh etc., thereupon sued for a declaration to the effect that the deed of adoption was invalid as against their reversionary interests, and on the 27th of August 1887, they obtained a decree to that effect. Previously to this, mutation in respect of Sher Singh's estate had been effected in the name of defendant, Nidhana, and the Revenue Authorities refused to accede to the prayer of the reversioners to cancel the entry, on the ground that it was competent to the widows to allow any one they liked to have possession of the land during their life-time. On the 26th of April 1889, one of the above mentioned reversioners, *viz.*, Sarup Singh and another reversioner, *viz.*, Sawan Singh, the paternal uncle of Nidhana, executed a written agreement, in which after reciting the facts of the previous alleged adoption and the litigation which ensued thereon, they gave *Musammat* Mano and *Musammat* Mahtabo authority to adopt any one they liked, and, as consideration for this concession, the said two reversioners received, in immediate possession, 80 *kanals* out of the estate of the deceased Sher Singh. The exact terms in which this authority was granted are as follows:

"*Is liye ab ham bazaria tahrir haza ke ikhtiar dete hain ke in Musammatan Mano wa Mahtab Kaur ko ikhtiar hai ke khah kisi ko mutbanna apna muqarrir kar leven. Ham ko babat taqarri mutbanna ke kisi kism ka uzr nahin hoga, na aur kisi kism ka ham ko dawa hoga*".

In pursuance of the authority thus given to them, the two widows, on the 27th April 1889, executed a deed whereby they purported to adopt Nidhana, and the terms of this document are as follows:

"*Ab barue ikhtiarnama tabniat musaddaqa 26th April* 1889, *Musammian Sarup Singh wa Sawan warisan nazdiki ne ham ko ijazat mutbanna karne ki de di hai, lihaza muqiran bakhushi khud Nidhan mazkur ko mutbanna apna qarar de kar iqrar karte hain ke Musammi Nidhana muzkur hamara mutbanna hai.*"

It appears that the other reversionary heir, Mangal Singh, who sued successfully in 1887, was not a party to this transaction, and that he subsequently appeared before the Revenue Authorities and protested against the deed of gift executed by the two widows on the same day on which they had executed the deed of adoption. The Revenue Authorities, however, refused to interfere and it is in evidence that subsequently Mangal Singh, on two occasions at least, accepted Nidhana as the representative and agent of the widows during their life-time. On one occasion,

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an exchange of land was made by Mangal Singh and the other sharers in the *khata* including Nidhana, and on another occasion, Mangal Singh temporarily cultivated a part of Sher Singh's land and paid rent therefor to Nidhana.

Within twelve years of the death of the survivor of the two widows, the grandson of Sarup Singh, *viz.*, Sham Singh, and the sons of Mangal Singh, *viz.*, Dip Singh and others, brought two suits claiming possession of their respective shares in the estate of the deceased Sher Singh, to which in the ordinary course of things they would respectively be entitled to one-third, Nidhana and his uncle Sawan Singh being entitled, as reversionary heirs, to the other third. Nidhana, however, claimed to be entitled to the whole of the estate as the adopted son of Sher Singh, and his claim is supported by his said uncle. The Court of first instance dismissed plaintiff's suits on various grounds, whereupon they appealed to the Divisional Judge, who accepted both appeals and granted plaintiffs a decree with costs in the terms prayed for. Defendant has appealed to this Court from the decrees of the lower Appellate Court, and I have heard Mr. Sheo Narain at considerable length on his behalf.

The contention of Nidhana is that the two widows, in adopting him as a son, adopted him to the deceased Sher Singh, and that this adoption, being made with the consent of the reversioners, Sarup Singh and Sawan Singh, was equivalent to an adoption made by the widows with the authority of the deceased Sher Singh. Next, it is argued that if this contention fails as against all the plaintiffs, it should be held to prevail at least against Sham Singh, whose grandfather gave express consent, for valuable consideration, to the action of the widows. Mr. Sheo Narain also urged that after the death of Sher Singh, Nidhana acquired, at various times, about 17 *kanals* of land which formed no part of Sher Singh's estate and that that area should in any event be excluded from the area of 227 *kanals* which is stated in the plaint to represent the estate left by the deceased, Sher Singh.

As regards the appeal against Dip Singh and others, I have no hesitation in holding that it must fail. Mangal Singh never consented to the adoption by the widows and the only point that can be urged against him and his descendants is that Mangal Singh by his subsequent conduct acquiesced in what the widows had done. Mr. Sheo Narain, however, candidly admitted that this plea of acquiescence could not be supported, and that the Divisional Judge had given sound reasons for rejecting it. So far then as the appeal against those plaintiffs is concerned, the only question is whether they are entitled to a third of 227 *kanals* or to a third of the 227 *kanals minus* the 17 *kanals* alleged to have been acquired by Nidhana. Mr. Shadi Lal, on behalf of all the respondents, conceded that it was possible that Nidhana had acquired certain land for himself, and he was quite willing that the area of Sher Singh's estate should be taken to be 210 *kanals* and not 227. The result, therefore, will be that the appeal as against Dip Singh etc., is accepted to the extent of altering the decree of the lower Appellate Court into one for possession of the 210 *kanals* left by Sher Singh. In all other respects, that appeal is dismissed with costs.

Turning now to the appeal against the decree in favour of Sham Singh, I find considerable force in the arguments addressed to me by Mr. Sheo Narain. The Divisional Judge, in holding that the result of the agreement of the 26th April 1889 and of the deed of adoption of the 27th April 1889 was merely to make Nidhana heir to the personal property of the two widows, lays great stress on the literal wording of the two documents which he construes as meaning that the widows were given authority merely to adopt a son to themselves and did, under the terms employed by them in their own deed, actually adopt a son to themselves and not a son to Sher Singh. It has been laid down by their Lordships of the Privy Council that "deeds and contracts of the people of India ought to be liberally construed. The form of expression, the literal sense, is not to be so much regarded as the real meaning of the parties which the transaction discloses." *Hannoomanpursshad Panday* v. *Musammat Babooee Munraj Koonweree* (1). And it has been

(1) 6 M. I. A. 393; 18 W. R. 81, *note.*

frequently laid down both by their Lordships and by the Courts of this country that in construing such deeds and contracts, regard must be had to all the attendant circumstances of the transaction, [see, *inter alia*, *Janardana* v. *Anant* (2) and *Udai Raj Singh* v. *Bhagwan Bakhsh Singh* (3)].

Accepting this canon of construction, I can have no hesitation in holding that the intention of Sarup Singh and Sawan Singh and of the two widows was that the adoption should be not to themselves but to Sher Singh. To hold otherwise would mean that the widows surrendered a large portion of Sher Singh's estate to Sarup Singh and Sawan Singh for no conceivable benefit either to themselves or to Nidhana. The widows were in possession for their life-time, and the adoption, if so it can be called, of a son to themselves would have been meaningless and of no practical benefit to any one, and it is difficult to believe that they would have given 80 *kanals* of land in return for a concession of no value whatever. That they were anxious to adopt a son to Sher Singh is clear from the deed which they executed in 1884, and I have little doubt that after their failure in 1887, they endeavoured to persuade the reversioners to agree to Nidhana being adopted as Sher Singh's son and that it was with full knowledge that this was their intention and their object that Sarup Singh and Sawan Singh executed the agreement of the 26th April 1889.

I cannot, therefore, agree with the Divisional Judge that the intention of the parties must be gathered from the strict terms used in the agreement and in the deed of adoption, and that the circumstances of the transaction must be ignored. In my opinion, all the parties concerned were well aware that the intention of the widows was to appoint an heir to the last male-holder of the estate, and in arriving at this conclusion, I am influenced by the facts that this was obviously the real wish of the widows and that the deeds were drawn up in all probability by some village scribe of scanty knowledge of legal terms and expressions.

(2) 32 B. 386 at p. 390; 10 Bom. L. R. 575.

(3) 32 A. 227; 7 A. L. J. 274 (P.C.); 14 C. W.N. 641; 11 C.L.J. 387; 12 Bom. L. R. 409; 20 M.L.J. 458; 13 O. C. 172; 7 M. L. T. 410; 6 Ind. Cas. 279.

I hold, accordingly, that so far as the plaintiff, Sham Singh, is concerned, the adoption of Nidhana as the son of Sher Singh had the express approval of his grandfather, Sarup Singh, who received valuable consideration for acceding his assent to the action of the widows, and that this adoption is binding upon Sham Singh. I, therefore, accept the defendant's appeal against the decree of the Divisional Judge in favour of Sham Singh and reversing the decree, I dismiss Sham Singh's suit with costs throughout.

Appeal allowed.

Adv[illegible]

Jamn[illegible]

MADRAS HIGH COURT.

CITY CIVIL COURT APPEAL No. 21 OF 1910.

October 23, 1912.

Present:—Sir Ralph Benson, KT., Offg. Chief Justice, and Mr. Justice Sankaran Nair.

M. COOPOOSAMI CHETTY—PLAINTIFF—APPELLANT

versus

A. T. DURAISAMY CHETTY AND OTHERS—DEFENDANTS—RESPONDENTS.

Caste, ex-communication from—One section refusing to invite plaintiff without his undergoing some expiatory ceremonies, but not outcasting him—Cause of action—Civil Procedure Code (Act V of 1908), s. 9.

An allegation that defendants insisted that the plaintiff should undergo certain expiatory ceremonies, required to be performed by members of a caste after pollutions of certain kinds, before he could be invited to certain functions in defendant's houses, affords no cause of action against the defendants.

Refusal to invite the plaintiff and his friends to auspicious occasions would not in itself give the plaintiff a cause of action, provided his enjoyment of right as a member of the caste has not been obstructed.

Appeal against the revised decree of the City Civil Court, Madras, dated 8th August 1910, in Original Suit No. 64 of 1910.

Mr. *T. Rangachariar*, for the Appellant.

Mr. *K. S. Krishnasawmy Iyengar*, for the Respondents.

JUDGMENT.—The plaintiff gave his daughter in marriage to Mr. Venugopaul Chetty, a High Court Vakil. Both of them belong to the *Vaisya* caste but are members of different divisions of that caste. As might be expected, some members of the sub-caste to which the plaintiff belongs disapproved the marriage on the ground that it was

opposed to custom with the result that on occasions of marriages, funeral ceremonies etc, in their families, the plaintiff and those who took his side were not invited and they also refused the invitations of the plaintiff and his friends to attend at similar functions in their houses. The defendants are among those who disapproved the marriage. They and their friends form a separate faction; some members of the plaintiff's faction were admitted by the defendants into their faction only on the performance of certain expiatory ceremonies required on account of their association with the plaintiff and his friends in social and religious functions.

It is the plaintiff's case that the defendants have proclaimed him to be an outcaste and that these expiatory ceremonies were intended to show that he was an outcaste. The defendants denied that they ever called the plaintiff and those who agreed with him outcastes. They further denied that the plaintiff was an outcaste and alleged that the nature of the ceremonies was not such as to show that the plaintiff was one. The Judge first held that the suit was not maintainable as the plaint did not disclose a cause of action. We reversed his judgment on the ground that if the defendants said anything which was capable of being understood to imply that the plaintiff was an outcaste or if as a condition for admission into religious and social communion, he insisted on the performance of any ceremonies which implied that the plaintiff was an outcaste, the plaintiff would have a good cause of action. The Judge has now found that there is no evidence to prove that the defendants called the plaintiff an outcaste. He also finds that the plaintiff's evidence to prove that the defendants used certain words which, according to him, implied that the plaintiff was an outcaste, is totally unreliable, and in appeal reliance is not placed upon that evidence. The main question, that was argued, is that the defendants insisted upon the plaintiff and those who are associated with him performing certain ceremonies which are performed only by those persons who have lost their caste when they seek re-admission into it. With reference to this contention, the Judge finds that according to the evidence adduced in this case there are two kinds of *prayaschittams* performed. Those who leave their caste by imprisonment and those who have gone beyond the seas have to undergo a *prayaschittam* in which '*homam*' is performed. For instance, the plaintiff's 4th witness sates that he was in Jail for 3 days and for taking the food prepared in Jail, though cooked by Brahmins, he performed a *prayaschittam* which consisted of changing his sacred thread, and performing *homam* and *punyahavachanam*. There is another *prayaschittam* according to the witnesses in which the *homam* is omitted. This is performed, according to the uncontradicted evidence in the case, even by those who remain in caste on certain occasions. The plaintiff's 3rd witness, who was doing the duties of a *Purohit* to the caste to which the parties belong, during the absence of his brother, says that *punyahavachanam* is performed and *panchagavayam* is given on *sradha* days, on the day when a woman takes a bath after her confinement and on the 17th day after the death of a person.

The evidence in this case is quite clear that all that the defendants insisted upon was not performance of ceremonies which should be performed in the case of re-admission of a person who has lost his caste but only the minor ceremonies which have to be performed for purification after pollution of the kinds described above.

Refusal to invite the plaintiff and his friends to marriage would not in itself give the plaintiff a cause of action. The fact, therefore, that the plaintiff and his friends were not invited to religious and social functions at the defendant's houses is immaterial. It does not show that the plaintiff and his friends are outcastes any more than any refusal on their part to invite the defendants and their friends to similar functions in their houses would show the defendants are not in caste. It is admitted by the plaintiff that he has not been obstructed in the enjoyment of any right which he has as a member of his caste. He admits that he is attending temple worship and that nobody objects to his going to temples We are, therefore, of opinion that the Judge is right and dismiss the appeal with costs.

Appeal dismissed.

IMPERATOR v. TYEBALI CURIMJI.

BOMBAY HIGH COURT.

CRIMINAL REVISION PETITION No. 213 OF 1911.

September 6, 1911.

Present:—Sir Basil Scott, Kt., Chief Justice, and Mr. Justice Russell.

IMPERATOR—PROSECUTOR

versus

TYEBALI CURIMJI BARODAWALLA—ACCUSED.

Bombay City Municipal Act (III of 1888), *s.* 394 *—Keeping bullocks for hire—Bullocks kept by tenants in huts and in open—Liability of owner.*

A. was joint owner of a place, part of which was let out to several tenants. The tenants kept bullocks on the place, some in huts and some in the open. The bullocks were plied for hire but the place was not licensed by the Municipal Commissioner under section 394 of the Bombay Municipal Act. *A.* knew that the bullocks were kept on the land and allowed it:

Held, that *A.* was guilty of an offence under section 394 of the Bombay Municipal Act, whether the bullocks were kept upon leased land or on waste land not leased out.

Regina v. *Heyworth*, (1866) 14 L. T. N. S. 600, relied upon.

Emperor v. *Mirza Mahomd Shirazi*, 4 Bom. L. R. 943, distinguished.

JUDGMENT.

SCOTT, C. J.—The finding of the Magistrate is that the accused is one of the joint owners of the land in question on which about a hundred bullocks are kept, some in huts and some in the open, the bullocks being plied for hire; that the place is not licensed by the Municipal Commissioner under section 394 of the Bombay Municipal Act. The accused was charged with using the place without having taken out a license. The defence was that the bullocks did not belong to the accused and that he did not keep them or use the place for keeping them; that the bullocks belonged to tenants who had hired different pieces of the ground and put up huts and were keeping the bullocks. The Magistrate finds that the accused knew ever since March 1910 that bullocks were kept on the land and allowed it, and actually contemplated building a bullock stable, and that such rent as was received for the land was taken by him.

The matter comes up on revision before us upon conviction of the accused on these facts.

It is contended for the petitioner that the bullocks are kept upon certain vacant ground forming part of a large area belonging to the accused, and that they are not actually kept upon the plots which are leased out to tenants.

That contention does not appear to be consistent with the finding of the Magistrate that some of the bullocks are actually kept in the tenants' huts. I will, however, deal with the case upon both assumptions; *first*, that the bullocks are kept upon the land leased out to the tenants, and, *secondly*, that they are kept upon waste land not leased out. In either case, we must assume that they were so kept with the knowledge of the accused. Upon the first assumption, we have the authority of a Bench of this Court, in a case decided on the 2nd December 1897 [*Criminal Reference No.* 105 *of* 1897 (1)] that if the owner of premises without a license allows such animals to be kept therein, whether on payment of a fee or otherwise, he should be considered to use his premises for that purpose. This appears to be in accordance with the decision in *Regina* v. *Heyworth* (2), where the question was as to the liability for using a place as a slaughter-house without a license under section 126 of 10 and 11 Vic. c. 34. That section provided that "Every person who, without having first obtained such license as aforesaid, uses as a slaughter-house any place not so used at the passing of the special Act, shall for each offence be liable." It was held by Mr. Justice Lush that "The owner uses the place by letting it out. The license is not to the person, but to the place, and the penalty is not imposed on every person who shall slaughter cattle in an unlicensed place, but on every person who uses a place without a license."

We have been referred to a decision of another Bench of this Court in *Emperor* v. *Mirza Mahomed Shirazi* (3), in which the Court held that where the owner of premises has leased them out for a term of three years, he would not be liable under the

*The section runs thus:—

Section 394. (1) Except under a license granted by the Commissioner, no person shall—.....

(*c*) keep or allow to be kept, in or upon any premises, horses, cattle or any other four-footed animals,

(*i*) for sale,

(*ii*) for letting out on hire.

(*iii*) for any purpose for which any charge is made or any remuneration is received, or

(*iv*) for sale of any produce thereof.....

(1) 4 Bom. L. R. 945, *note*.

(2) (1866) 14 L. T. N. S. 600.

(3) 4 Bom. L. R. 943.

section for the acts of his tenants which he could not control. Those are very different facts from the facts of the present case.

The alteration in the section, when re-enacted in the Act of 1888, which is referred to in *Emperor* v. *Mirza Mahomed Shirazi* (3), has been relied upon for the petitioner. We are not prepared to adopt the view of this Court in that case as to the reason for alteration, for upon the facts of this case the decision in *Criminal Reference No.* 105 *of* 1897 (1) is directly in point and is supported by the English case above cited. Therefore, if the petitioner let out the land upon which bullocks were kept, he would be liable under the section having taken rent with the knowledge of the purpose for which the land was used by his monthly tenants. On the other hand, if the land used was waste land for which the tenants were not paying rent, but which the landlord (the petitioner) permitted to be used out of kindness to the tenants, we think he would clearly be using the land for bullocks, without a license, and would, therefore, be liable to conviction under the Act.

We discharge the Rule.

RUSSELL, J.—I agree. One of the uses to which this land was put, to the knowledge of the accused, was for keeping bullocks without a license which were let on hire, and that being so, in my opinion, he "used" the premises and so brought himself within section 394 of the City of Bombay Municipal Act, 1888.

Rule discharged.

BOMBAY HIGH COURT.

CRIMINAL REFERENCE No. 61 OF 1912.

August 26, 1912.

Present:—Mr. Justice Batchelor and Mr. Justice Rao.

EMPEROR—PROSECUTOR

versus

ABDUL RAHIMAN MOMIN—ACCUSED.

Practice—Jurisdiction—Magistrate seeking advice of District Magistrate—Magistrate bound to decide question himself.

A Magistrate, before whom an accused was placed on trial, felt a doubt as to his jurisdiction to try the accused. He thereupon sought the advice of the District Magistrate and, on the receipt of the latter's opinion on the question of jurisdiction, proceeded to try the case:

Held, that the Magistrate was not justified in seeking the advice of the District Magistrate in the way he did. The Magistrate was bound to finish his inquiry, complete his record by the reception of all evidence of relevant facts, including the facts which bore upon the question of accused's amenability to his jurisdiction, and then *as a Magistrate* pass such order as seemed to him to be legal and proper.

Criminal Reference made by the Sessions Judge of Satara.

Mr. *S. R. Bakhle*, for the Accused.

Mr. *L.A. Shah*, Acting Government Pleader, for the Crown.

JUDGMENT.—We think that the procedure by which this matter has ultimately found its way to this Court is open to objection. The accused was placed before the second class Magistrate on an accusation that he, being a subject of the Aundh State, had within the limits of that State dishonestly received certain property which had been stolen in British India. Those circumstances, no doubt, raise a point of law as to whether the accused would be amenable to the jurisdiction of the British Court; and that is a question which could only be decided by a Tribunal placed in full possession of all the facts bearing upon that question. The second class Magistrate, however, seeing this legal question looming before him, instead of completing his inquiry, getting upon the record all the evidence that was available and then deciding the point of law, right or wrong, for himself, proceeded to address an official communication to the District Magistrate seeking his advice in the matter. The District Magistrate replied, stating his opinion on the question of jurisdiction, but, in our opinion, the best reply would have been to direct the second class Magistrate to complete his inquiry, and as a Magistrate pass such order as seemed to him to be legal and proper. That is the direction which we must now make. The second class Magistrate must finish the inquiry, completing his record by the reception of all evidence of relevant facts, including the facts which bear upon this question of the accused's amenability to a British Court's jurisdiction. With this record thus complete, the Magistrate must consider for himself the question of law which arises and must decide it for himself. If he decides it rightly, so much the better; if he decides it wrongly, there are Tribunals constituted for the purpose of correcting his mistake.

BOMBAY HIGH COURT.

CRIMINAL APPEAL No. 234 OF 1912.

August 7, 1912.

Present:—Sir Basil Scott, Kt., Chief Justice, and Mr. Justice Chandavarkar.

EMPEROR—PROSECUTOR

versus

ALIBHAI MIABHAI—ACCUSED.

Public Conveyances Act (VI of 1863), s. 18—Licensee of conveyance—Omission to produce list of fares on demand by Police officer.*

The provisions of section 18 of the Public Conveyances Act are framed solely for the benefit of the hirer or the passenger, and it is when the list of fares is not produced on demand by the *hirer or the passenger* that the penalty provided in the section can be imposed.

The penalty cannot be imposed on the licensee for failure to produce the list of fares when required to do so by a Police officer at the carriage stand.

Criminal appeal from the order of acquittal passed by the Honorary Magistrate, 1st Class, Ahmedabad City.

FACTS :—The licensee of a public conveyance was required by a Police officer, while his carriage was standing at the carriage stand to produce his list of fares. He was unable to do so.

He was proceeded against under section 18 of the Public Conveyances Act but was acquitted by the Magistrate. The Magistrate's order stated :—"The section quoted is apparently very clear and makes a licensee, driver, or other attendant liable to the punishment provided therein, only if he fails to comply with the demand for producing the list etc. made by any hirer of or passenger by the public conveyance. In this case, no such demand was made by any hirer or passenger and the section does not, therefore, apply. From the accused's statement, he seems to have left at home through oversight the list of the fares etc. His consequent inability to produce the same to Mr. Gillispie, Sargeant, is not punishable under section 18 quoted above."

Mr. *L. A. Shah*, Acting Government Pleader, for the Crown.

JUDGMENT.—We are of opinion that the Magistrate has come to the right conclusion with regard to the construction of section 18 of the Public Conveyances Act (VI of 1863).

We think the object of the section was to provide that the licensee or driver of a public conveyance shall have a clean list of fares with him in order that he may be in a position on demand to produce the same for the benefit of the hirer or passenger. The provisions of the section are framed solely for the benefit of the hirer or the passenger, and it is when the list is not produced on demand by the hirer or passenger that the penalty can be imposed.

The case for the prosecution cannot be put higher than this that the section is capable of two constructions. In a case of such ambiguity, the Court ought to lean in favour of the accused.

We dismiss the appeal and affirm the order of acquittal.

Appeal dismissed.

* The section runs thus :—

Section 18. Every licensee, driver or other attendant in charge of any public conveyance shall have with him, when plying for hire, a clean and legible list in English and such vernacular language or languages as the Commissioner of Police or Master Attendant may order, bearing the name in full of the licensee, and showing the rates and fares fixed and appointed to be taken for the fare or hire of his conveyance, with an abstract of the law relating to public conveyances, and shall, on demand, produce the same for the information of any hirer of, or passenger by, such public conveyance, under penalty, on conviction before a Magistrate of Police, of a fine not exceeding rupees twenty, and, in default of payment of such fine, he shall be liable to simple imprisonment for a period not exceeding two months.

CALCUTTA HIGH COURT.

CRIMINAL APPEAL No. 689 OF 1912.

August 23, 1912.

Present:—Mr. Justice Carnduff and Mr. Justice Imam.

SUKNANDAN SINGH—APPELLANT

versus

EMPEROR—RESPONDENT.

Criminal Procedure Code (Act V of 1898), ss. 35, 411—Sentences to run concurrently—Sentence of six months' imprisonment on each of two counts by Presidency Magistrate—Right of appeal—Aggregate sentence.

Two sentences, each of six months' imprisonment passed simultaneously under section 35 of the Criminal Procedure Code, and directed to run concurrently, cannot be held to be a single sentence of one year's

imprisonment, but would be considered as a single sentence of six months' imprisonment.

If such a sentence is passed by a Presidency Magistrate, it will not be appealable under section 411 of the Criminal Procedure Code.

Appeal against the conviction and sentence of six months' rigorous imprisonment, passed on each of two counts, the sentences to run concurrently, by the fifth Presidency Magistrate of Calcutta on August 13th, 1912.

Mr. *K. N. Chaudhri* and Babu *Manmatha Nath Mukherjee*, for the Appellant.

JUDGMENT.—Two sentences, each of six months' imprisonment, passed simultaneously under section 35 of the Criminal Procedure Code of 1898 and directed to run concurrently cannot, in our opinion, be held to be, in the aggregate, a single sentence of one year's imprisonment. The word "aggregate" in sub-section (3) of the section connotes the combined effect of the different sentences passed and, if two concurrent sentences could properly be said to be aggregated in the sense of being merged together, the result of the so-called aggregation would, we think, be a single sentence of six months' imprisonment. The intention which is to be gathered from, for example, section 411 of the Code, is that a person who is to suffer by being imprisoned for more than a certain period shall have the privilege of an appeal. If he is, in fact, to be imprisoned for a shorter period, whether under one or two sentences, we do not understand how the privilege can, or why it should, be extended to him.

This appeal is, therefore, incompetent and dismissed accordingly.

Appeal dismissed.

BOMAY HIGH COURT.

CRIMINAL REVISION PETITION No. 213 OF 1912.

August 7, 1912.

Present:—Mr. Justice Batchelor and Mr. Justice Rao.

EMPEROR—PROSECUTOR

versus

DADABHAI FRAMJI CAMA—ACCUSED.

Bombay City Municipal Act (III of 1888), *s.* 394—*Keeping bullocks for hire by tenant with owner's knowledge—Liability of owner.*

A. let out certain premises to *B.* For several years, to the knowledge of *A.*, the premises were used by *B.* or his sub-tenants for the purpose of stabling bullocks used for hire in contravention of section 394 of the Bombay Municipal Act. In the lease given by *A.* to *B.*, there was a clause restraining *B.* from putting the land to any use not sanctioned by Municipal Regulations:

Held, that *A.* was guilty of an offence under section 394 of the Act, as despite the terms of the lease, he allowed the unwarranted use of the premises.

Imperator v. *Tyebali Curimji Barodawalla*, 14 Bom.L. R. 885, note; 17 Ind. Cas. 529, followed.

Regina v. *Heyworth*, (1866) 14 L. T. N. S. 600, relied upon.

Criminal Application for revision from conviction and sentence recorded by the Third Presidency Magistrate of Bombay.

Mr. *Robertson*, instructed by Messrs. *Forbes and Co.*, for the Accused.

Mr. *Jardine*, Acting Advocate-General, instructed by Messrs. *Crawford Brown and Co.*, for the Municipality.

JUDGMENT.—The petitioner here has been convicted of allowing to be kept, on his premises, bullocks used for hire, without a license from the Municipal Commissioner, in contravention of section 394 of the Bombay Municipal Act (Bom. Act III of 1888), and has been sentenced to a fine of Rs. 15. The question before us is whether the lower Court has committed any error of law in finding the petitioner guilty under this section.

The facts found are that the premises in question belonged to the petitioner; that he has let them out to one Kondiba; and that for many years, to the petitioner's knowledge, the premises have been used by his tenant or sub-tenants for the purpose of stabling bullocks used for hire in contravention of this section. The only question is whether upon that state of facts, the petitioner was rightly convicted under section 394. That section provides that "Except under a license granted by the Commissioner, no person shall, *inter alia*, keep or allow to be kept, in or upon any premises, cattle for letting out on hire." It is urged by Mr. Robertson for the petitioner that the responsibility for stabling the cattle, without Municipal permission lay upon the petitioner's tenant and upon him only. And Counsel has referred to the lease given by the petitioner to his tenant and to the clause in the lease which restrains

the tenant from putting the land to any use not sanctioned by Municipal Regulations. It appears to us, however, that these terms of the lease make rather against the petitioner than in his favour, for they show that with the knowledge at his disposal, he had the power to eject his tenant. This he did not do, but stood by, and offered no obstruction or impediment to his tenant's unlawful use of the land. It seems to us, therefore, that it may rightly be said that despite the terms of the lease, he allowed the unwarranted use of the premises.

The case falls within the decision of this Court in *Imperator* v. *Tyebali Curimji Barodawalla* (1), where in a similar state of facts a conviction was affirmed, and reference was made to *Regina* v. *Heyworth* (2). That was a case which involved liability for using a place as a slaughter-house without a license under section 126 of 10 and 11 Vic. c. 34. That section provided that "Every person who, without having first obtained such license as aforesaid, uses as a slaughter-house any place not used as such at the passing of the special Act, shall for each offence be liable to a certain punishment." In considering that section, Mr. Justice Lush said: "The owner 'uses' the place by letting it out. The license is not to the person, but to the place."

So upon these facts, we think, that under section 394 of the Municipal Act, the petitioner must be held to have allowed his cattle to be stabled by his tenant in contravention of the provisions of the law. It may well be, as Mr. Robertson has suggested and we are quite prepared to accept the suggestion, that the petitioner has acted throughout in good faith, and under a mistaken belief as to his legal responsibility. But however that be, he has, in our opinion, rightly been convicted under section 394 and we must, therefore, discharge the Rule.

Rule discharged.

(1) 14 Bom. L. R. 885, *note*; 17 Ind. Cas. 529.
(2) (1866) 14 L. T. N. S. 600.

CALCUTTA HIGH COURT.
CRIMINAL REVISION No. 907 OF 1912.
August 15, 1912.
Present:—Mr. Justice Holmwood and Mr. Justice Imam.

MANIK CHANDRA CHAKRAVARTI AND ANOTHER—FIRST PARTY—PETITIONERS
versus
PREO NATH KUAR AND OTHERS—SECOND PARTY—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 145, scope of—Absolute continuous possession dealt with—Party claiming right of easement not to be made party to section 145 proceedings—Jurisdiction of Magistrate—Public, if may be declared to be in possession.

Section 145 of the Code of Criminal Procedure only deals with rights of absolute continuous possession of immoveable property, and proceedings under that section are entirely without jurisdiction unless they are directed to the decision of absolute continuing possession of either party.

The right of a party, who does not claim anything beyond the right to worship on one day in the year and the right to make due and proper preparations for the holding of that worship by erecting huts for the purpose of holding the *puja*, is in the nature of an easement and not in the nature of possession, and, therefore, such a party cannot be made a party to a proceeding under section 145, Criminal Procedure Code.

The public cannot be declared to be in possession of any piece of land, for if that be done, then both parties to the dispute are included in that term and the possession, therefore, is joint possession and the jurisdiction of the Court under section 145, Criminal Procedure Code, is ousted.

Rule against the order of the Deputy Magistrate of Howrah, dated May 11th, 1912, declaring the Opposite Party to be entitled to possession of the land in dispute.

Babus *Atulya Charan Bose* and *Bir Bhushan Dutt*, for the Petitioners.

Mr. *K. N. Chaudhuri* and Babu *Manmatha Nath Mukherjee*, for the Opposite Party.

JUDGMENT.—This was a Rule calling upon the District Magistrate of Howrah and on the opposite party to show cause why the order passed under section 145, Criminal Procedure Code, should not be discharged on the grounds, *firstly*, that the public who claim the right of easement for one day in the year cannot be a party to section 145 proceedings, and *secondly*, that constructive conditional possession is not known to the law.

We are of opinion that this Rule must be made absolute on both the grounds on which it was issued. It is clear that if the public

are declared to be in possession of any piece of land, then both parties to the dispute are included in that term and the possession, therefore, is joint possession and the jurisdiction of the Court under section 145 is ousted. But this is an academical question. The principal question is whether a party, who do not claim anything beyond the right to worship on one day in the year and the right to make due and proper preparations for the holding of that worship, by erecting huts for the purpose of holding the *puja*, can be admitted to proceedings under section 145 of the Code of Criminal Procedure, which only deals with rights to absolute continuous possession of immoveable property. What the learned Magistrate means by constructive conditional possession we cannot conceive. If he means their right to be in possession for one day in the year or to take such steps as are necessary to prepare for the *puja*, that is in the nature of an easement and not in the nature of possession at all and this is what the second party themselves ask for in their petition. They say that the first party is likely to disturb them in their public worship on the last day of *Baisakh*, inasmuch as the first party claims the land to be his ancestral property and desires to hold a private worship of his own apparently of the same goddess Bhadrakali on that very day: and they pray that considering the emergency of the matter, the Magistrate may be pleased to take proceedings under section 144 of the Criminal Procedure Code. And they rely upon the case of *Belagal Ramacharlu* v. *Emperor* (1). Now, had the Magistrate taken such proceedings, all these troubles would have been avoided. He had only to prohibit any person claiming either as proprietor or in any other capacity from interfering with the public and with the public's designated priest whose name was given in the proceedings in conducting this *puja* or in preparing for it. This would have settled the whole dispute; and this can easily be done year after year, if it be necessary. The proceedings can be taken a month beforehand. It would be ample for all that is necessary to meet the ends of justice. But as we have already indicated, proceedings under section 145 are entirely without jurisdiction unless they are directed to the decision of the absolute continuing possession of either party until they are ousted by the order of the Civil Court. We, therefore, make the Rule absolute and set aside the proceedings in the lower Court. Costs ordered will be refunded.

Rule made absolute; Case remanded.

(1) 26 M. 471.

BOMBAY HIGH COURT.

CRIMINAL APPEAL No. 263 OF 1912.

August 10, 1912.

Present:—Mr. Justice Batchelor and Mr. Justice Heaton.

EMPEROR—APPELLANT

versus

CHIMANLAL JAGJIVAN—ACCUSED.

British India—Wadhwan Civil Station—Bombay Abkari Act (Bom. Act V of 1878), *s.* 43 (*a*) *—*Importation of* bhang *from Wadhwan Civil Station to Viramgam.*

Wadhwan Civil Station is not a part of British India.

Triecam Ponachand v. *The Bombay, Baroda and Central India Railway Company*, 9 B. 244, overruled.

Queen-Empress v. *Abdul Latif* valad *Abdul Rahiman*, 10 B. 186, followed.

Hemchand v. *Sakarlal*, 33 C. 219, 8 Bom. L. R. 129, relied upon.

The importation of *twenty* tolas of *bhang* from Wadhwan Civil Station into Viramgam is an importation of *bhang* from foreign territory into Presidency of Bombay and is, therefore, punishable under section 43 of the Bombay Abkari Act.

Criminal appeal by the Government of Bombay from an order of acquittal passed by the second class Magistrate of Viramgam.

Mr. *L. A. Shah*, Acting Government Pleader, for the Appellant.

Mr. *T. R. Desai*, for the Accused.

JUDGMENT.

BATCHELOR, J.—In this case, the accused was charged under section 43 of the Bombay Abkari Act (Bom. Act V of 1878), with

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*The section runs as follows:—

Section 43. Whoever, in contravention of this Act, or of any rule or order made under this Act, or of any license, permit or pass obtained under this Act—

(*a*)imports or exports liquor, hemp or any intoxicating drug into or out of any part of the Presidency of Bombay,...

shall be punished for each such offence with fine which may extend to one thousand rupees or with imprisonment for a term which may extend to six months or with both.

EMPEROR v. CHIMANLAL JAGJIVAN.

importing an intoxcating drug into the Presidency of Bombay. The fact proved is that the accused brought twenty tolas of *bhang* from Wadhwan Civil Station to Viramgam. Viramgam admittedly is British territory. It is further admitted that the importation of twenty tolas of *bhang* into British territory from foreign territory would be punishable under section 43.

The only question which arises, therefore, is whether Wadhwan Civil Station is within the Presidency of Bombay or not. The Abkari Act extends to the whole of the Presidency of Bombay (see section 1); and by the Bombay General Clauses Act (Bom. Act I of 1904) 'Presidency of Bombay' means the territories within British India for the time being under the administration of the Governor of Bombay in Council. 'British India' is by the same Act defined to mean all territories and places within His Majesty's Dominions which are for the time being governed by His Majesty through the Governor-General of India or through any Governor or any other officer subordinate to the Governor-General of India.

In the Court below, the learned Magistrate has held that Wadhwan Civil Station is within the limits of British India, and for that view, he has relied upon Mr. Justice Bayley's decision in *Triccam Panachand* v. *The Bombay, Baroda and Central India Railway Company* (1). That decision is clear authority for the Magistrate's decision, and the real question now before us may be said to be whether *Triccam Panachand's* case (1) was rightly decided. It was the decision of a single Judge and as such is not binding upon us. It is unnecessary, therefore, to consider the reasoning upon which that case proceeded but it is material to say, with great respect, that the grounds upon which Mr. Justice Bayley based his determination do not appear to my own mind to carry conviction.

While we are not bound by Mr. Justice Bayley's decision, there is a decision of this Court which is binding upon us, and that is the decision of the Bench in *Queen-Empress* v. *Abdul Latib* valad *Abdul Rahiman* (2), where Mr. Justice Birdwood and Mr. Justice Jardine, have held that the Civil Station at Rajkot is not part of British India within the meaning of Statute 21 & 22 Vic. c. 106.

It is urged on behalf of the appellant that the position of Rajkot Civil Station is, for our present purposes, indistinguishable from that of Wadhwan Civil Station; and upon reference to the agreements made with these two States, and recorded in Aitchison's Treaties, I am of opinion that this argument must be allowed. So far as the material clauses in the two agreements are concerned, they are couched in identically the same language, nor has any attempt been made before us to distinguish the language in the one agreement from the language in the other. It follows, therefore, that if in the case of Rajkot, the true construction of the agreement is that Rajkot Civil Station remains outside British India, the same construction must be placed upon the agreement with Wadhwan. Therefore, following the decision in *Abdul Latib's* case (2), which for the rest commends itself to my own mind, we must, I think, hold that Wadhwan Civil Station is outside the limits of British India. It is true that in *Abdul Latib's* case (2) what the Court decided was that Rajkot was not part of British India, as that term is defined in the Indian Penal Code, and that the definition of 'British India' in the Indian Penal Code is framed in different words from the definition which occurs in the Bombay General Clauses Act. It appears to me, however, that so far as regards our present purposes, this difference in language is not a difference of substance. Reference may also, I think, be made to the Privy Council decision in *Hemchand* v. *Sakar Lal* (3), which seems to me to lend support to the view that Wadhwan Civil Station is not a place within His Majesty's Dominions which for the time being is governed by His Majesty through the Governor-General of India or through any Governor subordinate to the Governor-General. It may be observed further that, as was admitted in argument, the laws which prevail in the Bombay Presidency do not prevail *proprio vigore* in Wadhwan Civil Station, and it is irrelevant to the present point that some of such laws are extended to the Civil Station by recourse to other powers

(1) 9 B. 244.
(2) 10 B. 186.

(3) 33 C. 219; 8 Bom. L. R. 129; 1 M. L. T. 115; 16 M. L. J. 115; 3 C. L. J. 395; 10 C. W. N. 361; 3 A. L. J. 250; 30 I. A. 1 (P. C.)

than those vested in the Bombay Legislature.

For these reasons, I am of opinion that, notwithstanding the decision in *Triccam Panachand* v. *The Bombay, Baroda and Central India Railway Company* (1), we ought now to hold that Wadhwan Civil Station is not part of British India. If that is so, then it follows that the accused must be convicted of the offence with which he was charged, and I would suggest that he be punished with a nominal fine of one rupee, seeing that the object of the appeal is not to secure this particular accused's punishment so much as to have a definite pronouncement as to the legal position of Wadhwan Civil Station.

HEATON, J.—I agree in the conclusion that the Wadhwan Civil Station is not part of British India, and I also agree that the decision in *Queen-Empress* v. *Abdul Latib* valad *Abdul Rahiman* (2) is in reality a binding authority in this case. Since that decision was pronounced, matters have progressed a good deal, arguments have been rife and decisions have been obtained. The subject is one which from time to time has occupied my attention, and I could, were I so disposed, deliver a very lengthy, however imperfect, judgment on the point now in dispute. But it seems to me quite unnecessary to do this; unnecessary for me to say more than that, I think, the decision given in *Queen-Empress* v. *Abdul Latib* valad *Abdul Rahiman* (2) was absolutely right.

I would only say a word or two about one argument which was advanced by Mr. Desai. He said: "It cannot be that the people who all their lives have supposed they were living in British India, who are governed by British Officials and subject to British laws, are in truth not living in British India at all but in a Native State."

Happily or unhappily it may be so. There are many places in other parts of the world where British laws are in force, where there are British Courts and British Officials, where there are people living to all intents and purposes under British Dominion, but which are in truth not part of His Majesty's Dominions. I would point out one more thing, and that is that, as a fact, these British laws, under which the inhabitants of the Wadhwan Civil Station are living, are applied to that particular place by a special process and do not apply of themselves; and I can imagine no more cogent circumstance for showing to thoughtful minds that Wadhwan Civil Station is in truth not a part of British India.

Appeal allowed.

CALCUTTA HIGH COURT.

CRIMINAL REVISION No. 1031 OF 1912.

August 16, 1912.

Present:—Mr. Justice Holmwood and Mr. Justice Imam.

GANPAT RAI—PETITIONER

versus

EMPEROR—OPPOSITE PARTY.

Petroleum Act (VIII of 1899), *ss.* 11, 15—*Possession and transport of petroleum—Illegal possession by agent without principal's knowledge—Liability of principal.*

Even though the Petroleum Act provides a personal penalty, the only person that can be punished is the one who keeps petroleum or carries it about or puts more than 500 gallons at one place.

There is no provision in the Act, as there is in the Excise Act and in the Motor Car Act, which makes the principal responsible for the acts of his agents or servants.

Therefore, if an agent of several persons in the sale of petroleum keeps more than 500 gallons in contravention of section 11 of the Petroleum Act, his principal is not responsible for this unless the latter knew that more than 500 gallons of petroleum was illegally kept on his license and allowed this to take place with such knowledge.

Rule against the order of the Deputy Magistrate of Palaman, dated April 4th, 1912, convicting the petitioner under section 15 (*a*) of the Petroleum Act, VIII of 1899, on each of three counts, and sentencing him to pay a fine of Rs. 50 on each count.

Babu *Rajendra Prasad*, for the Petitioner.

Babu *Srish Chandra Chowdhury*, Junior Government Pleader, for the Crown.

JUDGMENT.—We are of opinion that this Rule must be made absolute upon the grounds on which it was issued.

The law (Act VIII of 1899) lays down in section 11: "No quantity of petroleum exceeding 500 gallons shall be kept by any one person, or on the same premises, or shall be transported, except under, and in accordance with, the conditions of a license granted under this Act."

Now, it is found that a person, named Sheo Bhagwan, who was an agent of the petitioner and also apparently agent of several other

persons in the sale of petroleum, imported or rather transported (for, we donot know how this petroleum was imported into this country) more than 150 tins at a time, and we are told that 150 tins is equal to the maximum allowed, *viz.*, 500 gallons. If, therefore, Sheo Bhagwan transported more than 150 tins, he is guilty of transporting petroleum in contravention of the Act. But we are unable to see that the principal, Ganpat Rai, is responsible for this, unless there is a finding that he knew that more than 150 tins were being transported at one time on his license and allowed this to take place with such knowledge. Now, there is no finding to that effect.

The agent, Sheo Bhagwan, seems to have been allowed to give evidence and, of course, being himself the guilty person, he would naturally try to shift the balance on to his principal. He says that he did transport more than 150 tins for his principal at one time and despatched them in parcels of 150 gallons to the dealers. Still we are unable to say, there being no finding to that effect, that the petitioner was in any way responsible for this illegal proceeding.

The second point depends upon the first and has already been decided by us, namely, that the petitioner cannot be held criminally liable for any illegal act of the said agent. There is no provision, as far as we can see, in this Act, as there is in the Excise Act and in the Motor Car Act, which makes the principal responsible for the acts of his agents or servants and nothing can be read into the law which is not to be found in the law.

As regards the third ground, we have already referred to that. It relates to the contention of the petitioner that Sheo Bhagwan was agent for other firms as well as for the petitioner and that it is impossible for the petitioner to know how much petroleum was imported for his use and how much for that of the others. It is argued by the learned Vakil for the Crown that as Ganpat Rai took commission or profit of one pice per tin on every tin sold, he must have been aware of how many tins were in the possession of his agent at one time. This does not seem to us to be at all a necessary conclusion. A stock of 150 tins may be sold out gradually and be replenished from time to time and it is impossible for the absent principal to know whether at one time his agent had 150 tins on his behalf or on behalf of the other firms. Even though the Act provides a personal penalty, we think the only person that can be punished is the one who keeps petroleum or carries it about or puts more than 150 tins at one place.

For these reasons, the Rule must be made absolute and the conviction and sentence set aside. The fines, if paid, must be refunded.

Rule made absolute.

BOMBAY HIGH COURT.

CRIMINAL REFERENCE NO. 73 OF 1912.

August 29, 1912.

Present:—Mr. Justice Batchelor and Mr. Justice Rao.

EMPEROR—PROSECUTOR

versus

BUDHANKHAN INAYATKHAN—ACCUSED.

Penal Code (Act XLV of 1860), s. 414—Concealing stolen property—Owner of property not traced—Offence.

Section 414 of the Penal Code does not impose on the prosecution the requirement to trace in all cases the owners of the property stolen. All that is needed is to show that the accused voluntarily assisted in concealing or disposing of property which he had reason to believe to be stolen property. The latter fact may be proved from the accused's own conduct and actions.

Criminal Reference made by the Assistant Sessions Judge of Thana.

Mr. *L. A. Shah*, Acting Government Pleader, for the Crown.

JUDGMENT.—This is a Reference made to us by the Assistant Sessions Judge of Thana, who found himself unable to accept the verdict of the Jury. The accused Budhankhan *valad* Mithekhan *alias* Nathu Inayatkhan was committed for trial on charges under sections 414 and 75 of the Indian Penal Code. On the motion of the Public Prosecutor, a charge under section 411 was added in the Court of Session. The Jury by a majority acquitted the accused on the charge under section 411, but by a majority of 4 to 1 they found him guilty under section 414. It is because the Assistant Sessions Judge is unable to agree with the Jury that the charge under section 414 is proved that this Reference has been made.

EMPEROR *v.* BUDHANKHAN.

We do not understand the Assistant Sessions Judge to express any real dissent from the view which the Jury took of the effect of the evidence as to the matters of fact. We understand his reference to show that he doubted whether on the facts as stated by the prosecution witnesses, a conviction can legally be had. We are unable to share that doubt.

The facts stated for the prosecution were mainly these: the accused arrived at Palghar Station about 4 o'clock in the morning from the Surat train and crossed over from the up-platform to the down-platform. He was found to be without a ticket, and was, therefore, directed to stay in the passengers' shed outside the Station until the morning when the Station Master would arrive and see into the matter. The witness Keshav, the third class Head Constable, inquired of the accused what things he had in his possession, and the accused showed him a few annas and a knife, and that was all that could be found in his possession. About an hour later, the accused jumped over the railing of the passengers' shed and moved along towards the north. On being questioned as to where he was going, he said that he wanted to drink water. The porter showed him the water-pipe towards the south, but the accused, as if bent on something other than drinking water, went on towards the north. His conduct excited suspicion specially when he was seen to be searching for something near the railway track. Questioned by Keshav as to what he was looking for, he said he was looking for a rupee which he had thrown away. It was obviously unlikely that a Pathan cooly in possession of only a few annas should throw away a whole rupee; and the explanation naturally did not satisfy the mind of Keshav. Keshav called other men to his assistance, and they all searched about the railway line, pretending to assist the accused to recover what he had lost. Suddenly one of the searchers came upon two gold bangles, and cried out that he had found them. At that moment, the accused took off his shoes and ran away. He was, however, pursued and captured and the discovery of the bangles was recorded in a properly executed *panchnama*. The value of the bangles was Rs. 38. They were made of gold and were such as would be appropriate to children of the wealthier classes. They were obviously singular and inappropriate as part of the personal belongings of a poor Pathan cooly. This, indeed, was recognized by the accused himself, who throughout has laid no claim to be entitled to the bangles. His defence has been that he has no connection with them whatever.

We see no reason to distrust the evidence, of which the purport has been given above, and which rests upon witnesses against whom no motive for false statement can reasonably be assigned. It is noteworthy that the bangles were not casually dropped about the railway track, but were found carefully placed one on each side of the railway line. The inference is that they were so placed by the accused in the hope that, after he had been released in the matter of his travelling without a ticket, he could return to the spot and recover the ornaments from their place of concealment. His whole conduct appears to us conclusively to show that it was he who deposited the bangles by the railway line, and that he was conscious that he had no title to the property. That being so, we are unable to perceive the force of the Assistant Sessions Judge's objection that there is no affirmative evidence in the case to show from whom or in what circumstances the bangles became stolen property. It is clearly impossible to expect in all cases, including cases of petty losses, that the Police should be able to trace the owners of the property stolen; nor, we think, does section 414 impose any such requirement on the prosecution. All that is needed is to show that the accused voluntarily assisted in concealing or disposing of property which he had reason to believe to be stolen property. Here the accused's own conduct from the beginning to the end clearly indicates that he had reason to believe, and did believe, that these ornaments were stolen property. It is, moreover, proved that he was in possession of the property: this consists of valuable gold ornaments of which accused would not ordinarily be in honest possession; and he has declined to explain or justify his possession. Further, his actions in connection with the ornaments amounted to voluntarily assisting in con-

ealing or disposing or making away with this property; and we, therefore, agree with the majority of the Jury that the charge against him was proved.

The accused being thus convicted under section 414, it will be necessary that he should be tried further under section 75, Indian Penal Code, and an appropriate sentence passed having regard to the results of that trial. For this purpose, we record a conviction under section 414 and remand the case for further disposal to the Sessions Court.

Case remanded.

ALLAHABAD HIGH COURT.
FULL BENCH.

MISCELLANEOUS APPEAL No. 431 OF 1912.
November 19, 1912.

Present:—Sir Henry Richards, Kt., Chief Justice, Mr. Justice Tudball and Mr. Justice Chamier.

In the matter of HAR PRASAD SINGH, VAKIL.

Legal Practitioners Act (XVIII of 1879), s. 13—*Professional misconduct—High Court Rules, Chapter XV, rule* 25—*General Civil Courts Rules*, 1911, *Chapter XXI, rule* 37—*Civil Procedure Code (Act V of* 1908), *O. XXI, r.* 73.

If a Pleader, acting for a decree-holder, purchases the property sold in execution of his client's decree, he is guilty of professional misconduct. The evil is equally great if he purchases the property for other persons.

Therefore, where, in execution of his client's decree, a Pleader made apurchase on behalf of his father, the Court *held* him guilty of misconduct.

Per Chamier, J.—Rule 37 of Chapter XXI of the General Rules, Civil, 1911, applies even to a Pleader of the High Court, when he is practising in the Subordinate Courts.

Reference made by the District Judge of Banda.

Dr. *Sunder Lal* (with him Dr. *Tej Bahadur Sapru*, Messrs. *Peare Lal Banerji*, *Damodar Das* and *Umashanker Bajpai*), for the Vakil.

Mr. *Ryves*, in support of Reference.

JUDGMENT.

RICHARDS, C. J.—This is a Reference with regard to the alleged misconduct of one Har Prasad Singh, a Vakil practising in the Court of the Subordinate Judge at Banda. It appears that the Delhi and London Bank obtained a decree and that Har Prasad Singh was acting for the Bank. Certain property was put up to sale. The first sale proved abortive. On the same day, the property was put up a second time and portion of it was purchased by Har Prasad Singh on behalf of his father. There can be little doubt that Har Prasad Singh who was living with his father must in a sense have been interested in the purchase. He might possibly succeed and naturally he would desire to obtain as good a bargain for his father as he reasonably could. He has been reported by the learned Subordinate Judge as having contravened rule 25 of the High Courts Rules, Chapter XV and rule 37 of the Civil Courts Rules Chapter XXI. Rule 25 of the High Courts Rules, provides that "No Advocate, Attorney or Vakil shall, in his own name or in the name or names of any other person or persons, purchase any property or any share or interest in any property sold in the execution of a decree or order in any suit, appeal or other proceeding in which he was in any way professionally engaged." Rule 37 of the Civil Courts Rules is as follows:—"Except in the case permitted by clause (13) of Rule 10, no Legal Practitioner shall, at a sale in execution of a decree in a suit in which he has been professionally engaged, bid for or purchase, whether in his own or in any other name for his own benefit or for the benefit of any other person any property sold in execution of such decree.

"Any Legal Practitioner contravening this rule will be held guilty of misconduct within the meaning of Act XVIII of 1879 and be dealt with accordingly."

It will be observed that rule 25 differs very slightly from rule 37, except for the provision at the end. There can be little doubt that the evil of an Advocate, Attorney or Vakil purchasing for other persons is practically as great as if he purchased on his own behalf. It must, however, be admitted that rule 25 is possibly open to the construction that it only prohibits purchases being made by an Advocate, Attorney or Vakil on his own behalf. There is no doubt whatever that the matter is specifically dealt with by rule 37 of Chapter XXI of the Civil Courts Rules. There it is expressly laid down that a purchase cannot be made for any one and

that the legal practitioner, which includes, of course, a Vakil, is even prohibited from bidding at the sale. It has not been seriously contended that the High Court was not empowered to make this rule under its inherent jurisdiction or under section 15 of the Charter Act. However, having regard to the facts set forth in the affidavit, which has been filed on behalf of Har Prasad Singh, the testimonials of his previous good conduct, I think that his action in contravening the rule was either done in forgetfulness or on the spur of the moment, and I think that under all the circumstances of this particular case, it is unnecessary for this Court to take any action under section 8 of the Letters Patent.

I wish to say that I hope that this will be a warning not only to Har Prasad Singh but also to other Legal Practitioners that the rules of the Court must be implicitly obeyed.

TUDBALL, J.—I agree with the Chief Justice that in the circumstances of the present case, it is unnecessary to do more than to warn the Vakil concerned. I have personally, no doubt whatsoever, that he knew he was breaking a rule of the Court, which he was bound to obey, but that he did so on the spur of the moment as he was unable to make any other arrangement for the acquisition of the property by his father. It is only in view of his character and the fact that he has only five years' experience at the Bar that I remain content with warning him and taking no further action against him. In my opinion, rule 37 of Chapter XXI of the Civil Courts Rules and rule 25 of the High Courts Rules, Chaper XV have practically one and the same meaning, and I should like it to be well understood by all the members of the Bar that that is so, and that the action of which the Vakil in the present instance has been guilty, was an action which in the future will not go unpunished.

CHAMIER, J.—I agree that it is unnecessary to do more than warn the Vakil in the present case. But I wish to add a few words in view of the discussion which has taken place in regard to rule 37 of Chapter XXI of the General Rules, Civil, 1911. It has been suggested that a Vakil of this Court when practising in the Subordinate Courts is not bound by this rule. It seems to me that there is no force whatever in this suggestion. The rule applies to all Legal Practitioners practising in the subordinate Courts. Then, it was contended that this Court had no power to make such a rule. It seems to me that if statutory or legislative authority is required to support this rule, it is to be found in section 15 of the Indian High Courts Act, 1861. But whether the rule is valid or not as a rule, it has been in existence for about 30 years and it shows that for that period this Court has considered that conduct of the kind now in question is most objectionable and will be dealt with as misconduct under the Legal Practitioners Act. I am of opinion that the rule contains a most salutary provision and that serious notice should be taken of any deliberate disregard of it. In the present case, I am prepared to accept the affidavit of the Vakil that he acted on the spur of the moment and in view of his previous good character, I agree that no further action need be taken.

BY THE COURT.—Let the papers be filed.

BOMBAY HIGH COURT.

CRIMINAL REFERENCE No. 83 OF 1912.

August 26, 1912.

Present:—Mr. Justice Batchelor and Mr Justice Rao.

In re, RAMJIBHAI WAGHJIBHAI—APPLICANT.

Criminal Procedure Code (Act V of 1898), *ss.* 87, 88, 110, 112, 114—*Warrant for arrest of person who had left Court's jurisdiction—Proclamation—Attachment of property.*

A Magistrate cannot legally issue a warrant under section 114, Criminal Procedure Code, for the arrest of a person who has already left the local limits of the Magistrate's jurisdiction. The person proceeded against must be actually and physically present in the district in which the Magistrate exercises jurisdiction.

Where a warrant under section 114 was issued for the arrest of a person who had left the district and subsequently a proclamation against the person was issued and proceedings taken under sections 87, 88, Criminal Procedure Code:

Held, that the warrant, proclamation and attachment were all illegal.

Reference made by the Sessions Judge of Ahmedabad.

GROUNDS OF REFERENCE.

I am of the opinion that the Magistrate could not legally issue a warrant. I do not mean that he had no power in a Chapter

VIII case to issue a warrant under section 114 without a formal finding as to the desperate and dangerous nature of the accused. But it does seem to me that when a Magistrate is informed that a person has left the district, this cannot possibly be information that the same is in the local limits of his jurisdiction as required in section 110.

It will be observed that section 110 does not say a person "residing" in his district whereby technical "residence" on the lines of the Civil Procedure Code might give the Magistrate jurisdiction. But the person proceeded against must, I think, be actually and physically present at the district. I suppose the object of the Chapter being to prevent commission of future crime and not to punish past crime, this object is equally subserved by the person who is hostile to public order voluntarily banishing himself as by his being bound over. I think then the Magistrate could not legally issue a warrant under section 114. If so, he could not legally issue a proclamation: (*vide* section 87); and that the proceedings under sections 87 and 83 are, therefore, illegal and should be set aside.

I am not able to interfere directly as matters have not yet reached the stage where section 405, Criminal Procedure Code, applies. The "accused" has not come in and surrendered, and is not, I suppose, likely to do so both for general reasons and because his co-accused have been ordered to be bound over under section 112 with a condition as to the quality of sureties which is of doubtful legality.

I might have had some doubts as to whether any Court could interfere under the Criminal Procedure Code but *vide* the case of *Imperator* v. *Jina Badhar* (1). The only question in my mind is, whether a proclamation cannot be issued when a warrant even if illegal has been issued and evaded.

Mr. *G. N. Thakore*, for the Applicant.

JUDGMENT.—There is no appearance in this case for the District Magistrate though notice has been served upon him. In these circumstances, we have not had the advantage of arguments in support of the Sub-Divisional Magistrate's proceedings. But upon the best consideration we can give to the matter, we take the same view as the learned Sessions Judge has expressed in his reference; and for the reasons there appearing, we hold that the warrant, proclamation and attachment in this case were illegal. We, therefore, set them aside, and direct the attachment to be raised.

Order accordingly.

(1) 14 Bom. L. R. 163. 14 Ind. Cas. 757; 13 Cr. L. J. 293.

ALLAHABAD HIGH COURT.

CRIMINAL REVISION PETITION NO. 803 OF 1912.

November 30, 1912.

Present:—Mr. Justice Tudball.

JABBAR SINGH—APPLICANT

versus

EMPEROR—OPPOSITE PARTY.

U. P. Municipalities Act (I of 1900), s. 128, cls. (h), (i)—Municipal Rules—"Dandidar," *meaning of—Seller.*

A *dandidar*, who only weighs things brought to a market to be sold, is not a seller of those things.

Application to revise an order of the Magistrate of Cawnpore.

Mr. *Purushottam Das Tandan*, for the Applicant.

Mr. *Malcomson*, for the Crown.

ORDER.—The applicant, Jabbar Singh, has been convicted of a breach of the Municipal Rules made by the Municipality of Cawnpore and has been sentenced to fifty rupees fine, the maximum punishment allowed. The rule is one, which purports to have been made under section 128 clauses (*h*), (*i*), for the regulation of the Collector Gunj market, in the Cawnpore Municipality. Rule 2 of these rules recites: "No retail transaction shall be permitted in the market except in the street known as the 'Pharyas street' and on a strip of land lying on both sides of and extending back eight feet from the *pacca* road traversing the market and leading from the Kotwali to the Bawan Dukan. Retail sales are only permitted subject to the payment of rent at the rate of eight annas per square yard per month for the area occupied and subject also to the condition that neither grain nor vegetables shall be sold.

For the purpose of these rules any transaction in which less than a cart load of produce is sold shall be considered retail transaction. The fees shall be collected and brought to account in accordance with the provision of the Municipal Account Code. Rule 4 says:—"Any person who sells retail in

the market otherwise than in accordance with rule 2 shall be punishable with fine which may extend to Rs. 50." The case which was brought against the appellant was that he had sold *gur* retail on that portion of the market which was restricted to wholesale transactions. The Bench Magistrates, before whom the case came, found, as a matter of fact, that the transaction in regard to which the accused was charged had taken place on that portion of the land specially set aside for "retail" transactions. But the Court convicted him because he had not paid rent at the rate of eight annas per square yard per month prior to the transaction in question. Among other defences, the applicant pleaded that he was a mere *dandidar* or a weighman and that as such he was neither a seller nor a buyer nor an agent of either. The Bench Magistrates held that he was a *dandidar*, but they held that because the *dandidars* frequently arrange a sale between the seller and the buyer or rather they frequently bring the buyer and the seller together, therefore, the man who weighs produce in the market is a person who sells. I may note here that certain points of law are raised on behalf of the applicant which go to the root of these rules and the validity and the legality thereof. But I do not propose to waste time in deciding any question of law, when clearly upon the facts of the case the applicant has not committed any breach of the rule itself. Rule 2 says that retail sales are only permitted subject to payment of rent. The rule is cumbersome and unwieldy and I should think most difficult indeed to work. It is urged that the applicant should have gone and paid rent at the rate of eight annas per square yard per month prior to carrying out the sale. It was alleged that he had sold in this manner previously and was warned. But the Bench Magistrates very much doubted the truth of that evidence. It seems to me extremely doubtful that rule 4 of these Rules was ever intended to be used in the manner in which it is being used in this case, that is to say, to fine a man because he has not paid a fee which was due to the Municipal Board. There is nothing to show that any demand was ever made for payment or that he ever refused to pay. The definition of retail sale is quite unworkable. It is according to the rule a sale of anything less than a cart load of produce. Carts vary in size, from a hand cart to a camel cart and bullock cart carrying forty maunds. It would almost be open to any one to say that he sold within the meaning of this rule if he carried a toy cart load of produce to the market and sold it there. Even if the applicant had been the actual seller in the present case it would be difficult to hold, in the face of these rules, that he sold less than a cart load. But it is quite clear that the applicant was neither the seller nor the buyer. In the present transaction, he sold neither retail nor wholesale. He may or may not have brought the buyer and the seller together. The only part he took in the transaction was the weighing of the produce and receiving of payment for his services as a weighman. It was not his duty to pay rent for the land nor was he liable to pay any such rent. He has committed no breach of rules and, therefore, ought not to have been convicted. I, therefore, accept the application and set aside the conviction and sentence. The fine, if paid, will be refunded. In my opinion, the Municipal Board would be wise if it revised its rules and brought them a little more in accordance with common sense.

Application accepted.

BOMBAY HIGH COURT.

CRIMINAL REVIEW No. 154 OF 1912.

August 15, 1912.

Present:—Mr. Justice Batchelor and Mr. Justice Rao.

EMPEROR—PROSECUTOR

versus

ISTLINGAPA SHIVAPA—ACCUSED.

Penal Code (Act XLV of 1860), s. 304-A—Injuries inflicted intentionally—Section not applicable.

Section 304A of the Penal Code deals with the causing of death by a rash or negligent act. It does not apply to a case where injuries are inflicted neither rashly nor negligently, but intentionally and designedly.

Queen-Empress v. *Nidamarti*, 7 M. H. C. R. 119, followed.

Messrs. *S. Karnad* and *V. R. Sirur*, for the Accused.

JUDGMENT.—We are of opinion that the Magistrate, Mr. Kittur, has failed properly to understand the nature of this offence. He finds that the three accused severely beat the

deceased man with a piece of stone and with a stick; that they kicked him with their sandalled boots in the stomach. Within a week of the injuries thus inflicted, peritonitis supervened and the deceased died of that malady after seven days. It is just possible on the record to suggest a doubt whether the peritonitis was the consequence of the injuries, and for this reason we have refrained from ordering the accused's commitment for trial on a far more serious charge. It is certain, however, that the injuries were such as to endanger life within the meaning of section 320 of the Indian Penal Code, and the three accused are, consequently, guilty of voluntarily causing grievous hurt under section 325. But the Magistrate has convicted them under section 304-A or in the alternative under section 323 of voluntarily causing simple hurt.

Section 304-A deals with the causing of death by a rash and negligent act, and on its very face has nothing in the world to do with a case where injuries are inflicted, not rashly, not negligently, but intentionally and designedly as was the case here on the Magistrate's own finding. The meaning of section 304-A is well explained in the case of *Queen-Empress* v. *Nidamurti* (1), where Mr. Justice Holloway, in dealing with a similar case, to which section 304-A had been mistakenly applied, said: "This section is, in our opinion, wholly inapplicable to the facts of this case. Culpable rashness is acting with the consciousness that the mischievous and illegal consequences may follow, but with the hope that they will not, and often with the belief that the actor has taken sufficient precautions to prevent their happening. The imputability arises from acting despite the consciousness. Culpable negligence is acting without the consciousness that the illegal and mischievous effect will follow, but in circumstances which show that the actor has not exercised the caution incumbent upon him, and that if he had, he would have had the consciousness. The imputability arises from the neglect of the civic duty of circumspection. It is manifest that personal injury, consciously and intentionally caused, cannot fall within either of these categories."

Reference may also be made to the decision of this Court in *King-Emperor* v. *Heera Joceta* (2).

We must set aside the conviction and sentences of the lower Court and convict each of the three accused persons of the offence of voluntarily causing grievous hurt under section 325, Indian Penal Code, and direct that each of them be rigorously imprisoned for a term of two years. The fines, if paid, should be refunded.

Order accordingly.

(1) 7 M. H. C. R. 119.

(2) 3 Bom. L. R 394.

PUNJAB CHIEF COURT.

CRIMINAL APPEAL No. 270 OF 1912

July 6, 1912.

Present:—Mr. Justice Shah Din.

ISHAR DAS—CONVICT—APPELLANT

versus

EMPEROR—RESPONDENT.

Penal Code (Act XLV of 1860), s. 401—Association for the purpose of habitual theft.

The essential requisites for a conviction under section 401 of the Penal Code are:—(1) proof of association, and (2) proof that the association was for purposes of habitual theft.

The accused, in company with three others, whose whereabouts were unknown, came to a village. They were regarded with suspicion, and on being challenged ran away, but in the pursuit, the accused was caught. It was not shown who the others were, or whether they had before been seen together in the neighbourhood, or at some other place under suspicious circumstances, or that any one of them had ever been suspected or found guilty of theft or robbery:

Held, (1) that the conviction under section 401 of the Penal Code could not be sustained;

(2) that the fact that the accused had at one time been bound over under section 110 of the Criminal Procedure Code, was immaterial.

Afridi v. *Emperor*, 9 P. R. 1880 Cr. and *Nankura* v. *Emperor*, 27 C. 139, followed.

Appeal from the order of the District Magistrate, Jhelum, dated the 7th April 1912, convicting the appellant.

Mr. *Nand Lal*, for the Appellant.

JUDGMENT.—The appellant, Ishar Das, a *Khatri* of Tal in the Kohat District, has been convicted by the District Magistrate of Jhelum of an offence under section 401, Indian Penal Code, and has been sentenced to seven years' rigorous imprisonment, including three months' solitary confinement.

The facts, as found by the District Magis-

trate, are not disputed. On the 21st February last, at mid-day the appellant was seen in company with three *Pathans* near a tank, known as the *Loharanwali Band*, not far from the village of Chumbi, Tahsil Chakwal. Later in the afternoon, he and his companions were discovered sitting by the roadside on the top of the hill overlooking the Kallar Kahar plateau, and shortly afterwards the four men followed a goat-herd, Bakhsh, towards Chumbi. Bakhsh informed the villagers of the suspicious character of this gang of *Pathans*, and the villagers accordingly formed themselves into two parties, one setting out in pursuit of the *Pathans* and the other going up the high ground close to the village to watch the operations of their friends. The first party saw the *Pathans* following two *Musallis* of the village, and on their inquiring from the latter as to who the men were that were following them, the *Pathans*, including the appellant, who was dressed as a *Pathan*, at first halted, and thereafter, on being challenged, fled away. The villagers gave chase, upon which the *Pathans* fired three shots at them, but one of them, Allah Dad, overtook and knocked down with a stone the appellant and secured him until the other villagers came up and he was then taken to the village and searched. No arms were found in his possession, but he had some matches and wax and string.

The Police investigation followed and in due course, the appellant was sent up for trial under section 400, Indian Penal Code. The District Magistrate, however, framed a charge against him under section 401, Indian Penal Code, and he has convicted him under the same section. The question for decision in this appeal is whether upon the facts as stated above the appellant has been rightly convicted of an offence under section 401, in other words, whether upon these facts it can be held that the appellant belonged to a wandering, or other gang of persons associated for the purpose of habitually committing theft or dacoity. In my opinion, the appellant's case does not fall within the purview of section 401, and he has been wrongly convicted under that section. I agree with the District Magistrate that the explanation of his movements given by the appellant is not very satisfactory, and that his presence and behaviour in the neighbourhood of Chumbi, on the day in question, in the company of three *Pathans* were certainly suspicious. But it has not been shown at all what sort of men those *Pathans* were and whether they had ever been seen together in that neighbourhood or at some other place under suspicious circumstances, nor is it proved that either the appellant or any one of his *Pathan* companions has ever been suspected or found guilty of theft or robbery. The whereabouts of those *Pathans* are unknown, and the only thing against the appellant's character is that he was once, as admitted by himself, bound over under section 110, Criminal Procedure Code. I fail to see how, under these circumstances, section 401, Indian Penal Code, applies to the appellant's case. The essential ingredients of an offence under that section have been explained in *Afridi* v. *Emperor* (1) and *Nankura Pasi* v. *Emperor* (2) and following those decisions, I hold that it has not been proved that Ishar Das, appellant, belonged to a wandering gang of persons associated for purposes of habitually committing theft or robbery.

I, accordingly, accept this appeal and setting aside the conviction and sentence of the appellant, acquit him.

Revision allowed.

(1) 9 P. R. 1880 Cr.
(2) 27 C. 139.

MADRAS HIGH COURT.
FULL BENCH.

REFERRED CASES NOS. 9 AND 10 OF 1912 AND CIVIL REVISION PETITION NO. 485 OF 1911.

October 2, 1912.

Present:—Sir Ralph Benson, KT., Offg. Chief Justice, Mr. Justice Sankaran Nair and Mr. Justice Sundara Aiyar.

IN NO. 9

MUNIREDDI—PETITIONER

IN NO. 10

MARWADI MOTIRAM—PETITIONER

versus

K. VENKATA RAO—COUNTER-PETITIONER.

Legal Practitioners Act (XVIII of 1879), s. 13—Legal Practitioners Act Rules by Madras High Court, rule 27—Professional misconduct—Failure to appear for client in Court after receiving fee—Failure to make arrangements for professional help to client—False defence—Negligence, when amounts to misconduct—Transfer of Property Act (IV of 1882), ss. 3, 136—Purchase of actionable claim by Pleader during pendency of

MUNIREDDI *v.* VENKATA RAO.

suit—Evidence—Admissibility of judgment in civil suit between parties relating to same subject-matter—Whether conclusive proof—Pleader engaging in trade—Carrying on family trade—Misconduct—Failure to report to High Court—Punishment.

A Pleader is amenable to the disciplinary jurisdiction of the High Court for failure to appear for his client at the trial of the cause after receiving the fees thereof or, in the event of unavoidable circumstances precluding his appearance, for failure to make the necessary arrangement for his client.

The judgment in a civil suit between the Pleader and his client, relating to the subject-matter of the inquiry against the Pleader under the Legal Practitioners Act, is admissible in the latter inquiry to establish at least a *prima facie* case against the Pleader but such judgment will not be conclusive proof and the Pleader is entitled to adduce additional evidence in such proceedings in rebuttal of the charges against him.

The purchase of an actionable claim by a Pleader amounts to professional misconduct, the more so when the claim has been put in Court and is ripe for judgment.

Failure to obtain the sanction of High Court before a Pleader engages in trade, is in contravention of rule 27 of the rules under the Act.

Per *Sundara Aiyar, J.*—In the absence of an agreement that the fee promised should be previously paid, it is doubtful whether a plea of non-payment of a part of the fee would be of any avail in an action against the Pleader under the Legal Practitioners Act.

Mere negligence, as the omission by a Pleader to do his duty, may not amount to misconduct. But where the negligence is gross or where the Pleader falsely repudiates an agreement that he had entered into with his client, he is amenable to the disciplinary jurisdiction of the High Court.

The judgment in the civil suit will be relevant under section 11 of the Evidence Act.

The judgment will not be admissible where the conduct of the Pleader was not the direct issue in the Court which found him guilty of misconduct, but only arose incidentally in a litigation between other parties.

In the matter of Rajendro Nath Mukerji, 22 A. 49; 26 I. A. 242; 3 C. W. N. 736, referred to.

In re Lubeck, 33 C. 151; 15 M.L. J. 432; 7 Bom. L. R. 894; 10 C. W. N. 57; 32 I. A. 217 (P.C.), distinguished.

A Pleader, who belongs to a trading family should not be regarded as trading simply because other members carry on the trade, the benefit of which would go to all the members of the family, including the Pleader. But if all the members enter into a partnership and carry on a family trade as partners, then all of them must be regarded as carrying on the trade.

Per *Sankaran Nair, J.*—A Vakil is bound to appear in Court and conduct his client's case even if the fee or any portion thereof remains unpaid, in the absence of any agreement to the contrary or at least notice to that effect to the client in sufficient time to enable him to make other arrangements.

The High Court has not declared, under section 13 of the Legal Practitioners Act, that it is unprofessional for a Pleader to follow any trade or business, especially where Pleaders belong to a joint family which is carrying on a family trade, but the omission to report this circumstance under rule 27 of the High Court Rules brings the defaulting Pleader under clause (*b*) or (*f*) of section 13 of the Legal Practitioners Act and renders him liable to punishment.

Cases stated under section 14 of Act XVIII of 1879, by the District Judge of Bellary, in O. P. Nos. 102 and 313 of 1911, on the file of his Court, and Petition under section 115 of Act V of 1908, praying the High Court to revise the decree of the District Court of Bellary, in Appeal No. 21 of 1911.

The Hon'ble Mr. *J. L. Rosario*, Advocate-General, for the Government.

Mr. *K. Srinivasa Aiyangar*, for the Vakils' Association.

The Hon'ble Mr. *T. Richmond* and Mr. *M. Govindarajalu Naidu*, for the Petitioner in Referred Case No. 10 of 1912.

Mr. *T. Rangachariar*, for the Counter-petitioner, 1st Grade Pleader.

The Petitioner in Referred Case No. 9 of 1912 did not appear in person or by Pleader.

JUDGMENT.

REFERRED CASE NO. 9 OF 1912.

SUNDARA AIYAR, J.—This is a case of misconduct against a first grade Pleader practising in Bellary. One Muni Reddi lodged a complaint against the Pleader charging him with the misconduct for which he has been tried by the District Judge of Bellary. He subsequently withdrew his complaint, but as the District Judge had, before the withdrawal, already framed a charge against the Pleader, he proceeded with the inquiry, found him guilty of the misconduct charged, and made a report to this Court under section 14 of the Legal Practitioners Act.

The facts that led up to the charge are briefly as follows:—An inquiry into a charge of dacoity was going on about June 1908 in the Sub-Magistrate's Court of Tadpatri against Muni Reddi. The Pleader was engaged, according to Muni Reddi's case, to defend him both in the Magistrate's Court and in the Sessions Court of Bellary in the event of the case being committed to the Sessions Court for trial, and a fee of Rs. 350 was settled and paid for the Pleader's services in both Courts. The Pleader appeared in the Magistrate's Court but did not defend Muni Reddi in the Sessions Court. He left the District for Rangoon without making any arrangement for Muni Reddi's defence at the Sessions trial. Another Pleader had to be engaged

for the defence. Muni Reddi was acquitted at the trial. He subsequently instituted a suit for the recovery of the fees paid by him with interest. It was transferred to the Subordinate Judge's Court of Bellary for trial. The Pleader defended the suit contending that his engagement with Muni Reddi was only to defend him in the Magistrate's Court and to put in a petition for bail in the Sessions Court, and did not include Muni Reddi's defence at the Sessions trial; that only Rs. 268 and not the whole of the Rs. 350 stipulated for was paid to him by Muni Reddi; that although Muni Reddi afterwards asserted that he had undertaken the defence in Sessions Court also, he repudiated any such agreement and that he had not failed to fulfil the engagement actually entered into by him. The Subordinate Judge dismissed the suit upholding the Pleader's defence. On appeal, the District Judge, Mr. Phillips, reversed the judgment of the Subordinate Judge and found the defendant's contentions to be untrue. He passed an order, under section 476 of the Code of Criminal Procedure, directing the prosecution of the Pleader for making a false statement on a comparatively unimportant point. The order was set aside by this Court in revision and it is unnecessary to refer to it further. Muni Reddi afterwards put in a petition against the Pleader under the Legal Practitioners Act, requesting that an inquiry should be made into the Pleader's conduct, but as already stated, he subsequently withdrew the petition. The charge framed against the Pleader was that having agreed to appear for Muni Reddi in the Sessions Court and received the fee for such appearance, he failed to appear, and, when asked to return the fee, he failed to do so, and that in defending the suit, filed by Muni Reddi, he denied receipt of part of the fees, and also denied that he was engaged to work in the Sessions Court; and that, therefore, he was guilty of fraudulent and improper conduct in the discharge of his professional duty, an offence under section 13 (*b*) of the Legal Practitioners Act. No fresh evidence was recorded in support of the charge and indeed there was no one to let in evidence as Muni Reddi had withdrawn his complaint. The Pleader evidently relied on the evidence he had already adduced in the civil suit but he also adduced some fresh evidence. He examined two witnesses and gave evidence again himself. He also put in his account books and diary which he had not filed in the civil suit. The District Judge, after considering the fresh evidence, adhered to the conclusions he had arrived at in his judgment in the appeal from the Subordinate Judge's decision in the civil suit.

Mr. Rangachariar, who has appeared for the Pleader at the hearing of the charge against the Pleader in this Court, has raised an objection which, if well founded, would go to the root of the whole proceedings before the District Judge and vitiate his report. That objection is that the Judge was wrong in considering the judgment or the evidence in the civil suit, that the proceedings in the suit were not admissible in evidence at all in the inquiry under the Legal Practitioners Act, which, he contended, was in the nature of a criminal trial and that the charges should have been established by evidence adduced at the inquiry. He argues that a judgment is not admissible in evidence in any judicial proceeding except in the cases covered by sections 40, 41 and 42 of the Indian Evidence Act, and that none of these sections is applicable to the present case. This contention I am entirely unable to accept. In *In the matter of Rajendro Nath Mukerji*(1), a Pleader, who had been convicted of fraudulently using as genuine a document which he knew to be forged, was proceeded against for misconduct under paragraph 8 of the Letters Patent of the Allahabad High Court. That Court not only regarded the judgment convicting the Pleader as good evidence of his misconduct but refused to allow the propriety of the conviction to be questioned at the inquiry, and removed his name from the rolls of the Court. The Judicial Committee of the Privy Council upheld its procedure. Counsel, who appeared for the Pleader before the Privy Council, did not indeed question the admissibility of the criminal judgment in evidence but merely contended that the Court would not in consequence necessarily disbar him and that the learned Judges of the High Court went too far in not allowing the propriety of the conviction to be questioned which Counsel maintained was not justified either in law or in fact. The Privy Council dealing with this argument observed: "It is plain

(1) 22 A. 49; 26 I. A. 242; 3 C. W. N. 736.

that the object of the present appeal is to have the judgments of the Sessions Judge and of the High Court on appeal reviewed and reversed in substance if not in form. This ought not to be allowed. In effect, the appellant would indirectly have an appeal against the conviction when, if he had petitioned for leave to appeal against it, the leave would certainly have been refused." These observations show that their Lordships treated the conviction as conclusive evidence of the offence of which the Pleader had been convicted. Their Lordships refer to the judgment of Lord Mansfield in *In re Brounsall* (2), where that learned Judge observed with reference to proceedings taken against a Solicitor who had been convicted of stealing a guinea. "This application is not in the nature of a second trial or new punishment, but the question is whether after that conduct of this man (that is in stealing the guinea, it does not say when, where or how), it is proper that he should continue a member of the profession which should stand free from all suspicion.....and it is on this principle that he is an unfit person to practise as an attorney." Lord Mansfield evidently appears to have regarded the conviction as evidence of the man having committed the offence of theft. Mr. Rangachariar contends that the case before the Allahabad High Court and the cases referred to in the Privy Council judgment therein are distinguishable from the present case, for in those cases the practitioner had been convicted of a serious criminal offence and that such a conviction apart from the question of his being really guilty of the offence or not, would be a sufficient ground for his being regarded as unfit to be a practitioner in a Court. It is, no doubt, true that a conviction for felony or other serious offence has been regarded as a sufficient ground for punishing a Solicitor or an Advocate for misconduct, and section 12 of the Legal Practitioners Act recognises and gives effect to this view. But what is the principle underlying it. The conviction itself is certainly not misconduct on the part of the Pleader convicted. Can it be said that whether the Pleader be guilty or not, he having been subjected to the infamy of a conviction, he must be further punished by the Court in its disciplinary jurisdiction over its practitioners? I do not think that this is the reason for punishing a Pleader. The Court is not bound to, nor does it always altogether, remove a Pleader from the exercise of his profession on the ground of his conviction of a criminal offence. It may inflict a lighter punishment by suspending him for a period. If the infamy due to conviction be the ground of punishment, one would suppose that it it makes him unfit to practise; he must be regarded as unfit to do so for ever and not for a period only. But as already observed, the Court, having regard to the gravity of the offence, the extenuating circumstances, if any, and taking all the facts of the case into consideration, has the power, in the interests of the public and of the profession, to award such punishment to the Pleader, or no punishment at all. I am of opinion that the reason for punishing a person who has been convicted is that the conviction is good evidence of the commission by the Pleader of the offence in question. But assuming that the conviction itself is regarded as good cause for punishing the Pleader, would not a similar principle apply where a Civil Court has found the Pleader guilty of grave misconduct which requires that he should be dealt with by the Court under its disciplinary jurisdiction? I see no reason why it should not. The principle would, of course, not apply where the conduct of the Pleader was not the direct issue in the Court which found him guilty of misconduct but only arose incidentally in a litigation between other parties. Such was the case in *In re Lubeck* (3). In this case, the suit related to the very misconduct charged against the Pleader in the present proceedings and I see no reason for holding that the judgment and the proceedings in the civil suit are not admissible in evidence. With respect to the contention that the judgment would not be relevant on the question of the Pleader's guilt under any of the sections of the Indian Evidence Act, I do not think it presents any serious difficulty. It appears to me, on the other hand, to be a rather bold argument to urge that the finding in proceedings against the Pleader in which the question was exactly the same as at the present inquiry should be regarded as irrelevant. There is no

(2) (1778) Cowper's Rep. 829.

(3) 33 C. 151; 15 M. L. J. 432; 7 Bom. L. R. 894; 10 C. W. N. 57; 32 I. A. 217 (P. C.).

reason why it should not come within the provisions of section 11 of the Indian Evidence Act, which lays down that "Facts not otherwise relevant are relevant if by themselves or in connection with other facts they make the existence or non-existence of any fact in issue or relevant fact highly probable or improbable."

I have more doubt whether the finding of the Civil Court can be regarded as conclusive. In a criminal trial, the guilt of the accused has to be proved by the prosecution beyond all reasonable doubt and a Court convicting a Pleader of a criminal offence must be taken to have found the offence proved conclusively against him. But in a civil suit, the finding on the issue does not proceed on the conclusiveness of the evidence adduced on either side but on the balance of the evidence adduced on both sides. It might, for instance, be said that in this case, the District Judge could not be held to have decided in the civil suit that the plaintiff had proved by his evidence beyond all reasonable doubt that the Pleader had agreed to defend the plaintiff in the Sessions Court and that he had been paid his fee for doing so. It is unnecessary to decide this precise point in this case, for the District Judge did not treat his own previous judgment in the civil suit as conclusive against the Pleader, but allowed him to adduce any evidence he might choose. No complaint has been made before us that the Pleader was not allowed to let in any specific evidence or that he was prevented from further cross-examining any particular witness examined in the civil suit on any specific matter. I must, therefore, disallow this objection of Mr. Rangachariar.

The learned Vakil reviewed the evidence adduced in the civil suit and the fresh evidence adduced at this inquiry at considerable length and attempted to show that the findings of the Judge cannot be sustained. I have given to both the evidence and to Mr. Rangachariar's arguments the anxious consideration which any case against a professional gentleman deserves, but I am unable to differ from the conclusions of the Judge. I do not consider it necessary to repeat the reasons given by the Judge in his careful and elaborate judgment and shall only deal with the principal points urged by Mr. Rangachariar. The first question for decision is whether the Pleader undertook to defend Muni Reddi at the Sessions trial also, or whether he merely agreed to put in a bail petition so far as the Sessions Court was concerned.

[The learned Judge then considered the evidence on the point and held that he had no hesitation in coming to the conclusion that the Pleader agreed to defend Muni Reddi in the Sessions Court also.]

Mr. Rangachariar's next contention is that assuming that the engagement included Muni Reddi's defence in the Sessions Court, as the whole of the Pleader's fee was not paid but only Rs. 268 out of Rs. 350, the Pleader was absolved from the duty to appear in the Sessions Court. Here again the Pleader starts with the initial difficulty that Exhibit B2 furnishes evidence against him in his own handwriting.* * * * * * I must hold on the evidence available to the Court that the sum of Rs. 95 was paid to the Pleader. Having regard to this finding, it is unnecessary to deal with the further question whether the non-payment of a portion of the fee would absolve the Pleader from his duty to appear for the client. In the absence of an agreement that the fee promised should be previously paid, it is, to say the least, very doubtful whether a plea of non-payment of part of the fee would be of any avail. * * * * * * A client is not generally in much haste to take proceedings against a Pleader of standing. It may be that Muni was prompted by others to make his complaint, but in the circumstances I do not think that any inference adverse to the truth of Muni's case can be drawn from his delay. I, therefore, hold it to be satisfactorily proved that the Pleader, after undertaking the defence of Muni at the Sessions trial and receiving payment for it, deliberately failed to make any arrangement for the defence on a false plea that he had not agreed to conduct the defence at the Sessions trial.

Mr. Rangachariar argued that if it should be found that the Pleader did undertake to appear for Muni in the Sessions Court, his default must have been due to forgetfulness on his part as he had arranged for his other cases during his absence. The District

Judge was inclined to take this view in his judgment in the civil suit but this view is absolutely inconsistent not only with the Pleader's own contention both in the civil suit and at this inquiry but also with the evidence of his brother that he told Muni Reddi on the 14th October 1908 that the Pleader had not agreed to defend him at all in the Sessions Court. It is very difficult to believe that a Sessions case of so grave a nature in which the Pleader had appeared in the Magistrate's Court would have been forgotten. In Civil Revision Petition No. 321 of 1911 preferred by the Pleader against the judgment of the Judge in civil case, his Counsel stated that the Pleader might have forgotten the engagement. As this was inconsistent with the case that his engagement did not include the Sessions trial, Mr. Rangachariar was asked to explain the inconsistency and the Court was told that the statement in the memorandum of civil revision petition was made by Counsel without instructions. In the circumstances, I am unable to accept the suggestion made as a last resort that forgetfulness might have been the reason for the Pleader not arranging for the defence.

It is argued for the Pleader that even if all the facts are found against him, they amount only to negligence and that the Pleader cannot be punished for mere negligence not amounting to fraud. I am of opinion that what is proved amounts to something worse than negligence; nor am I prepared to accept the contention that a Pleader who is wilfully and grossly negligent in the discharge of his duties cannot be punished for his misconduct in the exercise of our disciplinary powers. The Pleader was not guilty of a mere omission to do his duty in this case. He repudiated the agreement into which he had entered with his client and he did so deliberately and without justification. I cannot say that this amounts to anything less than fraudulent conduct on his part.

A passage in Cordery on Solicitors, page 180, was referred to on behalf of the Pleader. I do not think that that passage lays down anything more than that it is not all negligence which would furnish a cause of action to a client that would be punished by the Court. Certainly that is so. For instance, a Pleader may not have acted with sufficient diligence in the discharge of his duties. He may not have instructed himself in the facts or the law of a case as he should. He may have acted contrary to the client's instructions in some particular matters, or he may have acted without instructions. In such cases, the Court would generally be content with leaving the client to his remedy in an action for damages. But negligence may also be so gross and amount to such a violation of the duties of a Pleader as an officer of the Court and to the litigant and as a member of a responsible and honourable profession as to require that the Court should punish him in the exercise of its powers over its officers. The rule to be followed has been very recently laid down by the Judicial Committee of the Privy Council in its judgment in a case in which a Vakil of this Court was concerned. See the judgment dated 20th June 1912, *In the matter of G. Krishnaswami Aiyar* (4). In that case, the Pleader was acquitted of all direct and personal fraud, but he was found guilty of not exercising any control over his clerks who omitted to discharge their duties and wrote false letters to the client and misled him, and of a grave omission in not informing the Court and the client of the true state of things after he had discovered the improper conduct of his clerks. Lord Shaw in delivering the judgment of the Privy Council observes: "Their Lordships, while not interfering, as stated, with his acquittance of direct and personal fraud, do not see their way to acquit him of conduct in the management of the appeal and of his client's affairs which caused the procedure of the Court to be the very opposite of what all such procedure should be, namely, *first*, responsible, *secondly*, orderly, and *thirdly*, pure. In all these respects, there has been a violation of the proprieties which attach to legal procedure." And their Lordships expressed the hope that the Vakil 'in the management *by those under him* of affairs committed to his charge, would, in future, see to it, that such improprieties as those referred to do not recur.' These statements clearly show that their Lordships were of opinion that gross

(4) 23 M. L. J. 114; (1912) 1 M. W. N. 963; 16 Ind. Cas. 328; 16 C. W. N. 1081; 13 Cr. L. J. 680; 12 M. L. T. 396; 35 M. 543; 14 Bom. L. R. 1079; 16 C. L. J. 634.

negligence, which interfered with the responsible, orderly and pure conduct of proceedings in Court, would be punishable. The same rule has been laid down in America. "Professional misconduct or neglect of duty as an attorney is a good ground for suspension or disbarment."—Cyclopædia of Law and Procedure, Vol. IV, page 911. The jurisdiction of the Courts in punishing improper conduct on the part of Pleaders is expressed in very wide terms in the Legal Practitioners Act. Section 13 clause (*f*) provides that a Pleader may be punished for any other reasonable cause. It is not in the interest of clients whose interests Pleaders are bound to protect, or of the profession to which they belong, or of the pure administration of justice, to attempt to define exhaustively the different kinds of misconduct which are punishable. Any conduct, which contravenes the orderly and pure administration of justice, would be within the disciplinary jurisdiction of the Courts. The Pleader in this case is a person of long experience, and his defence to the charges against him has only aggravated his misconduct. It is not necessary to deal separately with the charge that he made a false defence in the civil suit. I wish to say nothing which would deprive Pleaders of the privileges in the conduct of their own suits which other litigants possess But it is impossible not to regard the Pleader's defence as a serious aggravation of his prior misconduct.

I agree with the learned Chief Justice as to the punishment that should be imposed on the Pleader.

REFERRED CASE NO. 10 OF 1912.

SUNDARA AIYAR, J.—In this case, two charges were preferred against the 1st grade Pleader; *first* that he trafficked jointly with one Marwadi Vannajee in an actionable claim put into Court obtained by Yadalla Pichayya and Papayya against the minor heirs of one Virabhadrappa in a suit in which he was plaintiff's Vakil; *secondly*, that he had been and was engaged in trade under the name of K. V. S. Ramchander and Co. The District Judge, Mr. B. C. Smith, in his report to this Court has found both the charges proved. After full consideration of the evidence on record, I concur in the findings arrived at by the District Judge. It is not necessary to do more than to refer very briefly to the evidence in support of the charges.

First charge.—On the 7th September 1909, an agreement was entered into between Pichayya and Papayya, the plaintiffs in Original Suit No. 3 of 1910, on the file of the Subordinate Judge's Court of Bellary, on the one hand and Vannajee on the other hand for the transfer of the claim of the former in Original Suit No. 3 of 1910, which was then pending for a sum of Rs. 4,750. The amount claimed was about Rs. 10,000. The evidence in the suit had been recorded but judgment had not been delivered. The transferee Vannajee was to take all risk of loss in case the suit was dismissed. The 1st grade Pleader represented the plaintiffs in the suit. According to the evidence of Papayya, one of the transferors, his fee for the suit had been paid prior to the transfer. The case of the petitioner, who made the complaint against the 1st grade Pleader, is that the transfer was wholly or partially for the benefit of the Pleader himself. The most important fact proved against the Pleader is that half of the profit which Vannajee made out of the bargain was paid to him. Vannajee sold his claim to one Veerabhadrappa, the 2nd witness for the petitioner, for Rs. 6,392-8-0. The profit made by Vannajee, according to himself, was Rs. 1,571-4-0 and of this amount, exactly one half, *i.e.*, Rs. 785-10-0 was received by the Pleader. A sum of Rs. 70-12-0 was deducted out of the total amount of Rs. 6,392-8-0 as the interest on the loan contracted by Vannajee at 6 per cent. per annum for the consideration paid by him for the transfer. The amount was borrowed from the firm of a banker S. Donga Chand. It is not denied that the Pleader became responsible to the banker for the payment of the amount. The Pleader's case is that he merely became surety to the banker for the loan which Vannajee took from him. Vannajee was the *gumastah* of one Kannajee. The Pleader gave a letter or *chit* to Vannajee addressed to the banker. This letter was dated 9th September 1909. It is stated on behalf of the Pleader that the money had been paid by the banker to Vannajee on the 7th before he gave the letter. The 1st witness for the petitioner, Sivaraj, a partner of the banker, states the banker's account contains an entry, dated 7th September 1909, debiting Kannajee through Vannajee with Rs. 4,000. On the 9th September, the debt was transferred to the Pleader, Kannajee being credited with the amount on the date. This might go

to show that the Pleader's connection with the loan commenced only after it was actually advanced by the banker but the inference does not necessarily follow. The reason for the alteration of the entry was that Vannajee objected to the entry in the name of Kannajee as he claimed the benefit of the transfer of the claim himself. It is quite clear that on the 9th, it was agreed that the Pleader should be regarded as the person mainly responsible to the banker for the payment of the loan. Now why did the Pleader agree to make himself responsible for the amount? The answer suggested by the payment of half the profits to him undoubtedly is that it was understood that he and Vannajee should go shares in the bargain. The Pleader in his written statement does not give any explanation of his receipt of Rs. 785-10-0. He merely denies the allegation that he was interested in the purchase of the claim and states that there was nothing against law, rules or public policy even if he was interested in it. After the witnesses in the present proceedings were examined, the Pleader made another short statement (not on oath) and offered himself for cross-examination. He gave no explanation of the receipt of Rs. 785-10-0 in this statement either. In cross-examination, he admitted his receipt of the amount (the payment being made directly to his father-in-law). He also stated:—"This Rs. 785-10-0 might have been partly remuneration for spending my time in negotiating the transaction and preparing the necessary documents. I have no account to show the sum due for each piece of Work done." This affords no satisfactory explanation. He does not say that the whole amount was paid for his services in bringing about the transfer. He admits that the amount was not entered in his accounts as fees and gives an extraordinary explanation that only remuneration for work done in Court is entered as fees in his accounts. He entered the amount under family earnings. Papayya, the transferor of the claim, says that he had paid to the Pleader the fee due to him for the conduct of the suit. This is likely as the case was almost ripe for judgment when the transfer was made. If the amount was not paid as fees due for professional work, then the payment must have been on account of a half share possessed by the Pleader in the claim by virtue of the transfer. Vannajee, who tries to support the Pleader as much as he can, is equally unable to show how the amount of Rs. 785-10-0 was made up. He tries to make out that he promised to pay the Pleader his fee and a present but he could not give any explanation as to how the fee would amount to Rs. 785-10-0. He admits that that amount was paid to the Pleader. He says that the interest payable on the loan was $7\frac{1}{2}$ annas and not 6 per cent. so as to throw doubt on the amount available for division between him and the Pleader. But he admits that the profit made out of the transaction was Rs. 1,571-4-0 and he also admits that he charged the Pleader 8 annas per Rs. 100 interest on his whole account including the sum of Rs. 4,000. There is absolutely nothing to support his statement that $7\frac{1}{2}$ annas and not 6 per cent. was the interest payable on the loan. In the absence of any explanation forthcoming from the Pleader, I have no doubt that the Judge was justified in coming to the conclusion that it was agreed between him and Vannajee that he should receive half the profits arising from the transfer of the claim. It is immaterial to consider whether he became interested in the transfer on the 7th September, or only on the 9th. The Judge's conclusion is strongly supported by the evidence of the petitioner's 2nd witness who purchased the claim from Vannajee. He states that he negotiated the purchase with the Pleader without any reference to Vannajee and that the payment of the consideration was made to the latter at the instance of the former. Papayya, who does not admit that the Pleader had a share in the claim, admits that the negotiations for the transfer to Vannajee took place at the Pleader's house.

The next question is whether the Pleader's act in purchasing the claim amounts to grossly unprofessional misconduct within the meaning of section 13 of the Legal Practitioners Act. The claim was then the subject-matter of a suit in which the Pleader appeared for the plaintiff. The defendants in the suit possessed large properties but were in involved circumstances. Papayya says that it was broadly rumoured

that his suit would fail and the Pleader admits that his client told him that the defendants were giving out that the suit would be dismissed. There can be no doubt that the plaintiffs were apprehensive of failure. The Pleader, on the other hand, was in a far better position than his client to judge of the chances of success. There can be no doubt that the transfer was a highly speculative one. There is no force whatever in the contention that the claim ceased to be actionable because a suit had been instituted for its enforcement. That fact is absolutely immaterial according to the definition of 'actionable claim' in section 3 of the Transfer of Property Act. The old definition contained in section 130 of Act IV 1882 and clause (*d*) of section 135, as it originally stood, put this beyond a doubt. Mr. Rangachariar on behalf of the Pleader contends that a purchase of an actionable claim is not necessarily unprofessional conduct. Mr. K. Srinivasa Aiyangar, who appears on behalf of the Vakils' Association supports this argument. I am quite unable to accept this contention. Section 136 enacts as follows: "No Judge, Legal Practitioner or Officer connected with any Court of Justice shall buy or traffic in or stipulate for, or agree to receive, any share of, or interest in, any actionable claim, and no Court of Justice shall enforce at his instance or at the instance of any person claiming by or through him, any actionable claim, so dealt with by him as aforesaid." It does not merely make purchases of actionable claims by the classes of persons named in it unenforceable in law. It expressly prohibits them from being interested in any transfer of an actionable claim. The prohibition is based on the ground of the offices held by them. I cannot doubt that the doing of an act, which a Legal Practitioner is forbidden to do on the ground that he is a Legal Practitioner, is a violation of the conduct that he should pursue as a practitioner and, therefore, unprofessional conduct. It is urged that the Legislature could not have intended to make the purchase of an actionable claim by a Pleader under all circumstances unprofessional conduct, that in other countries there is no such absolute prohibition, that the New York Civil Procedure Code forbids purchases of actionable claims and negotiable instruments only where it is made, "with the intention and for the purposes of bringing a suit thereon," and that in the French Civil Code the prohibition is confined to claims falling within the jurisdiction of the Court where the Pleader is practising. The language of section 136 of Act IV of 1882, is, in my opinion, absolutely clear. It is quite immaterial that the Indian Legislature considered it expedient to enact the rule in wider terms than the Legislatures of some other countries have done. It being clear that the Pleader's act amounted to professional misconduct, was it *grossly* unprofessional? I have no doubt that it was. I have already referred to the circumstances under which the transfer was made. The Court of first instance, as a matter of fact, passed a decree for about Rs. 11,000 though the amount was reduced to Rs. 6,000 and odd in appeal. The purchase amounted in this case to trafficking in litigation. It is unnecessary to decide the question whether the purchase of an actionable claim, though unprofessional, must amount to grossly unprofessional misconduct in every case. Undoubtedly, the onus would be on the Pleader who purchases an actionable claim to show that in the circumstances of any particular case it does not amount to gross misconduct. I think that it would not be improper to hold that Pleaders should not be permitted to do acts that are liable to subject them to severe temptation. I am of opinion that this charge has been proved against the Pleader. I agree with the learned Chief Justice as to the punishment that should be imposed.

The 2nd charge.—The facts relating to this charge are practically undisputed. The Pleader belongs to a wealthy family, possessed of various kinds of properties including landed estates, houses, directorships in companies, Secretaryship in one Company, an agency under the Oriental Life Insurance Co., some other trade agencies, shares in Joint Stock Companies and a mill at Bellary known by the name of Medum Seshanna Cotton Manufactory. The evidence of Srinivasa Row, the Pleader's brother, and himself a Pleader, shows that in 1894 the members of the family entered into a partnership. A fresh partnership deed (Exhibit G) was executed

in 1900. According to this deed, each member of the firm is authorised to sign the name of the firm, and the partners of the firm are responsible jointly and severally for the acts of the firm as well as for the acts of each partner and for monies reaching the hands of any one of them. The Pleader tates in his written statement:—"The members of the firm supervise the work of the managers and agents whenever they have leisure and during holidays." He denies that he has engaged himself in trade. In the face of the admitted facts, I am of opinion that the denial is absolutely untenable. It is contended that the actual work of the trade is done by clerks and agents and that, therefore, the Pleader cannot be said to be personally carrying on trade. I am quite unable to agree that the mere appointment of servants or agents is sufficient to show that the trade is not carried on personally by the Pleader. In that case, any trader, who is able to engage clerks and to dispense with attending to customers himself, may say that he is not personally engaged in his trade. It is not denied that the agents and managers could be dismissed at pleasure by the Pleader and his partners. The admission that the members of the firm supervised their work puts an end to all doubt on the matter. It is contended by Mr. Rangachariar that a Pleader who belongs to a trading family should not be regarded as trading, simply because other members carry on trade, the benefit of which would go to all the members of the family including the Pleader. I agree with him so far. It is quite true that every member of an undivided Hindu family cannot be said to be carrying on a trade, the benefit of which would go to the family. One member of it alone may be carrying on the trade but he may do so with family funds. Although as between the members of the family, the profit or the loss must be shared by all of them, it would not follow that every one of them is conducting the trade. Again two or more members may alone carry on a trade as partners and the outside public may be dealing with them alone, though, as amongst the members of the family *inter se*, all might be responsible for the result of the trade. But if all the members enter into a partnership and carry on a family trade as partners, then all of them must be regarded as carrying on the trade. This is a distinction well understood in law. In the present cas , the Pleader, who is the senior member of his family, has entered into a partnership with the other members. He as much as any other member of the family is trading with the outside public whatever may be the actual amount of work done by him in connection with the management of the trade. I hold, therefore, that the Pleader must be held to be personally engaged both in trade and in the other business referred to in the deed of partnership. It is then argued that carrying on a trade is not professional misconduct within the meaning of section 13 of the Legal Practitioners Act and that there is no rule framed by this Court under that Act which has declared it to be misconduct. Clause 27 of the rules framed under the Act is in these terms: "If any person, having been admitted as Pleader, accepts any appointment under Government, becomes a student of any school or college for purpose of pursuing his studies or enters into any trade or other business, or accepts employment as a Law Agent other than a Pleader, *Mukhtar* or Agent certified under Act XVIII of 1879 and these rules, he shall give immediate notice thereof to the High Court, who may thereupon suspend such Pleader from practice or pass such orders as the said Court may think fit." It is true that engaging in trade or other business is not definitely pronounced to be misconduct by this rule. According to it, the High Court may give permission to any Pleader, if it thinks fit to do so, to engage himself in any particular trade or business. A similar rule has been framed under the Letters Patent of the High Court with respect to High Court Vakils, although curiously enough no such rule has been framed applicable to Advocates and Attorneys. The Pleader was, undoubtedly, guilty of misconduct in not obtaining the permission of the High Court for carrying on trade or other business. He has been engaged in trading business of an important character and it was, undoubtedly, his duty to apply for and obtain the High Court's permission. No charge, however, has been framed against him of violating the provisions of clause 27 which require him to apply for permission to the High Court and I do not think we

should find him guilty of misconduct in violating the provisions of this clause without his having an opportunity to explain his conduct. But it does not follow from this that he is not guilty of misconduct by being engaged in trade or other business without the permission of the Court, if his doing so is inconsistent with the profession of a Pleader. The rule enables Pleaders to avoid all risk of being pronounced guilty of misconduct by obtaining the opinion of the High Court with respect to any business they may propose to undertake but the failure to take advantage of the provisions of the rule cannot absolve them from liability to be convicted of misconduct if they act in a manner inconsistent with their profession. It seems to me that there are two reasons why carrying on trade may be inconsistent with the profession of a Pleader. One reason is that it might prevent him from devoting that attention to his work as a Pleader which his duty to the public and to the Court require that he should. But another and certainly not less important reason is that a Pleader should not be permitted to engage himself in any pursuit which is inconsistent with his status as a member of a learned and honourable profession. In England every person who wishes to be called to the Bar has to state that he is not and has never since his admission as a student "been engaged in trade and that he is not an undischarged bankrupt." I am not aware that according to the Rules of the Bar in England, a Barrister can be punished for being engaged in any trade or business inconsistent with his being actively engaged in the practice of his profession, though there are various *offices* the holding of which is deemed to be inconsistent with practice as a Barrister. See page 384 of Halsbury's Laws of England, Vol. II. But I strongly believe that carrying on a trade would be deemed to be generally inconsistent with the active practice of the profession of either a Barrister or an attorney. To do so may not be in some cases inconsistent with the status itself of a Legal Practitioner. He would probably not be punished for having been engaged in trade or other business if he was not practising his profession at the same time although it is probable, I think, that there are some trades and businesses, which may be regarded as altogether inconsistent with the status of an Advocate. However, as the rules stand it would, be open to this Court to permit any particular trade or business being undertaken by a Pleader. There might certainly be some kinds of business which would in no way be inconsistent with either the status or the active practice of a Pleader's profession. There have been instances where engagement even in a trade has also been permitted by this Court although I take it that this would not ordinarily be allowed. It may be that there are enterprises which, having regard to the circumstances of this country, the Court would sanction a Pleader actively promoting and devoting a portion of his time to. Whether sanction should be given in any case would, no doubt, largely depend on the character of the trade or business and the extent to which it is likely to occupy the time and attention of the Pleader. But no Pleader can be permitted to derive any advantage by taking the responsibility on himself and engaging in a trade or business without the sanction of the Court. If he does so, he takes the risk of its being subsequently held that his conduct amounts to professional misconduct If permission would not have been given if he had asked for it, he must be held guilty of misconduct in having done that which the Court would not have sanctioned. This is the rule followed where a trustee acts without the sanction of the Court in a matter for which he could have obtained its permission. I do not consider it possible that the Court would have given permission to the Pleader in this case to be engaged as a partner of a large cotton mill and in the various other businesses which the Pleader admits to be included in the concerns of the partnership. It is, however, possible that he thought, as he says he did, that inasmuch as he would not have to devote much of his time personally to his work as a partner, he was not acting in violation of his duty as a Pleader. I am willing to believe that he acted *bona fide* and without any intention to act contrary to his duty as a professional man. I am, therefore, of opinion that it is sufficient to point out that he acted wrongly and that it is unnecessary to impose any punishment on him for his conduct in this matter.

REFERRED CASE No. 9 OF 1912.

SANKARAN NAIR, J.—I think that Mr. Rangachariar is right in his contention that

any charge against the Pleader must be proved by evidence taken at this inquiry. But I do not accept the further contention that the judgment in the civil suit is inadmissible in evidence. The Pleader was the defendant in that suit. It was decided therein that the plaintiff had paid him his fee to appear for him at the Sessions; that he failed to appear without making any arrangement for the conduct of the case: a decree was passed against him on these findings. The facts found against him must be taken, *prima facie*, to be proved. At the same time, I think it is open to him to show that the judgment is wrong and should not be accepted as final for the purpose of this inquiry. Any evidence which should have been but was not produced in the suit will, of course, be viewed with grave suspicion. Nor is it clear to me why it is not open to us, at this inquiry, to consider whether the judgment is right on the materials on which it was based. There is no law preventing us from doing so, and I see no injustice in it.

I think, therefore, the Judge is right in allowing the Pleader to give further evidence. On the evidence, Exhibit A, the receipt given by the Pleader to Muni Reddi, makes it clear that he was bound to defend him at the Sessions. I doubt whether it is open to him to say in this inquiry after giving that receipt, unless he proves mistake or some other invalidating circumstance, anything against that receipt. Because as a Pleader it was his duty to grant a proper receipt and not one which is misleading. He has, however, failed to prove that he did not agree to appear at the Sessions. I do not attach any weight to the other contention that the Vakil was not bound to appear as his client owed him a portion of his fee. He has failed to prove that any balance is due.

I am also of opinion that a Vakil is bound to appear and conduct his case even if the fee, or any portion thereof, remains unpaid, in the absence of any agreement to the contrary or at least notice to the effect to the client in sufficient time to enable him to make other arrangements.

Mr. Rangachariar argues that a Pleader like Mr. Venkata Row would not have failed to make some arrangement about his case before going to Rangoon. There is great force in this argument. Mr. Venkata Row appears to have made arrangements about all other cases. The only explanation that suggests itself to me is that he may have really thought that he was not bound to appear for Muni Reddi at the Sessions. This is supported by the facts that the counterfoil of the receipt kept by him showed that he was to appear only before the Magistrate and this Srinivas Row told Subba Row that Mr. Venkata Row was not engaged to defend Muni Reddi. What took place at the meeting in September between Muni Reddi and the Vakil also supports this view. I think that Venkata Row believed that he was not engaged to defend Muni Reddi at the Sessions. If he had pleaded in this inquiry, after the disposal of the appeal, that he acted in this erroneous but honest belief and tendered a proper apology, speaking for myself, the result might have been different. But he has persisted in this inquiry in trying to prove a defence already found false in a civil suit. I agree accordingly to the order which will be pronounced by the Chief Justice.

REFERRED CASE No. 10 OF 1912.

The charge against the Pleader, Mr. Venkata Rao, is that he purchased the claim of the plaintiff in Original Suit No. 8 of 1909 on the file of the Subordinate Judge's Court of Bellary. That was a suit brought by Pichayya and Papayya against certain minors for the recovery of a sum of more than Rs. 1 ,000. After evidence had been heard, but before judgment was pronounced, one Vannaji agreed to purchase the claim of the plaintiffs therein for Rs. 4,750 on 7th September 1909. Now, it appears from the evidence of the vendor, who is the prosecution 4th witness in the case, that, so far as he is concerned, he had nothing to do with Mr. Venkata Rao, and that, though the negotiations for the sale took place in Venkata Rao's house, the claim was agreed to be sold to Vannaji who was his client without any consultation with Venkata Rao. Vannaji borrowed Rs. 4,000 of this amount from the firm of Satraji Dongerchund. Anadaji, who was examined as a witness for Venkata Rao, was a partner in that firm. It appears from his evidence, which there is no reason to disbelieve, that when the firm lent Rs. 4,000 to Vannaji, the amount was debited against one Bhataji Khemaji, who was the principal of Vannaji; two days later, Vannaji told this

witness that it should have been debited against him and not against his principal; he refused to do so; then Vannaji got a letter from Mr. Venkata Rao asking him to debit that amount against Venkata Rao's account and that was accordingly done. Mr. Venkata Rao admits having written a letter to the firm asking them to do so. The entry was made by the prosecution 1st witness and he also gives evidence to the same effect.

On the 7th of December, Vannaji sold the decree to one Veerabhadrappa. Veerabhadrappa was a relative of the defendants in that suit and was naturally interested in them. He says that he heard a rumour that Mr. Venkata Rao had purchased the decree and that he spoke to him and arranged to purchase the decree from him; he paid Rs. 6,392-8-0 to Venkata Rao and got an assignment of the decree from the original decree-holder, Papiah, who had agreed to sell it to Vannaji. The money was actually paid to Vannaji as Vankata Rao directed him to do so. According to this witness, he never saw Vannaji at all while the negotiations were going on. If the matter had stopped here, the case would have been one of suspicion only.

But there is the following additional circumstance to be taken into consideration. The entire amount borrowed by Vannaji was Rs. 4,750. Now, this with interest at 6 per cent. per annum for three months, that is, the period between September 7, the date of agreement of sale to Vannaji and December 7, the sale of the decree to Veerabhadrappa, would come to Rs. 4,821-4-0. The difference between the two amounts Rs. 6,392-8-0 and Rs. 4,821-4-0, *i. e.*, Rs 1,571-4-0 is the profit and half of this is Rs. 785-10-0.

Now, it appears from the evidence and it is admitted that this amount, *i. e.*, Rs. 785-10-0, was paid on Venkata Rao's account to his father-in-law. It is not explained how this particular sum of exactly half of the profits was due to Venkata Rao. He gives no explanation; he produces no account to show that this was due to him for any fee. There is evidence that the interest payable on the sum of Rs. 4,000 was at 6 per cent. The evidence as to the rate of interest payable on the remaining Rs. 750 is discrepant and it is not clear what the real interest was; but there is nothing improbable in their setting apart interest at 6 per cent. for three months for the purpose of calculating profits on the transaction. In the absence of any explanation on the part of Venkata Rao, the only conclusion that we are justified in drawing is that he received it as his share of the profits of the transaction; and taken with the other circumstances of the case, his advancing the money to Vannaji and the facts disclosed by the prosecution 2nd witness, whose evidence is strongly corroborated by these two facts, I come to the conclusion that from the 9th September 1909 Venkata Rao must be treated as a partner with Vannaji and equally interested with him in the decree.

The question then remains for consideration whether this is grossly improper conduct in the discharge of professional duties.

An actionable claim should not be purchased by a Pleader and, in my opinion, the purchase of a claim after suit offends against public policy more than the purchase of such a claim before suit. It is trafficking in litigation and when the vendor is the client of the purchaser, the transaction, in the majority of cases, is likely to be oppressive to the client. In the case before us, however, not only no undue advantage has been taken but Venkata Rao seems to have acted fairly. Papiah offered to accept Rs. 4,000 from eerabhadrappa in full satisfaction of his claim and he got from Vannaji and Venkata Rao Rs. 4,750. Further, Venkata Rao did not deal with the client and was not in fact the original purchaser on the 7th. It is also proved that a portion of the interest due to the minor was remitted. As this is the first case of the kind that has come before this Court, a lenient view might have been taken of the case, if he had pleaded good faith and placed before the Court all the facts. He has not chosen the course. I agree to the order which will be pronounced by his Lordship the Chief Justice.

The next charge against Mr. Venkata Rao is that he has been trading in cotton and yarn with the other undivided members of

his family as partners. That he is a partner with them is proved beyond doubt by Exhibit G. The Company has also bought a spinning mill in Bellary, borrowed money to pay for it and to cover working expenses; it was buying cotton and selling yarn. There are, no doubt, managers and *gumastas* appointed but Venkata Rao and his brother do not cease to be persons carrying on trade any the less on that account. Holding, then, that Venkata Rao and his brothers are traders, the question remains whether he is guilty of any grossly unprofessional conduct. Rule 27 of the rules framed by the High Court under the Legal Practitioners Act, XVIII of 1879, runs thus:—

"If any person, having been admitted as Pleader, accepts any appointment under Government, becomes a student of any school or college for purposes of pursuing his studies or enters into any trade or other business, or accepts employment as a Law Agent other than a Pleader, Mukhtar, or Agent certified under Act XVIII of 1879 and these rules, he shall give immediate notice thereof to the High Court, who may thereupon suspend such Pleader from practice or pass such orders as the said Court may think fit.

"Provided that when a Pleader is appointed by or under the authority of the High Court to the office of District Munsif, whether temporarily or permanently, it shall not be necessary to give the notice prescribed in the first part of this rule; but no Pleader, while employed as District Munsif, shall be permitted to practise or do any business as a Pleader before any Court."

Now it will be noticed that the High Court can take action under this rule only if the Pleader who enters into any trade or business gives notice to the High Court. Under the rule, he is bound to give such notice. Then section 13 of the Act itself empowers the High Court to punish the Pleader in certain circumstances. The words of the section run thus:—"The High Court may also, after such inquiry as it thinks fit, suspend or dismiss any Pleader or Mukhtar holding a certificate as aforesaid:—

(*b*) who is guilty of fraudulent or grossly improper conduct in the discharge of his professional duty, or

(*f*) for any other reasonable cause".

The omission to comply with rule 27 by a Pleader would probably come under clause (*b*). It would certainly come under clause (*f*). If, therefore, a first grade Pleader omits to make the application which he is bound to submit to the High Court under rule 27, then he may be suspended under section 13 for breach of that rule until he makes the application under that section or any further time the High Court thinks fit. If he makes the application under rule 27, then he can be dealt with under that rule. Apparently, therefore, the rule and the section provide adequate remedy for all cases. Whether the Pleader should be suspended or should be allowed to carry on a trade under rule 27 depends upon the particular circumstances of each case: the character of the person making the application, the nature of the trade or business, the time that the Pleader would have to devote to it. There may also arise other considerations. The trade or business may be one which it may be in public interests to foster in that locality and men other than Pleaders may not be available perhaps to carry on the trade or business satisfactorily. Under this rule, applications are being made to the High Court for sanction and they have been granted or rejected according to the particular circumstances of the case. If we lay down a definite rule under section 13 of the Act, it would be depriving the High Court of the discretion vested in it by rule 27; for, it is obvious that once a Pleader is declared to be disqualified from engaging in any trade or in any particular kind of trade, it would not be right for the High Court to give any sanction under rule 27 to any other Pleader applying for it. I am not, therefore, able to say that under section 13, the High Court should declare that it is unprofessional for a Pleader to follow any trade or business. It is not required by the conditions of the legal profession or the circumstances of the country.

It may be a question whether any rule even is necessary, because the evil to be guarded against cannot be serious as the *sanads* of the first grade Pleaders have to be renewed every year and the High Court may refuse a renewal. But, in any event, I do not think it necessary that we should take any action under section 13 as against any Pleaders to whom rule 27 is applicable. I am also of opinion that it is difficult now to say generally that a Pleader should not

engage in any trade or business. Confining myself now only to Vakils they exercise the profession both of the Advocate and the Solicitor and they should not be debarred from performing those functions which a Solicitor is, and a Barrister may not be, entitled to discharge. Many, if not the majority, of the Pleaders are members of joint families who are engaged in trades or businesses. It would be an unnecessary interference with them now to declare that such trades or businesses are unprofessional. The notion that no trade, however honestly carried on, is worthy of a Vakil is a relic of the times that have passed away, and I should regret its introduction into India.

On the facts before us, there is no doubt Mr. Venkata Rao has been guilty of a violation of rule 27 in not having reported to the High Court his connection with the firm or with the mill. But he has not been charged with having violated that rule and we cannot take any notice of it as he has had no opportunity of making any answer to that charge. So far, therefore, as the second charge is concerned, I am not prepared to inflict any punishment on him.

REFERRED CASES NOS. 9 AND 10 OF 1912.

BENSON, OFFG. C. J.—I concur with the conclusions arrived at by my learned brothers in the judgments which have just been read, and which I have had the advantage of perusing.

With regard to the charge in connection with the criminal case against Muni Reddi, I am unable to accede to Mr. Rangachariar's contention that the judgment and evidence in the civil suit against the Pleader, Mr. Venkata Rao, is not admissible as evidence against him in the present proceedings. The question in that suit was the very question which we now have to decide, *viz.*, whether he engaged to defend Muni Reddi in the Sessions case and failed to do so without any valid excuse. Mr. Venkata Rao was the defendant in the case and the decision was against him.

I do not think that the decision is conclusive proof against him in the present proceedings, but it has not been treated as conclusive. He has been allowed in the present proceedings to produce further evidence in support of his defence and he has produced it, and it has been duly considered by the District Judge and by us. There is no suggestion that any evidence which the Pleader wished to adduce in the present proceedings has been shut out. We have not been referred to any authority for holding that the judgment is inadmissible in the present proceedings as establishing a *prima facie* case of unprofessional conduct against the Pleader, or for holding that we are precluded from considering whether the judgment is right on the evidence on which it was based, nor do I see any ground in reason why we should treat them as inadmissible.

On the merits, the evidence and probabilities in all these cases have been so fully considered in the judgments of the two District Judges and of my learned brothers that I do not think anything would be gained by my reviewing them afresh. I entirely agree with the conclusions at which my learned brothers have arrived.

I do not understand how it can be seriously argued that what the Pleader is said to have purchased from the plaintiffs in Original Suit No. 3 of 1909 was not "an actionable claim," and that there was nothing contrary to law or public policy in his purchasing it, if he did do so, and, therefore, his doing so was no professional misconduct. The plaintiff's claim had, no doubt, been put in action, but that did not render it the less an "actionable claim" as defined in section 3 of the Transfer of Property Act. The claim was still *sub judice*. Though the case was ripe for judgment, it had not been given. The claim had not become merged in a decree. Section 136 of the Transfer of Property Act in the most stringent terms declares that "no Judge, Legal Practitioner or Officer connected with any Court of Justice shall buy or traffic in or stipulate for, or agree to receive, any share of, or interest in, any actionable claim." A Pleader holds a privileged position in connection with the administration of justice, and the law imposes on him certain restrictions and disabilities by reason of the position or office which he holds, and in order to safeguard the interests of litigants and the pure administration of justice.

It is, I think, futile to contend that it is not professional misconduct for a man to do that which the law expressly forbids him to do by reason of the profession which

he exercises. The degree of misconduct will, no doubt, vary with the circumstances of each case, but I cannot doubt that a transaction such as that with which we are now concerned amounts to gross misconduct. The Pleader who is conducting a case is in a better position than his client to judge of the probability of his success or failure, and the nearer the case is to judgment, the greater will be his opportunity for correctly anticipating the event. It may be that when a case is ripe for judgment, there is no longer any temptation to the Pleader to conduct the case improperly, but to allow him at that stage to purchase his client's claim would expose him to a strong temptation to misrepresent to his client his prospects of success and the value of his claim. In the present case, the transaction was a highly speculative one. The evidence shows that the plaintiffs feared their suit would be dismissed and were willing, at one time, to sell their claim for Rs. 4,000. They, in fact, got a decree for Rs. 11,000 in the original Court, though this was reduced on appeal to Rs. 6,000. It is true there is no suggestion that the Pleader made any misrepresentation to his clients in this case, and the plaintiffs were satisfied with the price (Rs. 4,750) paid to them, but this does not prevent the Pleader's purchase of the claim, in defiance of the express provisions of law, from being professional misconduct of a very grave character.

It only remains for me to state the decision at which we have arrived as to the penalty we should impose under section 13 of the Legal Practitioners Act on Mr. Venkata Rao in respect of the charges which have been established against him. He cannot plead youth or inexperience in extenuation of his misconduct. Its gravity has certainly not been lessened by the false defences which he has put forward and maintained throughout in regard to the charges relating to his conduct in connection with the criminal case against Muni Reddi, and in purchasing his own client's claim in Original Suit No. 3 of 1909 in the Subordinate Judge's Court. We do not think that a mere warning or censure would suffice to mark our sense of the gravity of his misconduct in either of these cases. We think that we are required to impose a penalty of a substantial period of suspension in each case. We accordingly direct that Mr. K. Venkata Rao be suspended from the exercise of his profession as a Pleader for six months and three months on account of his misconduct in regard to these two cases respectively, the two periods to run consecutively.

We do not think it necessary to impose any penalty in connection with the charge against him for engaging in trade. We think it sufficient to say that he was wrong in carrying on trade without reporting the fact to the High Court under rule 27 of the Rules, made by the High Court under the Legal Practitioners Act, XVIII of 1879. The Pleader will have to pay the costs of the petitioner in Referred Case No. 10 of 1912.

The Civil Revision Petition No. 485 of 1911 is dismissed.

PUNJAB CHIEF COURT.
FULL BENCH.

CRIMINAL APPEAL No. 4 OF 1912.
November 12, 1912.

Present:—Sir Arthur Reid, KT., Chief Judge, Mr. Justice Robertson and Mr. Justice Rattigan.

EMPEROR—PROSECUTOR

versus

LIEUTENANT BRIAN BONHAM CARTER—ACCUSED.

Criminal Procedure Code (Act V of 1898), s. 304—Jury trial—Verdict of majority given as verdict of Jury—No dissent by any Juror—Discovery of mistake after some days—Power of Court to disturb verdict and order—Jurisdiction—Criminal cases—Interpretation of statutes—Practice—Reference to Full Bench—Punjab Courts Act (XVIII of 1884), s. 11.

Jurisdiction in criminal case is not to be assumed, and in regard to matters for which the Legislature has made express provision, it must not be assumed in excess of the jurisdiction so conferred.

Courts in India cannot travel beyond the scope of section 304, Criminal Procedure Code.

The Court will not disturb a verdict openly given in Court, if it is satisfied that all the Jurors heard the words of the Foreman and expressed no dissent at the time.

The power of amendment of a verdict provided by section 304, Criminal Procedure Code, must be exercised before or immediately after the verdict is recorded and cannot be exercised after the Jurors have dispersed.

In a trial by Jury before a Judge of the Chief Court, the Foreman publicly announced the verdict of "not guilty" as the unanimous verdict of the Jury, in the hearing of all the Jurors and without dissent on the part of any of them. The verdict was recorded and the prisoner was acquitted. From information received some days afterwards, the trying Judge was led to

EMPEROR *v.* BRIAN BONHAM CARTER.

believe that as a matter of fact, the Jurors were not agreed as regards the verdict. The Judge summoned the Foreman of the Jury and examined him on oath.

He deposed that the verdict given as the unanimous verdict was really the verdict of a majority of the Jurors and was given as the unanimous verdict owing to a misunderstanding that the opinion of the majority was binding upon all the Jurors.

The Judge thereupon took action under section 11 of the Punjab Courts Act and referred for the opinion of the Full Bench the question as to whether any proceedings should be taken in the matter and if so, what course should be adopted:—

Held, (1) that the Full Bench had jurisdiction to give the opinion as the question arose before a Judge, sitting as a Single Bench, in a judicial proceeding;

(2) that the Court had no jurisdiction, in consequence of the Foreman's subsequent statement, to set aside a verdict given in open Court and in the hearing of all the Jurors and the formal order of acquittal, that followed thereupon.

Case referred by the Hon'ble Mr. Justice Rattigan, for consideration of the question contained in his referring order, dated the 16th October 1912.

The *Government Advocate*, for the Crown.

The Hon'ble Mr. *Muhammad Shafi*, for the Accused.

ORDER OF REFERENCE.

RATTIGAN, J.—(16*th October* 1912). At the conclusion of the trial of Lieutenant Bonham Carter upon charges under sections 304 (2) and 304-A, Indian Penal Code, I was informed by the Foreman of the Jury that the Jury were agreed upon their verdict which was one of acquittal as regards both charges. I accordingly informed the prisoner that the Jury had acquitted him and I directed him to be discharged from custody.

Subsequently, I heard that there had been some mistake made by the Foreman of the Jury (Major F. Hyslop) and that the Jury, though unanimous with regard to the first charge, were not agreed with regard to the second charge. I accordingly sent for Major Hyslop and examined him on oath, and discovered that a mistake of the kind had been made.

The question now arises whether I should take further proceedings and, if so, what course I should adopt. This question I refer to a Division Bench.

JUDGMENT OF THE FULL BENCH.

RATTIGAN, J.—As the Judge responsible for this Reference, I would like to set forth the facts which led me to take action under section 11 of the Punjab Courts Act, 1884.

Lieutenant Bonham Carter was tried before me and a Jury upon two charges, (1) under section 304, Indian Penal Code, and (2) under section 304-A, Indian Penal Code. The Jury retired to consider their verdict and after an interval returned to the Court-room and in answer to my question whether they were agreed upon their verdict, the Foreman informed me that they were agreed with reference to the first charge but not agreed with reference to the second charge. I accordingly asked the Foreman what their verdict was upon the first charge, and he replied that the Jury were unanimously of opinion that the prisoner was 'not guilty.' I then asked him what was the verdict upon the second charge and he replied that five of the Jury were of opinion that the prisoner was guilty and four were of opinion that he was not guilty. He further stated that the Jury, as a whole, wished to be further charged with reference to the law relating to the second charge. I accordingly endeavoured to explain more fully the law relating thereto and when I had concluded, the Foreman, after consultation with the other members of the Jury, informed me that the Jury wished to retire again to consider their verdict. This request I, of course, granted. The Jury retired and later on returned to the Court. I then inquired of the Foreman whether the Jury were "now agreed upon their verdict as regards the second charge." In reply, the Foreman informed me, without any expression of dissent from any of the Jurors, that they were agreed, and that their verdict was 'not guilty' upon both charges. I assumed that this was the unanimous verdict of the Jury, and I accordingly informed the prisoner that he had been acquitted by the Jury as regards both charges, and I, therefore, had the verdict recorded and directed that the prisoner should be set at liberty.

From information which I received some days afterwards, I was led to believe that a mistake had been made and that the Jurors, as a matter of fact, were not 'agreed' with regard to the second charge. I, therefore, directed the Foreman to appear before me and I examined him, upon oath, as to the real facts of the case. He deposed that the Jury were not agreed as

to the second charge; that five were of opinion that the prisoner was not guilty and that four were of opinion that he was guilty; and that the verdict of 'not guilty' as announced by him in Court was due to a misunderstanding, the Jurors believing that the opinion of the majority, if for an acquittal, was binding upon them all.

In these circumstances, and in view of the importance of the question involved, I decided to take action under section 11 of the Punjab Courts Act and to take the opinion of a Division Bench of this Court as to whether I should take any further proceedings in the matter and if so what course I should adopt. By the orders of the Chief Judge, this reference was directed to be laid before a Full Bench, and it is in consequence of that order that the Full Bench has now to give the opinion which I desired to obtain.

Before proceeding to give my own opinion upon the questions referred, I think it right to state that, despite Mr. Muhammad Shafi's objections to the jurisdiction of the Full Bench to deal with this reference, I am satisfied that the reference was one within the purview of section 11 of the Punjab Courts Act, and that this Full Bench has, under that section, jurisdiction to give the opinion and advice asked for. The questions referred to the Full Bench were not purely academic but arose before me, sitting as a Single Bench, in a judicial proceeding. Rightly or wrongly, I believed that in consequence of information supplied to me, I was bound to inquire from the Foreman of the Jury whether there was any foundation for what I had heard, and when I examined him upon oath, I was acting as a Judge in a judicial proceeding. I would hold, therefore, that Mr. Muhammad Shafi's preliminary objection to the jurisdiction of the present Bench fails and should be overruled. I might add that, though I was not at the time aware of it, there is a precedent for the course I adopted in making the reference [see *Rex* v. *Wooler* (1) discussed later on].

Coming now to the questions for our opinion, I am satisfied, after consideration, that we must reply to the reference that no further action can legally be taken by the Judge who presided at the trial. The only provision in the Criminal Procedure Code, which is directly relevant to the questions before us, is that contained in section 301, which runs as follows:—

"When, by accident or mistake, a wrong verdict is delivered, the Jury may, before or immediately after it is recorded, amend the verdict, and it shall stand as ultimately amended."

This section thus provides for an amendment of a wrong verdict delivered by accident or mistake, but it clearly contemplates that such a verdict can be amended only before or "immediately after" it is recorded, in other words, before the Jurors have left the Court and while they are still under the observance of the presiding Judge. And the reason for this restriction upon the powers of amendment is obvious, for once the Jurors have left the Court, they are liable to outside influences, and it would be in the highest degree dangerous thereafter to accept statements or affidavits on the part of individual Jurors to the effect that a verdict, publicly announced by the Foreman of the Jury, in the hearing of all the Jurors and without dissent on the part of any of them, as the unanimous verdict of all the Jurors, was in fact not their verdict but the verdict of other members of the Jury. A mistake of this kind may, no doubt, lead to a failure or miscarriage of justice, but, while such a result is to be deplored, I am decidedly of opinion that it would be far more disastrous to the course of justice if the Courts allowed verdicts, openly given, to be disturbed in consequence of individual Jurors subsequently coming forward to depose that such verdict, by accident or mistake, did not really represent their opinions. A mistake of the kind now under consideration is not likely to occur very frequently, and would be, perhaps, impossible if in practice the ancient formula used in the Courts of England were to be adopted. This was for the clerk of the Court to say "Gentlemen of the Jury, hearken to your verdict while the Court records it. You say that the prisoner is (guilty; not guilty); and that is the verdict of you all."

(1) 18 R. R. 402; 2 Stark 111.

At the same time, it is difficult to understand how a Jury could misunderstand the question, "Are you agreed upon your verdict?" The present case, however, is proof that words of every day use and ordinarily well understood may, nevertheless, be misunderstood by Jurors who attempt to import their own knowledge of law into their proceedings. But, while I regret that the view of the law which I take upon this reference may occasionally, though I believe rarely, result in a failure or miscarriage of justice, I have myself no doubt not only that it is strictly correct, but also that it is in the end far more conducive, than any other rule of law would be, to the due administration of justice. The spirit of section 304 of the Code is clearly in accordance with this view, and it has the support of English and American authorities.

In *Reg.* v. *Vodden* (2), a Juryman, by mistake, delivered the verdict "not guilty" when the Jury meant "guilty." The prisoner was thereupon discharged but some of the Jurymen interposed whereupon he was brought back immediately, and the Jury was again asked what their verdict was. They said "guilty," and the prisoner was, therefore, sentenced. The Court of Crown Cases Reserved held that the mistake was corrected within "a reasonable time and on the very occasion that it was made," and that the conviction must, therefore, be upheld. This is the class of case for which section 304 of our Code makes provision, and from the terms of the Court's judgment, the inference would certainly seem to be that the mistake could not have been rectified had it not been at once brought to the notice of the Judge. *Rex* v. *Wooler* (1) is a case very relevant to the present inquiry and was one where an erroneous verdict was given and the Court of King's Bench directed a re-trial. The defendant, Wooler, had been tried on the 5th June 1817 before Abbott, J., and a Jury, for printing and publishing a seditious and blasphemous libel. On the 6th June, at the first sitting of the Court of King's Bench, Abbott, J., addressed the Court to the following effect:—

(2) 23 L. J. M. C. 7; C. C. 229; 17 Jur. 1014; 2 W. R. 55; 6 Cox. C. C. 226.

"I take the earliest opportunity of stating to the Court some circumstances which occurred at the trial of a case yesterday before me at Guildhall. The case to which I allude was an information filed by the Attorney-General against a person of the name of Thomas Jonathan Wooler, for a libel. After the case had been gone through, the Jury retired from the Court to consider their verdict. During their absence, another case was called on, and the trial proceeded, and just as the reply was concluding, the door on my left hand was opened, in order to admit the Jury in *Rex* v. *Wooler* (1), who returned after considering their verdict; and as soon as the reply in the other case was finished, which was done in one or two sentences, the names of the Jurors in *Rex* v. *Wooler* (1) were called over by the officer of the Court in the usual way, and they were asked according to the ordinary course, whether they had agreed in their verdict, and whether the defendant was guilty or not guilty. The Foreman answered that the Jury found the defendant guilty, but three of them were desirous, or had desired him on their part to add something by way of explaining their verdict. I then interposed, and told the Jury that I could not receive an opinion or declaration coming from a part only of the Jury, that the verdict must be the verdict of all; and I asked (speaking, as I thought, in a very distinct and audible tone of voice), whether all the Jury had agreed in the verdict they had at first pronounced? The Foreman answered that they had. At that time, I did not hear any dissent expressed by any of them. The situation was, however, such, all the Jury not having come into my view from the room behind the Bench, that it is not altogether impossible that some mistake or misapprehension might have taken place, and that some of the Jury might not have heard distinctly what had been said. The Jury having retired, and the door by which they entered being closed, I proceeded to sum up the other case. When I had concluded, it was suggested by a gentleman at the Bar, that some of the Jury in *Rex.* v. *Wooler* (1) had not concurred, and did not intend to concur, in the general verdict which had been delivered; and were desirous that the verdict should be recorded with

some degree of qualification. I have not the precise words very distinctly now in my mind; but I believe I have stated the substance. I was further given to understand that some of the Jury were present in or near the Court. I then said, that the verdict of the Jury having been recorded after that they had been distinctly asked if they had agreed and had replied in the affirmative, it seemed to me that sitting in that place, I could not do anything in the matter. I do not know whether I made use of the sentiment, but certainly my mind was impressed with it, that it would be extremely dangerous if the Judge after the Jury had retired from the Bar, and some interval of time had elapsed, were to receive and act upon any communication from them in the then state of the proceedings. I thought it was too late for me to interfere, and, therefore, was of opinion that the verdict must stand as recorded. I wish, however, to take the earliest opportunity of stating this occurrence to my Lord and my brothers."

After the Court had deliberated, the Chief Justice (Lord Ellenborough), addressed the Attorney-General as follows :—

"The Court cannot, according to the authorities and precedents of law, receive an affidavit from a Juryman upon the subject of the verdict; but the reason why he is precluded from making such affidavit is because, under ordinary circumstances, it must be intended that the verdict was given with his assent. But in order to imply his assent, unquestionably it should appear, that he heard what was propounded by the Foreman on behalf of himself and his fellows: and the difficulty which presents itself to my mind is whether there appears in this case a sufficient ground, upon which the Court can safely rely, to conclude that all the Jury did hear what was propounded for them, and on their behalf, by the Foreman. Now all the Jury were not at the time within the sight and view of the learned Judge, for it seems that a part were in the room behind; so that we have not, in this case, the ordinary means which exist in other cases, for presuming that every one of the Jury must have heard what was propounded on their behalf by their Foreman. If they did not hear it, they were not furnished with any means of contradiction or signifying any dissent or qualification and it cannot be considered as the verdict of all, because it is only their verdict if propounded by the Foreman with the assent of all. This circumstance affords a distinction from all the cases which have usually come before the Court, because verdicts are usually given by the Jury standing together in the view of the Judge, and with full opportunity of hearing everything which is propounded by the Foreman, and of expressing their dissent if they think fit so to do. *If it could be made out satisfactorily from the position in which the Jury stood, their proximity to and being in view of the Judge, that all heard and none dissented, it would be too much to disturb the verdict and certainly the Court would not entertain a motion of that kind founded upon an affidavit of a Juryman.* But the perfect evidence of all the Jury having heard, and having the means of dissenting if anything was untruly propounded on their behalf, seems to be wanting in this case."

In the course of the discussion that ensued, the suggestion was made that the Court might inform itself of the facts by requiring the Jurors who stated that they had not heard what was said, to file affidavits in support of their statements whereupon Lord Ellenborough observed :—

"The Court think that they are precluded from the means of acquiring that knowledge through an affidavit of any of the Jurors; if they cannot agree in their verdict, they ought to express dissent at the time. But if the Jurors at the time when their verdict was delivered by the Foreman had not the means of hearing what was propounded for them, there is no need of their affidavits upon that point. If the verdict had been given under such circumstances as ordinarily occur, the Court would infer their consciousness of what was propounded by their Foreman. *But the danger would be infinite from allowing such affidavits to be received; and this has, doubtless, in former times deterred the Court from yielding to such applications.* I do not know that an application of this kind has ever been made."

In the case cited, the verdict as erroneously announced by the Foreman was

'guilty,' and the Court of King's Bench, on being satisfied through affidavits of two by-standers that certain of the Jurors had not heard the verdict as so announced, ordered a re-trial of the defendant but by a different panel, the Chief Justice remarking, in reply to the defendant's prayer that the old panel should be recalled to try the case *de novo* :—

"In no instance that I am aware of can it arise that the same Jury should be suffered to re-assemble to consider the same question after they have been mixed with the multitude. If the Court were to suffer that to be done, what animadversions might well be made upon it by the enlightened part of society."

This case is authority in support of the proposition that the Court will not disturb a verdict openly given in Court, if it is satisfied that all the Jurors heard the words of the Foreman and expressed no dissent at the time.

In considering a question of the kind now before us, it is instructive to turn to not only English but also American authorities bearing upon it. In Wigmore's standard work on the "Law of Evidence" (Canadian Edition), I find the law on this subject thus enunciated :—

"The act of assent to a verdict is constituted by the express answer to the clerk at the polling in open Court, or by the silence which implies an assent. The outward act is final. Just as the act of the party to a deed is judged and determined by his outward conduct, so the act of a Juror is judged and determined by the Jury's polling, *irrespective, on the one hand, of motives and belief which may have led up to the verdict's terms, and, on the other hand, of the deliberations and utterances of the Juror during retirement.* The very purpose of the formality of polling is to afford an opportunity for free expression unhampered by the fears or the errors which may have attended the private proceedings. .....Sewall, J., in *Grinnell* v. *Phillips* (3), rejecting an affidavit (by one of the Jurors) "that he thought it his duty to coincide with the rest of the Jury but in his mind he had never approved of the verdict or consented to it", (observed):—"He is not to be believed or heard. The record of a verdict implies a unanimous consent of the Jury, and is conclusive and incontrovertible evidence of the fact. Besides the secret or mental act of a Juror can never be a subject of legal inquiry; *and from the necessity of the case, his conduct before the Court is the best and the only evidence that can be admitted of his assent to a verdict delivered in his presence*".

(3) 1 Mass. 530 at p. 542.

The learned author cites various other cases to a like purport where affidavits on the part of individual Jurors, to the effect that they had not really consented to a verdict publicly announced in their presence as the verdict of the Jury, were excluded from consideration, and he then continues as follows:

"Hence the fact that the verdict as delivered was by one or more individual Jurors not assented to by them in the Jury room, or is different from the one there informally assented to by them, is no ground for later correcting or setting aside the verdict. Much less is the fact that the Juror in his own mind was mistaken or unwilling in the assent which he confessedly gave in the Jury room; for here he has doubly committed himself to the verdict as delivered" and, in a later passage he remarks:—"After the verdict, however, has once been pronounced by the Jury and accepted by the Judge, it is final as regards its meaning and effect; and no statements by the Jurors, whether on affidavit or on examination, either unanimously or individually, can be resorted to for explaining or changing its meaning or legal effect". (Wigmore's "Law of Evidence" Canadian Edition, Volume IV, paras. 2355, 2356).

To the propositions thus laid down, there would appear to be two exceptions, and two only, namely, (1) when one or more of the Jurors, immediately after the verdict is recorded or within a very short time thereafter and while the Jurymen are still under the observance of the Judge, dissents or dissent from the verdict as announced [section 304 of the Criminal Procedure Code; *Rex* v. *Vodden* (2)] and (2), in England and perhaps in America, where it is proved by extrinsic evidence to the satisfaction of the Court that all the Jurors had not heard the announcement of the verdict by the Foreman. In every case, however, that I

have consulted, the Judges have been agreed that affidavits by particular Jurors, that the verdict announced in Court by the Foreman did not represent their opinions, or that they were under a misapprehension of law or of fact in not protesting forthwith against such verdict, have invariably been rejected on the ground that it would be against public policy to permit Jurors, who have left the Court and in all probability discussed the case with outsiders, to endeavour subsequently to set aside a verdict, to which, by their silence, they have impliedly given assent. In my opinion this is a principle which is in the true interests of the administration of justice and ought not to be departed from, save only in the exceptional cases above referred to.

In the case before us, I have no reason whatever to doubt the correctness of the Foreman's statement as made before me on oath, but I do not think that the Court has jurisdiction, in consequence of that statement, to set aside a verdict, given in open Court and in the hearing of all the Jurors, and the formal order of acquittal that followed thereupon. The Legislature presumably was well aware of the case-law on this subject when it enacted the Criminal Procedure Code, and in section 304, it has made express provision for the correction of a verdict given by accident or mistake. It cannot be said, therefore, that this matter was a *casus omissus* or was not considered by the Legislature, and as there is express legislation thereon, I am of opinion, that the Courts in India cannot travel beyond the scope of section 304, even in cases where the facts were similar to those in *Rex* v. *Wooler* (1). Jurisdiction in criminal cases is not to be assumed, and in regard to matter, for which the Legislature has made express provision, it certainly must not be assumed in excess of the jurisdiction so conferred. I would, therefore, reply to the reference that no further action can be taken.

REID, C. J.—I concur. The power of amendment provided by section 304 of the Code of Criminal Procedure must be exercised before or immediately after the verdict is recorded and, for the reasons recorded, cannot be exercised after the Jurors have dispersed.

ROBERTSON, J:—With some hesitation after giving the question my careful consideration, I concur in the view expressed by my brother Rattigan.

CALCUTTA HIGH COURT.

CRIMINAL APPEAL NO. 656 OF 1912.

October 4, 1912.

Present:—Mr. Justice Chitty and Mr. Justice Richardson.

SAMARUDDIN—APPELLANT

versus

EMPEROR—OPPOSITE PARTY.

Jury—Misdirection—Questions of law—Rioting—Common object—Suggestion by Judge that real case might be between cases alleged by both sides—Penal Code (Act XLV of 1860*), ss.* 146, 147*—Violence, if includes that against inanimate object—Minutest details, whether necessary for Judge to go into—Statement by prosecution witness that accused had been bound down, whether admissible—Evidence of bad character—Evidence Act (I of* 1872*), s.* 54.

In a case of rioting in which one common object was alleged throughout, the Judge suggested to the Jury that the case might not be precisely as the prosecution alleged, nor what the defence set up, but something between the two:

Held, that there was no misdirection; that the Judge left it entirely open to the Jury as to whether they would accept his suggestion or not; and that the acceptance of it by the Jury would not destroy the case for the prosecution.

Queen v. *Sabed Ali*, 20 W. R. Cr. 5 (F. B.); 11 B. L. R. 347, and *Wafadar Khan* v. *Queen-Empress*, 21 C. 955, distinguished.

In section 146, Indian Penal Code, violence includes violence against inanimate objects, such as pulling down a man's house.

In his charge to the Jury, it is not necessary for the Judge to go into the minutest details in the evidence.

In a prosecution for riot, the statement by a prosecution witness that he had brought a case under section 107 of the Criminal Procedure Code against some of the accused who had been bound down, is admissible, if introduced not for the purpose of proving the bad character of the accused, but as part of the *res gesæt*, the events which had transpired before, and which eventually led up to, the riot with which the accused were charged.

Appeal against the order of the Additional Sessions Judge of Dacca, dated June 4th, 1912, convicting the appellant under sections 147 and 304 read with section 149 of the Indian Penal Code and sentencing him to undergo rigorous imprisonment for two years under each count, the sentences to run concurrently.

SAMARUDDIN *v.* EMPEROR.

Babus *Dasarathi Sanyal* and *Debendra Narayan Bhattacharyya*, for the Appellant.

Mr. *Orr*, for the Crown.

JUDGMENT.—In this case, the appellant Samar-ud-din has been convicted by the unanimous verdict of a Jury of offences under section 304/149, Indian Penal Code, and section 147, Indian Penal Code, and has been sentenced by the Additional Sessions Judge of Dacca to two years' rigorous imprisonment on each count, the sentences to run concurrently. The appeal is, therefore, open to him only on the questions of law relating to the charge of the Additional Sessions Judge.

The first point that has been urged before us is that the Judge was in error in putting before the Jury what he calls "a third alternative." It should be stated that before the trial began in the Sessions Court, the charge was amended and, as eventually framed, the common object alleged was "in order to take forcible possession of complainant Pandab's land and hut and to assault Pandab, Joydeb, Chandra Kissore and Karam Ali." The Judge suggested to the Jury that the case might not be precisely as the prosecution alleged and at the same time might not be what the defence endeavoured to set up, but something between the two, namely, that the complainant's party might have gone to turn Madhumala out of possession, that they were resisted and driven out of the land by the Kusambati Sardars that up to that point the Kusambati Sardars, might have been acting within their rights but that they went further and intoxicated with success or anger or both determined to teach the complainant's party a lesson and assaulted them. Reliance was placed on the case of *Banga Hadua* v. *King-Emperor* (1) and also on the cases of the *Queen* v. *Sabed Ali* (2) and *Wafadar Khan* v. *Queen-Empress* (3). But these cases are quite distinguishable on their facts. We can see no reason why the Judge should not have made this suggestion to the Jury. He left it entirely open to them as to whether they would accept it or not and we cannot agree in the contention of the learned Pleader for the appellant that, if it was accepted, it would entirely destroy the prosecution case. The Full Bench case of *Queen* v. *Sabed Ali* (2), cited above, was quite different from the present as was also the case of *Wafadar Khan* v. *Queen-Empress* (3). There the charge was altered at the end of the case for the prosecution and a totally different common object was alleged. Here, there has been one common object alleged throughout and it cannot be suggested that the accused did not know exactly what they had to meet.

In the second place, it is argued that the learned Judge's explanation of section 147, Indian Penal Code, is faulty and that violence cannot mean violence against inanimate objects. No authority has been cited for such a proposition and we see no reason for restricting the meaning of the word "violence" in the manner stated. It could hardly be said that if an unlawful assembly came together for the purpose, say, of pulling down a man's house and they proceeded to carry out the object, they could not be said to have used violence. Then it was urged that, as regards the appellant, Samaruddin, the Judge did not point out to the Jury exactly what the evidence against him was. We do not see that there is any force in this contention. The Judge has discussed the whole of the evidence to the Jury and this man's name is mentioned on more than one occasion. He has told the Jury that they must be satisfied as against each of the accused (there were four others tried along with Samaruddin who were found not guilty) and that their verdict must be independent as against each. The next argument that the Judge should have asked the Jury, when they returned their verdict, as to which common object they held proved has no force in this particular case because, only one common object was alleged. In the case of *Wafadar Khan* v. *Queen-Empress* (3), cited above, there were two distinct common objects which had been alleged and had been mentioned in the charges. It is said, that, in his charge in this case, the Judge has failed to give advice to the Jury on most important particulars; but the particulars to which the learned Pleader has referred are minor details in the evidence which the Jury had heard and which they were asked to take into consideration,

(1) 11 C. L. J. 270; 5 Ind. Cas. 771; 11 Cr. L. J. 245.
(2) 20 W. R. Cr. 5; 11 B. L. R. (F. B.) 347.
(3) 21 C. 955.

It was not, in our opinion, necessary for the Judge to go into the minutest details; but even if it were, there is nothing to show in this case that these particular minor points were not mentioned to the Jury inasmuch as we have only the heads of the charge before us.

Then it was argued that the Court witness Hossain Bakhsh's evidence should have been explained by the Judge. It is difficult to say what precisely is meant by this. The evidence was commented upon by the Judge and the Jury were left to form their own opinion of it.

Lastly, it was argued that the evidence which was inadmissible was admitted and that prejudiced the accused. This evidence consisted of a statement of the prosecution witness No. 5, Sanu, who stated that he had brought a case under section 107, Criminal Procedure Code, against some of the accused including the appellant and that they had been bound down while a cross-case under the same section brought against himself by the accused had been dismissed. This was not, so far as we can see, introduced, as suggested here, for the purpose of proving the bad character of the accused but as part of the *res gestæ*, the events which had transpired before, and which eventually led up to, the riot which was investigated in the present case.

We think, on the whole, that the charge of the learned Sessions Judge was both full and impartial and that the whole case was put before the Jury by him. We accordingly dismiss the appeal.

Appeal dismissed.

ALLAHABAD HIGH COURT.

CRIMINAL MISCELLANEOUS APPEAL NO. 135 OF 1912.

August 5, 1912.

Present:—Mr. Justice Rafique.

RAM KISHAN DAS—APPLICANT

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 526—Application for transfer—Materials to be considered.

What the Court has to consider on an application for transfer is not merely the question whether there has been a real bias in the mind of the presiding Magistrate against the accused but also the further question whether incidents may not have happened which, though they may be susceptible of explanation and may have happened without any real bias in the mind of the Magistrate, are nevertheless such as are calculated to create in the mind of the accused a reasonable apprehension that he may not have a fair and impartial trial.

Farzand Ali v. *Hanuman Prasad*, 19 A. 64, followed.

Where a District Magistrate cancelled the license for arms held by an accused and refused to grant an interview to him:

Held, that the circumstances were sufficient grounds for transfer of the case from the District.

Application for transfer.

Mr. *Satya Chandra Mukerji*, for the Applicant.

Mr. *Ryves*, for the Crown.

JUDGMENT.—The applicant, Mahant Ram Kishen Das of Akhara Ram Bagh, sub-division Karwi, has filed three applications in this Court under section 526 of the Code of Criminal Procedure, with regard to three criminal cases pending against him in the Court of the Joint Magistrate of Karwi, praying that those cases be transferred to some other Court outside the District of Banda on the allegation that the District Authorities are prejudiced against him. The Mahant stands charged with the offences of rash and negligent driving, enticing away of a married woman with criminal intent and committing riot in the course of the abduction of the woman. The allegations on which the transfer is sought are to put briefly: (1) that on the 5th of June 1912, the Joint Magistrate at first refused to see the applicant and when on the latter's repeated request an interview was allowed, the Joint Magistrate told him that the applicant was a *badmash* and ordered him to go away; (2) that the Joint Magistrate has sanctioned the prosecution of the applicant for rash and negligent driving; (3) that the Joint Magistrate received information of the alleged abduction at his bungalow in the middle of the night of the 27th of June 1912, and went at once to the Railway Station and issued orders to the Police to make inquiry; (4) that the District Magistrate of Banda cancelled the applicant's license for arms and declined to see him when he called to pay his respects on the 8th of July 1912. No explanation appears to have been submitted by the Joint or the

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District Magistrate in reply to the allegations of the applicant. The learned Government Advocate appears to oppose the applications for transfer. He says that he does not oppose the transfer from the Court of Mr. Muir, the Joint Magistrate, not because the allegations made against him are true, but because the defence might possibly call him as a witness in the abduction case. In the case of transfer from the District Magistrate's Court, he opposes it strenuously on the ground that no case has been made out for imputing prejudice to the District Magistrate. For the applicant, it is contended that what the Court has to consider on an application for transfer is "not merely the question whether there has been a real bias in the mind of the presiding Magistrate against the accused but also the further question whether incidents may not have happened which, though they may be susceptible of explanation and may have happened without any real bias in the mind of the Magistrate, are nevertheless such as are calculated to create in the mind of the accused a reasonable apprehension that he may not have a fair and impartial trial." The withdrawal of the applicant's license for arms and the Magistrate's refusal to see the applicant before he was found guilty by a Court of law are circumstances, it is said, which are calculated to create in the mind of the applicant a reasonable apprehension that he may not have a fair and impartial trial. In support of his contention, the learned Counsel for the applicant relies on a case of this Court, namely, *Farzand Ali* v. *Hanuman Prasad* (1). The learned Government Advocate replies that the cancellation of the license for arms is a matter purely discretionary with the Magistrate and his refusal to see a man, who is standing his trial in a Criminal Court, is not improper, and that neither circumstance implies a prejudice in the mind of the Magistrate, nor can it be said to create a reasonable apprehension in the mind of an ordinary man that he would not have a fair and impartial trial at the hands of the Magistrate. Moreover, it is said that the case of *Farzand Ali* v. *Hanuman Prasad* (1) has not, as a rule, been followed in this Court. The correctness of the order of the Magistrate cancelling the license for arms, or the propriety of his conduct in refusing an interview to the applicant is not and could not be in question in the present application. Nor is it contended by the learned Counsel for the applicant that the District Magistrate is, as a matter of fact, prejudiced against the applicant. What is advanced for the applicant and has to be considered is whether the said two circumstances would create in the mind of the applicant a reasonable apprehension of not getting a fair and impartial trial in the Court of the District Magistrate. The position of an accused person is always one of great anxiety and suspense, and incidents, though susceptible of explanation, and which would perhaps pass unnoticed, but for the trial he is undergoing, alarm him and lead him to think that his guilt is already believed and that his conviction is a foregone conclusion. It is quite possible that such an impression has been produced in the mind of the applicant by the circumstances referred to above as they very likely led him to infer that the District Magistrate was displeased with him. It would, therefore, be advisable to grant the applicant's request for transfer. The suggestion that the principle enunciated in the case of *Farzand Ali* v. *Hanuman Prasad* (1), has not been followed in this Court has no force, as I find on similar considerations transfers were allowed in the following cases, namely, *Krishna Nath Tewari* v. *King-Emperor* (2); *Inayat Ali Khan* v. *King-Emperor* (3) and *Mohammad Fazal Ullah* v. *King-Emperor* (4). I think it is expedient in the ends of justice that the three cases pending against the applicant in the Court of the Joint Magistrate of Karwi should be transferred to another District. I am told that Allahabad is as far from Manikpore where most of the witnesses live as Banda is, and that it would be convenient to both parties to have the case tried in Allahabad. I order that the three cases, against the applicant, be transferred from the Court of the Joint Magistrate of Karwi to that of the District Magistrate of Allahabad, who will either try the cases

(1) 19 A. 64.

(2) Decided on the 3rd March 1910.
(3) Decided on the 18th October 1910.
(4) Decided on the 1st April 1912.

himself or send them for trial to some other Magistrate subordinate to him competent to try them.

Application allowed.

MADRAS HIGH COURT.

CRIMINAL REVISION CASE No. 301 OF 1912.
CRIMINAL REVISION PETITION No. 248 OF 1912.
October 31, 1912.

Present:—Mr. Justice Sadasiva Aiyar.

PICHAI ROWTHAN—ACCUSED—PETITIONER

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1893), s. 476—Action under section—When may be taken.

To justify action under section 476, it will suffice if it is taken with reasonable promptitude, *i.e.*, so shortly after the conclusion of the proceedings as to make it practically the continuation of the same proceeding.

Petition, under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the order of the 2nd Class Magistrate of Ramnad, dated 15th June 1912, in Mis. Order No. 7 of 1912 and to stay the proceedings in C. C. No. 60 of 1912 on the file of the Court of the Sub-Divisional Magistrate of Ramand, pending disposal of Criminal Revision Case No. 301 of 1912.

FACTS.—The petitioner in this case was a witness for the prosecution in C. C. No. 163 of 1912 on the file of the Sub Magistrate's Court, Ramnad, in which certain constables were charged for offences under sections 147, 323, 427, 354 and 448, Indian Penal Code. One of the facts put forward by the prosecution in that case was that when the constables were causing riot, some of the complainant's party proceeded to the bungalow of the District Superintendent of Police in order to report the occurrence to him. The accused, as the 5th witness for prosecution in that case, stated in course of his examination-in-chief that it was he and Court witness No. 2 that did so. "Immediately I and Maradu went to inform the Superintendent. We were not able to see him." In cross-examination, he said:—'As soon as the accused went away, I went home direct. At the very beginning when there was a row between the 1st accused and complainant I was present. Afterwards I was attending to my trade till the accused came in numbers. I did not go out anywhere. As soon as the accused began their rioting, I went away to my house.' The Sub-Magistrate held that the witness had perjured himself by giving contradictory statements and ordered the prosecution under section 476, Criminal Procedure Code, for an offence under section 193, Indian Penal Code, on the 15th June 1912. The judgment in calendar case was delivered on 10th June 1912. It was urged in revision that as the petitioner was examined in Court on the 6th and 7th June, judgment delivered on the 10th, there was nothing on the record to show that the Magistrate contemplated action then and that the subsequent order passed on the 15th June was, therefore, one made without jurisdiction.

Mr *C. Mahadhavan Nair*, for the Petitioner.

Mr. *C. F. Napier*, Contra.

ORDER.—Reading the deposition of the petitioner as a whole, I cannot say that the Magistrate's action requires interference of this Court under its revisional powers which are not exercised as matter of course.

As regards the delay of 5 days in taking action under section 476, Criminal Procedure Code, the Full Bench case in *Aiyakannu Pillai* v. *Emperor* (1) does not decide that the action should be taken invariably in the course of the judicial proceeding or at its conclusion. If it is taken within reasonable promptitude, that is, so shortly after the conclusion of the proceedings as to make it practically the continuation of the same proceeding, it will suffice. I hold that the action taken by the Magistrate in this case was prompt enough.

The petition is rejected.

Petition rejected.

(1) 32 M. 49; 4 M. L. T. 404; 19 M. L. J. 42; 9 Cr. L. J. 41; 1 Ind. Cas. 597.

DILAN SINGH *v.* EMPEROR.

CALCUTTA HIGH COURT.
CRIMINAL APPEAL No. 576 OF 1912.
August 26, 1912.
Present:—Mr. Justice Sharf-ud-din and Mr. Justice Coxe.
DILAN SINGH—ACCUSED—APPELLANT
versus
EMPEROR—PROSECUTOR.

Penal Code (Act XLV of 1860), *ss.* 182, 211—*False charge, bringing of, before Police—Recommendation by Police that informant should be prosecuted—Prosecution of informant and conviction—Irregularity—Criminal Procedure Code (Act V of* 1898*), ss* 195, 532, 537—"*Complaint*".

The appellant lodged information before a Sub-Inspector of Police that certain persons had beat him and set fire to a house. The Sub-Inspector on inquiry did not believe the story and recommended that the appellant might be prosecuted under sections 182 and 211 of the Penal Code.

The prosecution of the appellant was then directed by a Deputy Magistrate. A preliminary inquiry was made and the appellant was committed to the Court of Session and convicted under section 211:

Held, that even if there was any defect in the initiation of the proceedings in the original Court, still when the accused had been committed for trial to the Court of Session, a conviction by that Court could not be set aside simply on the ground of some irregularity in the commitment proceedings, more specially when that point was not raised in the first Court, and that section 532 of the Criminal Procedure Code would cure such a defect.

Haibat Khan v. *Emperor*, 33 C. 30, 10 C. W. N. 30; 3 Cr. L. J. 125 and *Abdul Rahman* v. *Emperor*, 7 C. L. J. 371, 7 Cr. L. J. 338, distinguished.

Queen-Empress v. *A. Morton and Moorteza Ali*, 9 B. 288, relied upon.

Section 195 of the Criminal Procedure Code clearly contemplates prosecutions at the instance of Police Officers. In any case, when a Police Officer asks that a person should be prosecuted under section 211, Indian Penal Code, for information given to him, and gives evidence himself in support of that charge, no serious irregularity can arise in the conviction of the accused in proceedings initiated upon that report.

Appeal against the order of the Sessions Judge of Gya, convicting the appellant under section 211, Indian Penal Code, and sentencing him to undergo rigorous imprisonment for three years.

Mr. *P. L. Roy*, Counsel, and Babu *Siva Nandan Roy*, for the Appellant.

Mr. *Orr*, for the Crown.

JUDGMENT.—The appellant in this case has been convicted under section 211 of the Indian Penal Code of instituting false criminal proceedings before the Sub-Inspector of Fatehpur Police Station against one Fazl Hussain and others.

It appears that there was some dispute about the possession of the village Manhona and the *zemindari* Kutchery therein, between Karn Singh who is one of the *ticcadars* of the village and Amirul Hossein who is a lessee from Kali Singh another *ticcadar*. The accused Dilan Singh admittedly went to the *thana* and there lodged information before the Sub-Inspector, Rajendra Narain Sarma, that while he was sitting in the Kutchery, Fazal Miah and others came there, caught hold of him, beat him, shut him up in a room in the Kutchery and there set fire to the thatch of the Kutchery building: that he raised an alarm and the villagers came and rescued him. The Sub-Inspector on inquiry, did not believe this story. The words of his final report are:—"I, therefore, submit the final report in the case and recommend that Dilan Singh and Karn Singh may be prosecuted under sections 182 and 211."

The prosecution of the accused was then directed by a Deputy Magistrate. A preliminary inquiry was made and the accused was committed to the Court of Session. The learned Sessions Judge, agreeing with both the assessors, has convicted the accused under section 211 and has sentenced him to three years' rigorous imprisonment.

The learned Counsel, who appears on behalf of the appellant, argues in the first place that the conviction is bad inasmuch as the first Deputy Magistrate had no jurisdiction to direct the prosecution of the accused under section 476 of the Criminal Procedure Code, and reliance has been placed on the case of *Haibat Khan* v. *Emperor* (1) and that of *Abdul Rahman* v. *Emperor* (2). The case of *Haibat Khan* v. *Emperor* (1) seems to us to be quite distinguishable, because, in that case there had been no commitment nor was the accused convicted at the Sessions Court. It seems to us clear that this makes a very considerable difference. Even if there is any defect in the initiation of the proceedings in the original Court, still when the accused has been committed for trial to the Court of Session, a conviction by the Court of Session cannot, in our opinion, be set aside simply on the ground of some irregularity in the commitment proceedings, more specially when that point was not raised in the first Court. In circumstances which are not wholly dissimilar, the Bombay High Court

(1) 33 C. 30; 10 C. W. N. 30; 3 Cr. L. J. 125.
(2) 7 C. L. J. 371; 7 Cr. L. J. 388.

held that section 532 would cure such a defect [see the case of *Queen-Empress* v. *A. Morton and Morteza Ali* (3)]. In the case of *Abdul Rahman* v. *Emperor* (2), though the learned Judges purported to follow the case of *Haibat Khan* v. *Emperor* (1), they went very considerably beyond the decision in the former case. That case, however, is distinguishable from the present case because of the circumstance that the Police Officer in this case has recommended the prosecution under section 211. It has been argued that that cannot be regarded as a complaint because the complainant was not examined on oath. Certainly, it is not a complaint as defined in the Code inasmuch as that definition expressly excludes a report of a Police Officer. But it appears to us to come within the meaning of the word complaint as used in section 195, as that section clearly contemplates prosecutions at the instance of the Police Officer. In any case when a Police Officer asks that a person should be prosecuted under section 211 for information given to him, and gives evidence himself in support of that charge, we cannot see that any serious irregularity can arise in the conviction of the accused in proceedings initiated upon that report. The order of the first Deputy Magistrate purporting to be one under section 476 might in that case be regarded as surplusage. We do not, therefore, think that effect can be given to the point of law raised by the learned Counsel. We are not prepared to say that there has been any real irregularity inasmuch as the accused has been prosecuted at the request of a person who was entitled to ask for a prosecution. But if there has been any irregularity, it certainly, in our opinion, is such an one as is cured by section 532 or 537 of the Criminal Procedure Code. On the facts, the evidence is altogether one-sided. It is common ground that the Kutchery building was set on fire by one side or the other. The whole of the evidence is that it was not set on fire by Fazal Miah and indeed Fazal Miah had no apparent motive beyond the ties of friendship to burn the Kutchery and to attempt to burn Dilan Singh. There are small defects apparently in the story of the prosecution as there are in all such stories but the learned Judge has dealt with them in his judgment and his discussion of them and the conclusions that he has arrived at with respect to them appear to us to be reasonable. We, therefore, think that the conviction is right. The sentence is not excessive.

The appeal is accordingly dismissed.

Appeal dismissed.

(3) 9 B. 288.

ALLAHABAD HIGH COURT.

CRIMINAL REVISION PETITION No. 306 OF 1912.

July 24, 1912.

Present:—Sir George Knox, KT., Judge.

EMPEROR—APPLICANT

versus

PAIMAL NAI—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 110 —*Power of Police to detain—Suspected person.*

Section 110 is not intended to afford the Police a means of keeping a suspected person under detention until they are able to work out a case against him. Action of this kind on the part of the Police tends to throw doubt upon their work generally and a Magistrate should not detain a person under section 110 of the Criminal Procedure Code, unless he has the necessary information upon which he can make the order in writing required by section 112.

Criminal revision against an order of the Sessions Judge of Saharanpur.

JUDGMENT.—Paimal Nai is reported to have been arrested by the Police acting under section 54 of the Code of Criminal Procedure. He was arrested as being a person who had been concerned in a cognizable offence or against whom a reasonable complaint had been made or credible information received or reasonable suspicion existed of his having been so concerned. The offence is apparently theft or possession of stolen property belonging to one Mohan.

The value of this information or suspicion may be appraised from the fact that when he was arrested, no attempt whatever was made to charge him with the offence. The Police, instead, had resort to section 110 of the Code of Criminal Procedure and they placed Paimal before a Magistrate with a view of action being taken under that section. They appear to have given the Magistrate some information of the vaguest possible description that Paimal had been concerned in several cases, that he was in the habit of consorting with bad characters and that he

VAITHINATHA IYER *v.* KUPPU THEVAN.

was himself a bad character. As this information, which was given to the Magistrate before the 17th February 1912, was not substantiated by any evidence until the 11th March 1912, the probability is that this was a bow drawn to venture and that the Police had no information such as they said they had. I cannot understand how the learned Magistrate detained Paimal upon a report of this kind.

Section 110 is not intended to afford the Police a means of keeping a suspected person under detention until they are able to work out a case against him. Action of this kind on the part of the Police tends to throw doubt upon their work generally and a Magistrate should not detain a person under section 110 of the Code of Criminal Procedure unless he has the necessary information upon which he can make the order in writing required by section 112. So far as I can gather from the papers on the record, and on inquiry made, I have been told that there are no further Police papers, the arrest of Paimal was not warranted by law. Then I find that on the order being read over and explained to the suspected person, he said that he had no cause to show. Assuming this to be an accurate statement of what the person suspected said, it is difficult to understand why the Police asked for further time to produce evidence and why defence witnesses were sent for. The whole proceedings are so doubtful that I direct that the order, dated the 11th of April 1912, be set aside and that Paimal be unconditionally released.

Conviction set aside.

MADRAS HIGH COURT.

CRIMINAL REVISION CASE No. 302 OF 1912.

CRIMINAL REVISION PETITION No. 249 OF 1912.

August 30, 1912.

Present:—Mr. Justice Napier.

VAITHINATHA IYER—COMPLAINANT—PETITIONER

versus

KUPPU THEVAN—ACCUSED—RESPONDENT.

Criminal Procedure Code (Act V of 1898), ss. 256, 257, 526—Transfer application to superior Magistrate—Duty of Magistrate to adjourn—Accused given opportunity to cross-examine prosecution witnesses or cite defence witnesses—Duty to give another opportunity.

There is no duty cast on a Magistrate to adjourn a case because an application is being made to a superior Magistrate for transfer; section 526, Criminal Procedure Code, confines that duty to cases where application is made to the High Court.

Once the requirements of section 256 or 257 have been complied with and the accused refuses to state that he wishes to cross-examine witnesses or cite defence witnesses, there is no provision requiring the Magistrate to offer an opportunity to the accused to have his witnesses summoned.

Petition, under sections 435 and 439 of the Code of Criminal Procedure, 1908, praying the High Court to revise the judgment of the Sub-Divisional Magistrate of Kumbakonam, in Criminal Appeal No. 52 of 1912, presented against that of the second class Magistrate of Papanasam, in Calendar Case No. 20 of 1912.

FACTS.—On the 15th January 1912, the complainant and another were riding their bicycles along the road when the accused, heedless of the ringing of the bells, pushed down the cycle with rider and on being remonstrated therefor slapped the complainant on the cheek. The two people took to their heels but the accused pursued them and threw stones at them. A complaint was then lodged.

On the 17th February, the accused applied to the Sub-Magistrate for an adjournment to move for a transfer. The case was adjourned to the 4th March and the accused was told the case will not be adjourned further. On the 4th, the accused again applied for an adjournment on the ground that no orders have been passed yet by the Sub-Divisional Magistrate on his transfer petition. The accused was then asked to go on and as the accused's Pleader was not present, the Magistrate adjourned the case to the 15th. On the 15th, the accused again represented that no orders have yet been passed on his transfer petition and asked for an adjournment The adjournment was refused and the accused declined to cross-examine the prosecution witnesses. He did not put in a list of the witnesses or bring any with him. The accused's Pleader said he had no instructions to proceed with the case but only to apply for adjournment. Under these circumstances, the Sub-Magistrate found the accused guilty under sections 341, 323 and 426, Indian Penal Code, and sen-

DEBI PROSAD v. EMPEROR.

tenced him to a fine of Rs. 75. The accused appealed: The Sub-Divisional Magistrate in ordering a re-trial said: "The procedure adopted by the Sub-Magistrate in disposing of this case is beset with many illegalities which must make his proceedings completely void. (1) There was an application before the Sub-Divisional Magistrate for transfer of this case to the file of some other Magistrate. The Sub-Magistrate, without waiting to see what was the result of the application, has proceeded with the case and disposed of it. The judgment in the case was pronounced on the 15th March last while order on the application was received by him on the 17th of that month. This procedure appears clearly illegal. (2) The prosecution witnesses in the case were not cross-examined and before the appellant was put on the defence, the witnesses for the prosecution were not offered to the appellant for further cross-examination as required in section 256, Criminal Procedure Code. (3) Further, no defence witnesses have been examined in this case. The Sub-Magistrate has asked the appellant whether he has brought his defence witnesses. In a warrant case, the appellant has a right under section 257, Criminal Procedure Code, to have his witnesses summoned by the Court. This opportunity does not appear to have been offered to the appellant."

Mr. *G. S. Ramachandra Iyer*, for the Petitioner.

Mr. *S. T. Srinivasa Gopalachariar*, for the Accused.

ORDER.—The order of the Sub-Divisional Magistrate is based on grounds which do not support it. There is no duty cast on a Magistrate to adjourn a case because an application is being made to a superior Magistrate for transfer. That duty is confined to cases where the application is to be to the High Court; section 526, Criminal Procedure Code. It appears from the record that the requirements of section 256 as to requiring the accused to state whether he wishes to cross-examine any witness were complied with. There is no provision requiring the Magistrate to offer an opportunity to the accused to have his witnesses summoned. It is his right to apply and he did not exercise it. I set aside the order for re-trial and direct the Sub-Divisional Magistrate to take the appeal on his file and dispose of it according to law.

Order set aside.

S. N. DAR, B. A. LL. B.
Vakil High Court,
SRINAGAR (Kashmir)

ALLAHABAD HIGH COURT.

CRIMINAL REVISION PETITION No. 530 OF 1912.

August 13, 1912

Present:—Mr. Justice Rafique.

DEBI PROSAD—APPLICANT

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 195 (b) Complaint, definition of—Letter of District Judge.

A document was tampered with during the pendency of a suit before a Munsif. The Munsif reported the fact to the District Judge, who wrote to the District Magistrate to take action in the matter:

Held, that the letter of the District Judge to the District Magistrate fell within the definition of a complaint under section 195 (*b*) of the Code of Criminal Procedure.

Emperor v. *Sundar Sarup*, 26 A. 514, A. W. N (1904) 90; 1 Cr. L. J. 335, followed.

Application for transfer of the case

Mr. *Nehal Chand*, for the Applicant.

M. *A. E. Ryves*, for the Crown.

JUDGMENT.—It appears that in a case pending in the Court of the Munsif of Havali in the District of Bareilly, a document was tampered with. The learned Munsif reported to the District Judge about the tampering of the document. The latter wrote to the District Magistrate to take action in the matter. The case was made over to the Joint Magistrate of the District for trial. The applicant, who is one of the accused in the case, has filed this petition under section 439 of the Code of Criminal Procedure, for revision of the proceedings pending in the Court of the Joint Magistrate. It is contended on his behalf that the Joint Magistrate has no jurisdiction to try the applicant and the other accused inasmuch as no complaint according to law has ever been filed. It is argued that the letter of the District Judge to the District Magistrate, in the absence of any proceedings under section 476 of the Code of Criminal Procedure, does not fall within the definition of a complaint, and that section 195, clause (*b*) of the Code of Criminal Procedure, has

no application. In support of this contention, the learned Counsel has cited *In the matter of the petition of Mathura Das* (1) and *In re Lakshmidas Lalji* (2). A later decision of this Court, *viz.*, *Emperor* v. *Sundar Sarup* (3), covers the present case. The application is, therefore, rejected.

Application rejected.

(1) 16 A. 80.
(2) 32 B. 184; 10 Bom. L. R. 28; 7 Cr. L. J. 35; 3 M. L. T. 46.
(3) 26 A. 514; A. W. N. (1904) 90; 1 Cr. L. J. 335.

ALLAHABAD HIGH COURT.
CRIMINAL REFERENCE No. 495 OF 1912.
July 13, 1912.
Present:—Mr. Justice Rafique.
KAMLA PRASAD—APPLICANT
versus
EMPEROR—OPPOSITE PARTY.

Penal Code (Act XLV of 1860), *s.* 290—*Public nuisance—Placing of* charpoy *temporarily on road.*

Placing a *charpoy* on the road in the *bazar* temporarily, does not amount to the offence of causing public nuisance. *In re Umesh Chandra Kar*, 14 C. 656; *Queen-Empress* v. *Virappa Chetti*, 20 M 433; *Rex v. Lord Grosvenor*, (1819) 2 Starkie 511; 20 R. R. 732, distinguished.

Criminal reference made by the Sessions Judge of Gorakhpur.

Mr. *M. L. Agarwala*, for the Applicant.

JUDGMENT.—This is a Reference made by the learned Sessions Judge of Gorakhpur, under section 438 of the Code of Criminal Procedure, recommending that the conviction of one Kamla Prasad, under section 290 of the Indian Penal Code, be set aside and the sentence of fine be remitted. The circumstances which gave rise to the prosecution of Kamla Prasad are as follows:—Kamla Prasad is a *karinda* of the Rani of Gopalpur. A *bazar* is held at a place called Gola, which, it is said, is comprised in the *zemindari* of the Rani. In the afternoon of March 26th, 1912, the second officer of the Police Station of Gola was passing through the *bazar* on an *ekka*. He found a crowd in the *bazar* which intercepted his further progress. On dispersing the crowd, it was discovered that Kamla Prasad was sitting on a *charpoy* in the middle of the road and there were two chairs, one on each side of the *charpoy* occupied by the friends of Kamla Prasad. On demand by the Sub-Inspector, the *charpoy* and the chairs were removed and the Sub-Inspector proceeded on his way in the *ekka*. Kamla Prasad was subsequently prosecuted under section 290 of the Indian Penal Code on the charge of causing a public nuisance by keeping a *charpoy* in the middle of a road. Kamla Prasad denied the charge and pleaded that he was sitting at a place close by the shop of one Faqir Meah. The learned Magistrate, however, disbelieved Kamla Prasad and convicted him under section 290 of the Indian Penal Code and sentenced him to pay a fine of Rs. 15. Kamla Prasad applied to the learned Sessions Judge of Gorakhpur for revision. The learned Judge has submitted the case to this Court, being of opinion that the conviction of Kamla Prasad was bad in law. It may be taken as proved in this case, that Kamla Prasad was sitting on a *charpoy* on the road in the *bazar*, but the question is whether this act falls under section 290 of the Indian Penal Code. I agree with the learned Judge that the act of Kamla Prasad in placing a *charpoy* on the road in the *bazar* temporarily, did not amount to the offence of causing public nuisance. The learned Magistrate in his explanation has referred to three cases in support of his order. *In re Umesh Chander Kar* (1), *Queen-Empress* v. *Virappa Chetti* (2), *Rex* v. *Lord Grosvenor* (3). Those cases are not on all fours with the present case. In all those cases, the obstruction was of a permanent nature. As remarked by the learned Judge, it is a common thing in this country for persons to place their *charpoys* on the public roads without any intention of obstructing traffic. It is not quite clear from the record whether the passage of the *ekka* of the Sub-Inspector was obstructed by the crowd or by the *charpoy* of Kamla Prasad or by both. I, therefore, accept the Reference, set aside the conviction and sentence, and direct that the fine, if realised, be refunded.

Reference accepted.

(1) 14 C. 656.
(2) 20 M. 433.
(3) (1819) 2 Starkie 511; 20 R. R. 732.

PUNJAB CHIEF COURT.

CRIMINAL REVISION PETITION No. 990 OF 1912.
September 10, 1912.
Present:—Mr. Justice Beadon.
JHANDU—ACCUSED—PETITIONER
versus
EMPEROR—PROSECUTOR—RESPONDENT.

Criminal Procedure Code (Act V of 1898), s. 195—Sanction to prosecute—Superior Court's duty when there is no prima facie case for sanction.

Where sanction to prosecute for any offence specified under section 195 of Act V of 1898, has been granted, the superior Court should see whether the discretion has been properly exercised, and when there is no *prima facie* case for the prosecution, the sanction should be revoked.

Petition for revision, under section 439 of the Criminal Procedure Code, of the order of the District Magistrate, Lyallpur, dated the 4th May 1912, upholding that of the Magistrate, 2nd class, Lyallpur, dated the 31st March 1912, sanctioning prosecution of the petitioner.

Mr. *Nand Lal*, for the Petitioner.

JUDGMENT.—The District Magistrate, acting under section 195 (6), Criminal Procedure Code, should have considered whether or not there was sufficient ground for granting sanction to prosecute. The question before him was not merely whether or not the Magistrate was empowered to grant sanction, but also whether or not the Magistrate had properly exercised his powers. Malang brought a complaint under section 428, Indian Penal Code, against Kiman and another, alleging Kiman had injured a pony with a *gandasa*. Jhandu purported to be an eye-witness of the mischief.

The pony had been injured but the Magistrate, not being satisfied that Kiman and the co-accused had done the deed, discharged them. Subsequently, on the application of Kiman, the Magistrate sanctioned the prosecution of Jhandu for giving false evidence.

Though the Magistrate was not satisfied with the evidence, the animal was injured, and it does not follow that Jhandu's evidence was false. There is certainly not a *prima facie* case against Jhandu and sanction should not have been given.

I set aside the order and revoke the sanction to prosecute Jhandu.

Petition allowed.

ALLAHABAD HIGH COURT.

CRIMINAL REVISION PETITION No. 517 OF 1912.
July 31, 1912.
Present:—Mr. Justice Tudball.
HASIN-UD-DIN—APPLICANT
versus
EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 118—Security for good behaviour.

A person was asked to furnish security for good behaviour. He gave two sureties. The Magistrate rejected the sureties on the ground that they did not live within a radius of five miles from the residence of the accused:

Held, that the order rejecting the sureties was bad and that there was no valid ground for rejecting the security.

Criminal revision against an order of the Magistrate of Naini Tal.

Mr. *S. C. Mukerji*, for the Applicant.

Mr. *R. Malcomson*, Assistant Government Advocate, for the Crown.

JUDGMENT.—The applicant, Hasin-ud-din, by an order of the Magistrate, dated the 11th of May 1912, was ordered to give security for his good behaviour for three years in his own bond for Rs. 500 and two sureties for Rs. 500 each. He produced two sureties, Karim Bakhsh and one other. The Magistrate has rejected this security for very peculiar reasons. His order runs as follows:—"The applicant, Karim Bakhsh, says he will keep Hasin-ud-din in his village but the other surety lives ten miles away at least from that village, and he is not present. Unless both the sureties live within a radius of five miles, I cannot allow this security." The order is by no means clear as to the centre from which the radius is to be drawn, whether that centre is to be the abode of the accused or of the sureties. Apparently there is no other defect in this security except that mentioned by the Magistrate, namely, that the sureties do not live within five miles of each other or of Hasin-ud din. This is no valid ground whatsoever for rejecting the security which is good in other respects. I, therefore, allow this application, set aside the order of the Magistrate and direct that the security offered by the two sureties produced be accepted together with the bond of Hasin-ud-din and that he be forthwith released directly the bonds are filed.

Application allowed.

HARGOBIND *v.* EMPEROR.

ALLAHABAD HIGH COURT.
CRIMINAL REVISION PETITION No. 499 OF 1912.
August 1, 1912.
Present:—Mr. Justice Tudball.
HARGOBIND—APPLICANT
versus
EMPEROR—OPPOSITE PARTY.

Public Gambling Act (III of 1867), ss. 3, 4—Search warrant illegal—Presumption.

A warrant issued for the search of any house, which the Police officer to whom the warrant was issued might think proper to search, is illegal and a search under it is not such as is contemplated by the Act. The result of such illegal search is, that no presumption whatsoever can be drawn in accordance with the Act such as is allowed by the terms thereof to be drawn in the case of a legal search.

Criminal revision from an order of the Magistrate, first class, of Mirzapur.

Mr. *A. P. Dube*, for the Applicant.

Mr. *R. Malcomson*, Assistant Government Advocate, for the Crown.

JUDGMENT.—The applicant in this case has been convicted under sections 3 and 4 of the Public Gambling Act and has been fined Rs. 30. The two points taken before me are:—(1) That the search carried out by the Police was entirely illegal, and (2) that it is not proved that the house in question is a gaming house. In regard to the first point after examining the warrant I find it was issued apparently for the search of any house which the Police officer to whom the warrant was issued might think proper to search. There can be little doubt that the warrant was entirely illegal and any search under it was not such as was contemplated by the Act. The result of this illegal search, however, is merely this, that no presumption whatsoever can be drawn in accordance with the Act such as is allowed by the terms thereof to be drawn in the case of a legal search. If, however, there is evidence on the record to establish that the house was a gaming house and that the present applicant was using it as such for his own profits, the legality of the conviction cannot be questioned. The evidence on the record is to the effect that the house in question belongs to one Mohan Kalwar. It was empty and unoccupied. This is to be gathered from the evidence of Bindeshri, one of the defence witnesses. The prosecution evidence shows that Zakir and Hargobind, the present applicants, with or without the permission of the owner were, as a matter of fact, using a room in this building for the purpose of gaming and that they were taking a portion of the winnings from the winners. The evidence is to the effect that when the Police arrived, gaming was going on. Sixteen *couries* were found on the ground. There was also a carpet on the ground. Candles and *chirag* were alight. A piece of chalk and a certain amount of cash was also recovered. But it is impossible to follow the train of thought in the Magistrate's mind when he said that the piece of chalk in the present case was an instrument of gaming, for there is nothing on the record to show that it was used for that purpose. It is urged that *couries* are not instruments of gaming *per se*, and unless and until there is evidence to show that they were used as instruments of gaming, the Court has no right to hold that they were such instruments. The evidence for the prosecution is to the effect that gaming was going on and that sixteen *couries* were on the ground. *Solahi* is a game which is played with sixteen *couries* and is a very common game in this country for the purpose of gambling, though it would have been better if the Magistrate had made the point perfectly clear by examination of witnesses. Still the circumstances of the case place it beyond doubt that the game which was being played was a game of *solahi* for which *couries* are used as instruments of gaming. In my opinion, therefore, the evidence on the record is sufficient to enable the Court to hold that the applicant was using the house in question as a gaming house deriving profits therefrom, and the *couries* were instruments of gaming and were being used as such. In these circumstances, I do not deem it necessary to interfere at all in this case. The application is dismissed.

Application dismissed.

BISSONATH PROSAD MALITA v. BRINDESRI PROSAD SINGH.

CALCUTTA HIGH COURT.

REGULAR CIVIL APPEAL No. 188 OF 1910.

August 16, 1912.

Present:—Sir Lawrence Jenkins, Kt., Chief Justice, and Mr. Justice N. Chatterjea.

BISSONATH PROSAD MALITA AND OTHERS—PLAINTIFFS—APPELLANTS

versus

BRINDESRI PROSAD SINGH AND OTHERS—DEFENDANTS—RESPONDENTS.

Party—Mitakshara *father, mortgage executed by—Only son minor at date of mortgage—Mortgage executed before advances made—Sums borrowed for family purposes—Suit on mortgage—Son made party defendant—Liability of son to be sued on mortgage—Decree against son—Mortgagee unable to prove item expended on family purpose—Inability of son to prove item borrowed for immoral purpose—Debt of father binding on son—Alteration of law—Procedure in mortgage suit—Joinder of defendant—Transfer of Property Act (IV of* 1882).

The plaintiffs sued on a mortgage-bond executed by *J.*, and they made his only son *B.*, who was a minor at the date of the mortgage, a defendant in the suit. The sums covered by the bond were expended on legitimate family purposes; but the mortgage was executed before the advances were made. *J.* and *B.* formed a *Mitakshara* joint family, and the mortgage purported to charge the entire interest in the property mortgaged:

Held, that *J.*, as the managing member of the family, had implied authority to execute the mortgage so as to make it unimpeachable by his minor son against whom as well as against his father, the mortgage could be enforced.

Suraj Bunsi Koer v. *Sheo Persad Singh*, 5 C. 148 at p. 165; 4 C. L. R. 226; 6 I. A. 88 and *Gharibullah* v. *Khallak Singh*, 30 I. A. 165; 5 Bom. L. R. 478; 7 C. W. N. 681; 25 A. 407, relied upon.

The plaintiffs were unable to show how an item of Rs. 600 was expended and the defendants refrained from throwing any light on the point:

Held, that as the defendants failed to show that the item was used for an immoral purpose, it was a debt of the father binding on the son, and he could not be permitted to redeem the mortgage except on paying the Rs. 600.

Luchmun Das v. *Giridhur Chowdhury*, 5 C. 855, 6 C. L. R. 473 (F. B.) commented upon.

After the passing of the Transfer of Property Act, a mortgagee must, in a suit on a mortgage of the joint property of a *Mitakshara* family executed by the father, join as a party the executant's son though he was a minor at the date of the instrument. But it was not necessary to make the son a party to such a suit before that Act was passed. The son's remedy was that he could sue to recover the property provided he could show that the debt was contracted for immoral purposes and the purchaser had notice that they were so contracted.

Appeal from the decree of the Sub-Judge of Patna, dated August 27th, 1909.

Babus *Provash Chandra Mitra* and *Susil Madhab Mallik*, for the Appellants.

Babus *Umakali Mukherjee* and *Bhudeo Chandra Roy*, for the Respondents.

JUDGMENT.

JENKINS, C. J.—The plaintiffs have brought this suit to realise a mortgage security executed in their favour by Babu Jagdip Narain Singh, defendant No. 1. They have made defendants to the suit both Jagdip Narain Singh and his only son Brindesri Prosad Singh, it being their case that the son, who was a minor at the date of the mortgage, is as much bound by it so far as it creates a security on the property comprised in it, as the father by whom it was executed. The suit was dismissed as against the son and hence this appeal.

The mortgage, Exhibit I, is dated the 21st November 1893, and to appreciate its meaning, it should be borne in mind that the mortgagees were a firm of bankers or *mahajans*. It begins in these terms: "Whereas I, the declarant, have taken lease of certain *mouzahs* and have to pay the rent thereof to the proprietors instalment by instalment; but the rent is not realised in due time from the tenants of the lease-hold *mouzah* and the proprietors are always making pressing demands; therefore, I have of my own accord and free-will opened, for the payment of the rent to proprietors due on account of the lease-hold *mouzahs*, a *khata* for Rs. 5,000 bearing interest at the rate of Re. 1 per cent. per mensem with the firm of Babu Bir Kishwar Lal-Parmeshur Narain at Koochi Hirnanand Sahu, appertaining to Thana Chouk Kalan, one of the quarters of Patna City as per details given below"—Then there follow provisions regulating the details of the transaction. The first clause provides for two *chittas*, one to be kept in the bankers' place of business, and the other to remain with the mortgagor, and then says:—"all sums paid into and received from the *kothi* by me shall be entered in both the *chittas*." The succeeding clauses deal with interest, periodical adjustments, the closing of the transaction, and then the charge is created in these terms. (His Lordship read clause 7).

The schedule to the mortgage describes the property, and from this description, it is apparent that the instrument professes to charge the entire family interest in this

property. This has not been disputed before us.

It is the plaintiffs' case that the transaction has been closed, and that there is due to them on the balance of the account a sum of Rs. 5,000 for principal, after giving up Rs. 7-0-9 and Rs. 3,554-10-8 for interest.

The amounts, which go to make up this sum of Rs. 5,000, are shown in a tabular form in the judgment of the Sub-Judge, where nine items are shown totalling Rs. 6,279-10-0 in all, and extending from *Jeyt Sudi* 6th to *Magh Badi* 11th, *Sambat* 1952.

The first two may be left out of consideration as they are beyond the limits claimed by the plaintiffs.

The rest call for a brief explanation. Excluding for the moment the last item of Rs. 600, it has been proved to my satisfaction, not merely by oral testimony, but by documentary evidence, that is above all cavil, that all these itmes were expended on legitimate family purposes, as for instance, the payment of rent, the payment of Government revenue, and family marriage expenses.

We have been taken through the items which go to show this with minute detail, but I do not propose to do more than state, as I have done, the general result of this investigation as no argument was addressed to us in disparagement of this conclusion. The attempt to evade liability by pleading the immorality of defendant No. 1 has been as unsuccessful as it was unmeritorious, and it was particularly unmeritorious, for there is strong reason to think that defendant No. 1 is in reality the person responsible for the advancement of this defence.

It was argued that the mortgage was security only for the amounts drawn or paid on account of instalments of rent, and in support of this, reliance was placed on the recital I have read. But this (in my opinion) places too narrow a construction on the instrument: the recital explains how the mortgage became necessary, but it does not control its operative provision.

The intention and effect of the instrument was, I think, to secure the balance from time to time due on the current account.

The result then is this; the mortgage purports to charge the entire interest in the property, and, apart from the Rs. 600 with which I will later deal, the whole of the Rs. 5,000, claimed as principal, was advanced for legitimate family purposes. Why then should not the mortgage be enforced against the entire family interest?

The law on this subject is thus stated by the Privy Council in *Suraj Bunsi Koer* v. *Sheo Parsad Singh* (1). "The right of co-parceners to impeach an alienation made by one member of the family without their authority, express or implied, has of late years been frequently before the Courts of India, and it cannot be said that there has been complete uniformity of decision respecting it. All are agreed that the alienation of any portion of the joint estate, without such express or implied authority, may be impeached by the co-parceners, and that such an authority will be implied, at least in the case of minors, if it can be shown that the alienation was made by the managing member of the family for legitimate family purposes."

This formulates a clear and precise principle, and it would seem to narrow the problem of the validity of a manager's alienation to this: had he an express authority? if not, had he an implied authority? At the same time, the passage indicates the kind of condition which would justify such an implication when it is pointed out that as against a minor's co-parcener it may be implied, if there was a legitimate family purpose.

But I do not read this statement of the law as laying down that these are the only conditions under which authority can be implied: each case must be judged according to its own peculiar circumstances. It is true that the word used in this passage is *alienation*; but a mortgage is an alienation, and nonetheless so because it is for a particular purpose: and this is recognised by the Transfer of Property Act.

Moreover, this view has the sanction of the highest judicial authority, for a mortgage by a managing member has been upheld on this principle by the Privy Council and in illustration of this I may refer to *Gharibullah* v. *Khallak Singh* (2).

No doubt, in the present case, the mortgage was executed before the advances were made: but I fail to see that this places any obstacle in the plaintiffs' way in view of the fact that the advances were all made for legitimate

(1) 5 C. 148 at p. 165; 4 C. L. R. 226; 6 I. A. 88.
(2) 30 I. A. 165; 5 Bom. L. R. 478; 7 C. W. N. 681; 25 A. 407 (P. C.).

family purposes and the mortgage was a necessary part of the arrangement. And I hold that in the circumstances, defendant No. 1, as the managing member, had implied authority to execute the mortgage so as to make it unimpeachable by his minor son.

It follows, then, that the alienation by way of mortgage is good and that it can be enforced as a mortgage against the defendant No. 2 as well as against his father, defendant No. 1.

So far I have dealt with the case apart from the item of Rs. 600: now it is necessary to consider how matters stand regarding this item.

The plaintiffs have been unable to show how it was expended: the defendants have refrained from throwing any light on the point, and yet it is difficult to suppose that they have not family books of account and available sources of information that would show what was done with this sum.

It has been forcibly argued that in view of all the circumstances, the position would appear to be one where it would be reasonable to apply the provisions of section 106 of the Evidence Act and hold that as the mode of expenditure is especially within the knowledge of the defendants, the burden of proving how it was made was on them. [See *Hunoomanpersad Pandey* v. *Mussammat Babooee Munraj Koonweree* (3).]

But even if the plaintiffs cannot show that this sum was expended for a legitimate family purpose, on the other hand the defendants have wholly failed to show that it was used for an immoral purpose. And so we have the position indicated in the case of *Luchmun Das* v. *Giridhur Chowdhry* (4).

This is a determination of a Full Bench of this Court which has given rise to much discussion, and in token of this, I need only refer to two recent but conflicting decisions reported as *Moheshur Dutt Tewari* v. *Kishun Singh* (5) and *Kishun Pershad* v. *Tipen Pershad Singh* (6). On the strength of this Full Bench determination, it is urged on behalf of the respondent that we cannot decide in the plaintiffs' favour without a reference to a Bench specially constituted. At most, however, this contention can only refer to the Rs. 600, and as to this, the plaintiffs say they would prefer to give up this amount rather than incur the delay and expense of a reference.

But, is the reference necessary having regard to the circumstances of this case? First then, it has to be seen what the Full Bench determined?

One of the questions propounded to them was this: "In the case of a *Mitakshara* family consisting of a father and one minor son, where the father being the manager raises money by hypothecating certain ancestral family property by bonds, and it is not proved on the other hand that there was any legal necessity for his raising the money, nor on the other, that the money was raised or expended for immoral or illegal purposes, or that the lender made any inquiry as to the purpose for which it was required, can the lender, the mortgagee, enforce by suit against the father and the son the payment of his money by sale of the property during the father's life-time? The answer which was returned by the Full Bench was in these terms:—"The mortgage itself, upon which the money was raised, could not be enforced, but the debt contracted by the father, being itself an antecedent debt, within the meaning of the rulings of the Privy Council and the son being a party to the suit, the mortgagee, notwithstanding the form of the proceedings, would be entitled to a decree directing the debt to be raised out of the whole ancestral estate inclusive of the mortgaged property."

This answer has occasioned much discussion, but it is now the accepted view that it cannot mean that the mortgage is incapable of enforcement against the father to the extent of his share.

But even with this gloss, the ruling is not free from difficulty. If in execution of a decree against the father alone for a debt unconnected with any immoral or illegal purpose, a part of the family property is sold in execution, the son's obligation to pay his father's debts would of itself afford a sufficient answer to a suit brought by a son to recover the property.

At the date of the Full Bench decision, the result would have been the same though the suit was for enforcement of a mortgage, and the son was not a party to it. Since then, however, the Transfer of Property Act has

(3) 6 M. I. A. 393; 18 W. R. 81 note.
(4) 5 C. 855; 6 C. L. R. 473.
(5) 34 C. 184; 5 C. L. J. 441; 11 C. W. N. 294.
(6) 34 C. 735; 11 C. W. N. 613; 5 C. L. J. 569.

been passed, and by section 85 it is provided (read section).

In *Lala Suraj Proshad* v. *Golab Chand* (7) it was held that this section is compulsory. So a mortgagee must now, in a suit on a mortgage of the joint property of a *Mitakshara* family executed by the father, join as a party the executant's son, though he was a minor at the date of the instrument. Such a son, therefore, is a person having an interest in the property comprised in the mortgage, and it is on that account and on that account alone that he is a necessary party. Moreover, it is only to a suit under Chapter IV of the Transfer of Property Act, now re-produced by Order XXXIV, Civil Procedure Code, relating to the mortgage that he is a necessary party.

The purpose of so joining the son is not to obtain a personal decree against him on the strength of his obligation to pay his father's debts, but primarily to give him an opportunity of redeeming as a person interested in the mortgaged property and incidentally to resist the suit as against himself on the ground that the character of the debt absolved him from any personal obligation. In this connection, regard may be had to section 90 of the Transfer of Property Act now re-produced in Order XXXIV, rule 6 of the Civil Procedure Code.

That it was not necessary to make the son a party to such a suit before the Transfer of Property Act was passed, or where its provisions did not apply, is clear from the cases to which reference was made in *Lala Suraj Proshad's* case (7). And though he was not a party, a decree could be passed for the sale of the entirety of the mortgaged property. The son's remedy in such a case was that he would sue to recover the property provided he could show that the debts were contracted for immoral purposes and the purchaser had notice that they were so contracted [*Suraj Bansi Koer's* case (1)]. Thus it will be seen that the law has been materially modified by statute and statutory rule since the Full Bench decision. But more than that, we have in this case facts which take it outside the scope of the Full Bench decision.

Here the sums covered by the mortgage were, with the exception of Rs. 600, advanced for a legitimate family purpose, and so there is a sufficient foundation for a decree for sale on the mortgage. And though it is not shown that the Rs. 600 was for a legitimate family purpose, it certainly was not for any immoral purpose, and in the circumstances, I think, it may be regarded as a debt of the father binding on the son, and that the 2nd defendant cannot be permitted to redeem the mortgage except on the terms of paying off the Rs. 600, as well as the balance of the Rs. 5,000 which is shown to have been contracted for legitimate family purposes.

The decree of the Sub-Judge must, therefore, be reversed and a mortgage-decree passed on the footing of Rs. 5,000 being due for principal. Unless the parties agree, there must be an account of what is due for interest at the mortgage rate. On payment of the amount so found by the defendants or either of them, there will be the usual direction for delivering up of the documents and, if required, for re-transfer. In default of payment within six months of this decree or the ascertainment of interest, whichsoever may be the later date, there will be a decree for sale and application of the proceeds. The plaintiffs must have their costs of the suit and appeal which will be added to their security.

N. CHATTERJEA, J.—I agree.

Appeal allowed.

MADRAS HIGH COURT.

CIVIL APPEAL No. 200 OF 1909.

October 28, 1912.

Present:—Mr. Justice Miller and Mr. Justice Abdur Rahim.

ARUNACHELLAM CHETTY AND OTHERS—PLAINTIFFS—APPELLANTS

versus

PRABHAYYA CHETTY AND ANOTHER—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 153, O. VII, r. 11, O. VI, r. 17—Want of verification and signature—Late verification and signature—Limitation Act (IX of 1908), s. 22—New party—Party not signing or verifying pleading.

If one of the plaintiffs is wrongly described in the plaint as a minor and has not himself signed and

(7) 28 C. 517

verified the plaint, he is not on that account to be considered not a party.

Want of signature and verification does not entail the rejection of the plaint as such verification and signature can be supplied at any stage of the proceedings.

The plaintiff who has not signed or verified cannot be considered to be a new party, when he signs or verifies the plaint, so as to attract the application of section 22 of the Limitation Act.

Appeal against the decree of the District Court of North Arcot, in Original Suit No. 5 of 1908.

Mr. *L. A. Govindaragava Iyer*, for the Appellants.

Mr. *P. Venkataramana Row*, for the Respondents.

JUDGMENT.—We are unable to take the view taken by the District Judge.

The 1st plaintiff was wrongly described in the plaint as a minor but was described as a plaintiff and though he has not himself signed and verified the plaint, he is not merely on that account to be considered as no party [*Mohini Mohun Das* v. *Bungsi Buddan Saha Das* (1)]. Want of signature or verification does not entail the rejection of the plaint under Order VII, rule 11 of the Civil Procedure Code, and such verification and signature can be supplied at any stage of the proceedings under Order VI, rule 17 and section 153 of the Code. Unless then it can be held that so far as the 1st plaintiff is concerned, there is really no plaint, the respondents cannot succeed, for it is only in the view that the 1st plaintiff was not on the record as plaintiff that his addition now could be considered as the bringing in of a new plaintiff, and so attract to the case the provisions of section 22 of the Limitation Act: and but for those provisions, it is obvious that any amendment of the plaint that might be necessary would have to be made in this case.

To succeed, we think the respondents ought to show that the 1st plaintiff did not consent to the suit in his name; that so far as he was concerned, it was certainly unauthorised [as was held to be the case in *Sheorania* v. *Bharat Singh* (2)] and there is nothing to show this; and, on the other hand, he has come forward stating that he is willing to proceed with the suit thus ratifying his mother's act, if he did not authorize it before.

(1) 17 C. 580. (2) 20 A. 90.

There is no reason to suppose that his description as a minor was due to anything but a mistake, as he has said, and we find no ground for holding that his prosecution of the suit will be prosecution by a new plaintiff within the meaning of section 22 of the Limitation Act

We allow the appeal and remand the suit to the District Judge for disposal according to law.

The costs in this Court will be costs in the suit.

Appeal allowed.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL NO. 508 OF 1910.

July 3, 1912.

Present:—Mr. Justice Kensington.

BRIJ LAL—PLAINTIFF—APPELLANT

versus

RAM RATTAN—DEFENDANT—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. II, r. 2—First suit by mortgagee to recover arrears of interest—Subsequent suit to recover both principal and interest or possession against vendee of equity of redemption—Intermediate declaratory decree.

Where a mortgagee, who has, under the terms of the mortgage-deed, a clear option on the happening of a default in regular payment of interest by the mortgagor, of either taking possession at once or of realizing interest or of accumulating interest with principal until possession is taken, sues and obtains a decree only for arrears of interest, his subsequent suit against the vendee of the equity of redemption to recover both principal and interest due or possession of the mortgaged property is barred under rule 2, Order II of Act V of 1908.

Even the fact that the mortgagee had obtained an intermediate declaratory decree against the vendee, declaring his lien against the mortgaged property both for principal and interest, is of no effect and cannot revive his rights which had once been extinguished on the first occasion under the force of the said rule by reason of his suing only for arrear of interest.

Gar a Ram v. *Abdul Rahman*, 28 P. R. 1907; 140 P W R. 1907 (F. B.), and *Kundan Mal* v. *Alla Dad Khan*, 19 P. R. 1910; 36 P. W. R. 1910; 5 Ind. Cas. 821 167 P. L. R. 1910, followed.

Raman v. *Wazira*. 79 P. R. 1886, dissented from.

Rangayya Goundan v. *Nanjappa Rao*, 24 M. 491; 3 Bom. L. R. 299; 6 C. W. N. 17; 28 I. A. 221, referred to.

Second appeal from the order of the Divisional Judge of the Jullundur Division, dated the 17th day of March 1910, reversing that of the Munsif of the 1st class, Jullundur, dated the 14th day of June 1909, decreeing

BRIJ LAL v. RAM RATTAN.

plaintiff's claim for possession of the house on payment of Rs. 1,000.

The Hon'ble Mr. *Shadi Lal*, for the Appellant.

Mr. *Sundar Das*, for the Respondent.

JUDGMENT.—The question raised in this appeal is one of considerable difficulty and I have taken a very long time to determine what course should be adopted. The essential facts are as follows:—

On the 6th September 1892, one Harbhagwan, not represented in the present suit, mortgaged a house to plaintiff's father for Rs. 450 by way of collateral security *(ar rahn)* with interestat 12 per cent. payable in yearly sums of Rs. 54. If the interest should not be paid, the mortgagee was given a clear option of either taking possession at once, or of realising the interest in any way he could, or, if he preferred allowing it, to accumulate with the principal until possession might be claimed.

On the 24th June 1897, the mortgagee obtained a decree for Rs 250 as arrears of interest.

On the 12th January 1898, the defendant Ram Rattan bought the equity of redemption from the mortgagor, and he is understood to have continued in possession of the house ever since. On the 23rd June 1900, plaintiff's father obtained a decree, confirmed by the Divisional Judge on the 29th October 1900, for a declaration that he had a charge on the house as against Ram Rattan for Rs. 450 and interest.

The question is, whether that decree can be now enforced by the plaintiff against Ram Rattan, to the extent of Rs. 1,000, principal and interest. The Munsif decided that it could be so enforced and gave plaintiff a decree, but the learned Divisional Judge has dismissed plaintiff's suit as barred by Order II, rule 2, Civil Procedure Code. The wording of the lower Appellate Court's judgment is not very clear, but apparently the ruling of *Ganga Ram* v. *Abdul Rahman* (1) was relied on as authority for the decision, which it certainly is. That ruling has since been approved and followed in the very elaborate judgment of *Chaudhri Kundan Lal* v. *Sardar Alla Dad Khan* (2), which is even more in point in the present case as the question whether a mortgagee can derive any benefit from an option in his deed to take possession when he pleases (exactly as in the present case) was exhaustively considered and decided against the mortgagee.

As opposed to this view of the law, which has been several times taken in this Court in recent unpublished decisions, and is supported by the Privy Council ruling of *Rangayya Goundan* v. *Nanjappa Rao* (3), Mr. Shadi Lal, Counsel for the plaintiff, has quoted an apparently very clear decision, the other way, of *Raman* v. *Wazira* (4). The precise terms of the mortgage then in question were not disclosed, but it appears to me hardly open to doubt that the decision does directly conflict with those given in 1907 and 1910. Mr. Shadi Lal pressed that the point might be referred to a Full Bench as doubt has been expressed about the soundness of the rulings of 1907 and 1910, more especially as they strangely enough make no reference to *Raman* v. *Wazira* (4). In the end, I do not see my way to making the desired reference. Whatever view of the law may have been taken, 25 years ago, there is no ambiguity in the more recent decisions of two separate Division Benches which are definitely against plaintiff. I can hardly say that the matter is now so uncertain that a Full Bench should be asked to go into it again on the present not very important case, especially as there is no explanation of the plaintiff's great delay in suing. It may be hard on him that he should lose his money in consequence of his father's previous suit for interest only, but this is largely due to his dilatory tactics.

As a subsidiary plea, it was urged on plaintiff's behalf that he should be given the benefit of the declaratory decree passed in his father's favour on the 23rd June 1900. I am unable to take that view both for the possibly correct reason given by the lower Appellate Court, and still more because plaintiff's right, if destroyed by the 1897 suit for interest alone, could

(1) 28 P. R. 1907; 140 P. W. R. 1907.

(2) 19 P. R. 1910; 36 P. W. R. 1910; 5 Ind. Cas. 821; 167 P. L. R. 1910.

(3) 24 M. 491 at p. 503; 3 B. L. R. 299; 6 C. W. N. 17; 28 I. A. 221 P. C.

(4) 79 P. R. 1886.

not subsequently be revived by a declaratory decree.

The result is that I feel constrained to uphold the lower Appellate Court's decree dismissing plaintiff's suit. The appeal is dismissed with costs to the defendant.

Appeal dismissed.

MADRAS HIGH COURT.

CIVIL MISCELLANEOUS PETITIONS NOS. 2243, 2289 AND 2317 OF 1912.

November 6, 1912.

Present:—Mr. Justice Sadasiva Aiyar.

M. K. SUBRAMANIA IYER AND OTHERS—PETITIONERS

versus

MUTHULAKSHMIAMMAL AND OTHERS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 151, O. XL, rr. 1 to 4, O. XLIII, r. 1 (s)—Receiver—Power to discharge and remove—Rules—Prayer to be put in possession of properties—Discharge or removal of Receiver—Appeal—Inherent power of Court—Execution by Appellate Court—Practice.

There is no specific provision made in the Civil Procedure Code for the discharge or removal of a Receiver, nor is there any provision for appeals against orders of discharge or removal of Receivers.

The power to discharge and remove or to give directions to a Receiver must be taken to be inherent in the Court which appointed the Receiver and the Appellate Court has got all the powers of the original Court.

A prayer for execution cannot be made to the Appellate Court direct.

The prayer in a petition to discharge the Receiver and put the parties in possession was treated as a prayer for appointment of the petitioners as Receivers of the properties they claimed possession of and was granted.

Messrs. *K. Ramachandra Iyer* and *T. V. Gopalaswami Mudaliar*, for the Petitioners.

Messrs. *S. Srinivasa Aiyengar* and *G. S. Ramachandra Iyer*, for the Respondents.

ORDER.—The prayers in the petition put in by the 1st defendant (2nd respondent) and by his sons (the 3rd and 4th respondents) are as follows: (*a*) that the petitioners may be placed in possession by the Receiver appointed in the suit of the lands comprised in a list which might be called list A as well as of the ploughing cattle and other agricultural implements relating thereto, and (*b*) that such joint family debts as had been found to be binding on all the members of the family and not in appeal in the High Court might be ordered to be paid out of the family funds in the Court deposit.

This petition is put in under section 15 of the Charter Act and section 94 of the Code of Civil Procedure. I do not think section 15 of the Charter Act has any application. Section 94 of the Civil Procedure Code is very general in its terms. So far as this petition is concerned, it is as follows:—"In order to prevent the ends of justice from being defeated, the Court may, if it is so prescribed.....(*e*) make such other interlocutory order as may appear to the Court to be just and convenient." The word 'prescribed' is defined in section 2 clause 16 as meaning "prescribed by rules." I do not think that the prayers of this petition come under any rules contained in, or passed in accordance with, the Civil Procedure Code. This suit is a suit for partition among three branches of a Hindu family; the suit is now nearly eight years old. The parties have been kept out of the enjoyment of any benefit out of the family property for more than 10 years past. A Receiver has been appointed for the very extensive landed and other properties of the family by the lower Court. During the progress of the suit in the lower Court, three lists were put in and accepted by all parties as effecting a fair division of about half of the family lands into three equal shares. Lots were cast and the properties in the A list fell to the share of the 1st defendant and his sons, (the petitioners in this petition), the C list fell to the share of the 6th defendant (5th respondent), and the B list fell to the share of plaintiff and the 5th defendant (the appellant). See paragraph 40 (*a*) of the Subordinate Judge's judgment. The properties in the B list ($\frac{1}{3}$ share) were to be divided into equal halves as between plaintiff and 5th defendant. Fifth defendant is now dead and his two widows are quarrelling about the division of his 1/6 share.

After this Appeal No. 232 of 1909 was filed in this Court by the deceased, 5th defendant, he seems to have put in an application (Civil Miscellaneous Petition No. 1277 of 1909) in this Court for the continuance of the Receiver appointed by the lower Court till the disposal of the appeal. Notice was given to the parties representing

the other two shares and they raised objections to the petition. The late Mr. Justice Krishnaswami Iyer passed the following order: "I do not think that this is a fit case for a Receiver now. There is no dispute about the shares or the bulk of the properties. I do not think the successful parties should be kept out of enjoyment of their shares. Any re adjustment of the shares if the appeal succeeds must necessarily be small. I dismiss the petition." Now this order of Krishnaswami Iyer, J., is clearly binding upon the parties and myself, so far as it goes. Any orders passed by the lower Court in connection with the Receiver's duties or the rights of the parties cannot prevail against the letter or the spirit of this order of Krishnaswami Iyer, J.

The present petition, as I said before, cannot be said to fall under any specific section or rule of the Civil Procedure Code. Order XL, rules 1 to 4, prescribe the procedure as regards the appointment, duties and remuneration of Receivers and the Court's power to direct the Receiver's properties to be attached and sold when the Receiver makes default in the performance of his duties and such like matters. There is no specific provision made in Order XL for the discharge or removal of a Receiver. There is also no provision in the Code allowing appeals in respect of orders of discharge and removal of Receivers though there is a provision [see Order XLIII, rule 1, clause (*s*)] for an appeal against an order under rule 1 or rule 4 of Order XL, *i.e.*, orders appointing Receivers and orders attaching and selling properties of Receivers and similar orders. See *Janaki Ammal* v. *Narayanaswami Iyer* (1).

Orders discharging or removing Receivers and giving other necessary directions to Receivers must, therefore, come under the general powers of Courts, now expressly mentioned as existing in Courts by section 151 of new Code. In Woodroffe's Book on Receivers, it is said (page 269, section 30):—"The power to terminate flows naturally and as a necessary sequence from the power to create. The power of the Courts to remove or discharge a Receiver whom it has appointed may be exercised at any stage of the litigation. It is a necessary adjunct of the power of appointment and is exercised as an incident to, or consequence of, that power; the authority to call such officer into being necessarily implying the authority to terminate his functions when their exercise is no longer necessary, or to remove the incumbent for an abuse of those functions or for other cause shown" or "because of the necessity of the appointment having ceased to exist." I take it, therefore, that the present petition is put in for the exercise of the inherent powers of the Court, though it does not come under any particular section or rule in the Code. I may, however, suggest that the Procedure Committee might take this matter into consideration and frame rules in respect of the discharge and removal of Receivers and in respect of the powers of the Court to give directions to Receivers when particular contingencies occur. A rule might also be framed that when a Receiver has been appointed by a lower Court in a suit and an appeal is pending from that decree, the Appellate Court might treat the Receiver as appointed by itself and give directions to him in the conduct of his duties. The present petition put in by the owners of one of the three shares in the properties is supported by the owner of another $\frac{1}{3}$ share and also by the owner of one moiety of the remaining $\frac{1}{3}$rd share, that is, the plaintiff, at whose instance the Receiver was originally appointed. Even as regards the owners of the other moiety of the $\frac{1}{3}$rd share, one of the widows who alleges that she owns a share in that moiety supports this petition. It is only the widow who is alleged to be the owner of a very small fractional share that is opposing this petition. One of the objections raised by this small fractional sharer is that this Court as an Appellate Court has no jurisdiction to entertain any objection in connection with the Receiver's duties just now. I cannot uphold this contention. The deceased 5th defendant, under whom this fractional sharer claims, himself treated this Court as competent to pass orders in connection with the receivership as he applied in Civil Miscellaneous Petition No. 2177 of 1909 for an order relating to the receivership and Krishnaswami Iyer, J., passed such an order. Section 107 of the Code (old section 582) gives

(1) 18 M. L. J. 589; 4 M. L. T. 268.

the Appellate Court all the powers of the Court of Original Jurisdiction. The suit and all the matters connected with the litigation are now before this Court and this Court has the power to pass all the necessary and convenient orders. See *Ramanadhan Chetty* v. *Narayanan Chetty* (2); *Sankara Bhatta* v. *Subraya Bhatta* (3) and *Hukam Chand Bold* v. *Kamalanand Singh* (4). The case in *Chenna Reddi* v. *Peddaobi Reddi* (5), overruling *Ramanadhan Chetti* v. *Narayanan Chetty* (6), does not affect the general rule which is expressly approved at the bottom of page 419 in *Chenna Reddi* v. *Peddaobi Reddi* (5). The general rule gives way, of course, when the statute itself provides for orders being passed on applications by the lower Court (as in applications for review) notwithstanding the filing of an appeal, and that is the only ground on which *Ramanadhan Chetti* v. *Narayanan Chetty* (2) was overruled by *Chenna Reddi* v. *Peddaobi Reddi* (5). The preliminary objection is, therefore, overruled.

As Krishnaswami Iyer, J., has remarked, this is not a fit case for the existence of a Receiver, so far as regards the properties about which there is no dispute worth the name and the successful parties should not be kept any longer out of enjoyment of such properties, which have fallen to their respective shares. Any re-adjustment of the shares even if the appeal succeeds must necessarily be small. It is admitted that at least Rs. 40,000 out of the income is in the custody of the Court and that is amply sufficient for any such re-adjustment, as that money along with the respective shares of the parties is security for the carrying out of the small re-adjustments which may be found necessary at the end. The objections of the fractional sharer, who is one of the representatives of the deceased appellant, are most of them frivolous and I overrule them. The prayer in the petition to put the respective sharers in possession of the respective plots in lists A, B and C, after discharging the Receiver from his duties and removing him from possession in respect of those plots, looks as if it was a prayer for execution of a portion of the decree of the lower Court. A prayer for execution cannot be made to the Appellate Court direct. See *Mithibai* v. *Limji Nowroji Banaji* (6). I will, therefore, treat it as a prayer for appointment of first petitioner as Receiver of the lands in list A discharging the existing Receiver so far as those lands are concerned. In the result, I direct that the Receiver be discharged as regards the following lands:

(*a*) Lands in list A except the lands in respect of which objections as to the division are pending in the lower Court and which are referred to in the objection petition put in by the 5th defendant to the lower Court in regard to certain *punja* lands and certain items of *nanja* lands in Nochukudi Village.

(*b*) Lands in list C except those to which objections are pending in the lower Court as above.

The remaining $\frac{1}{3}$rd share in list B, about which the plaintiff and the widows of the 5th defendant are having a triangular quarrel, will continue to remain with the Receiver as also the properties not comprised in the lists A, B and C and the properties excepted out of the lists A, B and C as above. The 6th defendant is appointed Receiver as regards the properties in the C list with the exception already mentioned. The present Receiver will put the new Receivers into possession of the respective properties of which they have been appointed Receivers. He will also put the new Receivers in possession of not less than 75 per cent. in value of the ploughing cattle and other agricultural implements, etc., appurtenant to the A list and C list.

A copy of this order shall be served upon the Receiver by the petitioners. The Receiver and all parties shall be at liberty to apply to this Court as regards the future remuneration of the Receiver after he delivers possession of the properties ordered to be delivered to the new Receivers and all other matters connected with the receivership. They can also apply to the lower Court for payment of moneys out of sums remaining in Court for the discharge of common debts and the lower Court (it must be presumed) will pass the necessary orders on those petitions so far as is allowed by law. There will be no order as to costs of this petition. The party appointed

(2) 27 M. 602; 14 M. L. J. 321.
(3) 30 M. 535; 17 M. L. J. 437.
(4) 33 C. 927; 3 C. L. J. 67.
(5) 32 M. 416; 6 M. L. T. 130; 2 Ind. Cas. 802; 19 M. L. J. 388.

(6) 5 B. 45.

Receiver will enjoy and appropriate the profits, but only after submission of proper quarterly accounts, the first of such accounts to be submitted within one month after taking possession of the property from the present Receiver.

ALLAHABAD HIGH COURT.
FIRST CIVIL APPEAL No. 270 OF 1911.
December 3, 1912.
Present:—Sir Henry Griffin, KT., Judge, and Mr. Justice Chamier.
RAM AUTAR DUBE—DEFENDANT—APPELLANT
versus
BADAL PANDEY AND OTHERS—PLAINTIFFS—RESPONDENTS.

Hindu Law—Widow—Will by widow—Suit by reversioner to set it aside—Cause of action—Declaratory suit.

The plaintiffs, who were the reversionary heirs of one *R.*, sued for a declaration that a Will executed by *M.*, widow of *R.*, was null and void as against them. In the pleadings, the defendant set up a title in the widow wholly inconsistent with the rights of the reversioners:

Held, that the suit was maintainable.

Pirthipal Kunwar v. *Guman Kunwar*, 17 C. 933; 17 I. A. 107, distinguished.

Thakurain Jaipal Kunwar v. *Indar Bahadur Singh*, 26 A. 238; 8 C. W. N. 465; 14 M. L. J. 149; 6 Bom. L. R. 495; 31 I. A. 67, relied upon.

First appeal from a decision of the Subordinate Judge of Gorakhpur, dated the 13th June 1911.

Mr. *Haribans Sahai*, for the Appellant.

Mr. *Iswar Saran*, for the Respondents.

JUDGMENT.—The appeal arises out of a suit brought by the plaintiffs, who alleged themselves to be the reversionary heirs of one Ramlal, for a declaration that a Will executed by *Musammat* Munga, widow of Ramlal, was null and void as against the interests of the reversioners on the ground that *Musammat* Munga had no authority to execute it. The Court below decreed the suit. In appeal, the only ground pressed for our consideration out of the six grounds in the memorandum of appeal is that the plaintiffs had no cause of action for bringing the suit and we are referred to a decision of their Lordships of the Privy Council in *Pirthipal Kunwar* v. *Guman Kunwar* (1). In the later

(1) 17 C. 933; 17 I. A. 107.

case of *Thakurain Jaipal Kunwar* v. *Indar Bahadur Singh* (2), the facts of which are almost on all fours with those of the present case, their Lordships of the Privy Council held that the execution of a Will by a limited owner, such as a Hindu widow, affords, as a general rule, no sufficient reason for granting a declaratory decree. But in the circumstances of the case before them, their Lordships held that they would not interfere with the decision of the Courts below which had been passed in deliberate exercise of the discretion entrusted to them by law. In the pleadings of the present case, the defendant set up a title in the widow wholly inconsistent with the right of the reversioners. Under these circumstances, following the ruling just referred to, we think we should not interfere with the decision of the Court below. We dismiss the appeal with costs.

Appeal dismissed.

(2) 26 A. 238; 8 C. W. N. 465; 14 M. L. J. 149; 6 Bom. L. R. 495; 31 I. A. 67.

MADRAS HIGH COURT.
SECOND CIVIL APPEAL No. 194 OF 1880.
July 14, 1880.
Present:—Mr. Justice Kindersley and Mr. Justice Forbes.
ARUNACHELLA CHETTI—PLAINTIFF—APPELLANT
versus
MUTHU CHETTIAR AND ANOTHER—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act XIV of 1882), s. 539, scope of—Suit against trespasser.

Section 539 of the Civil Procedure Code, 1882, is applicable only in cases of an express or constructive trust created for a public charitable purpose.

The section applies only to a suit *against* a trustee and not to a suit against a trespasser.

Second appeal from the decree of the District Court of South Tanjore, in A. S. No. 291 of 1879, affirming that of the Sub-Court at Kumbakonam, in Original Suit No. 21 of 1879.

Mr. *T. Rama Row*, for the Appellant.

Mr. *A. Ramachandra Aiyar*, for the Respondents.

JUDGMENT.

KINDERSLEY, J—In the present case, the plaintiff, as the person having hereditary right to the mangement of a public charity,

sues a person whom he regards as a trespasser. This is not the case of one of the general public and suing without the authority of the Advocate-General or other officer to secure the due performance of the trust, and, I think, that section 539, Civil Procedure Code, does not apply. The decision of the two lower Courts must be reversed and the suit must be remanded to the Subordinate Courts for decision on the merits.

The costs will be disposed of by the final decree.

FORBES, J.—Section 539 is applicable only in cases of an alleged breach of an express or constructive trust created for a public charitable purpose. The restriction on the right of suing is thus confined to cases where the person sued is a trustee. In the present case, the suit is brought against an alleged trespasser, whose title to manage is denied and who, if he is without title, cannot be guilty of a breach of trust.

CALCUTTA HIGH COURT.
SECOND CIVIL APPEAL No. 1836 OF 1910.
November 27, 1912.
Present:—Mr. Justice Holmwood and Mr. Justice Chapman.
KALI PROSANNA DAS AND OTHERS—PLAINTIFFS—APPELLANTS
versus
BHAGABAN MALI—DEFENDANT—RESPONDENT.

Bengal Tenancy Act (VIII of 1885), *ss.* 105, 109 A, 157—*Record of Rights—Person settled as* raiyat *by trespasser—Recorded as* raiyat *in Record of Right—Settling fair rent—Relationship of landlord and tenant—Whether consent of both parties essential—Decision of Special Judge in s.* 105 *Bengal Tenancy Act case, declining jurisdiction—Decision settling fair rent—Second appeal.*

A person, who is settled on a certain land as a *raiyat* by a trespasser, does thereby become a *raiyat* of some kind, and, therefore, when the *zemindari* is transferred by operation of law from one *zemindar* to another, he remains a *raiyat* on the land; and if he is recorded by the Settlement Authorities in the Record of Rights as a *raiyat* on the land, the *zemindar* is entitled to treat him as a *raiyat* and to ask the Revenue Court to settle a fair rent with him.

Binad Lal Pakrashi v. *Kalu Pramanik*, 20 C. 708 (F. B.), followed.

In order that the relationship of landlord and tenant might be established between two parties, the consent of both parties is not essential under the law in this country, though it may be so under the English law.

A decision by a Special Judge that he had no jurisdiction as a Revenue Court to fix a fair rent in respect of lands held by the defendants, inasmuch as the latter were trespassers, and that the *zemindar's* only remedy was by the institution of a suit, under section 157 of the Bengal Tenancy Act, is not a decision settling rent, and a second appeal from that decision is not barred by section 109A.

Appeal from the decree of the Special Judge of Backergunge, dated April 23rd, 1910, reversing that of the Assistant Settlement Officer of that District, dated September 7th, 1909.

Dr. *Rash Behary Ghose*, Babus *Akhoy Kumar Banerjee* and *Romesh Chandra Sen*, for the Appellants.

Mr. *S. P. Sinha*, Counsel, Babus *Jogesh Chandra Roy*, *Prokash Chandra Majumdar*, for the Respondent.

JUDGMENT.—This is a second appeal from the judgment of the learned Special Judge of Backergunge, in which he held that he had no jurisdiction as a Revenue Court to fix a fair rent in respect of lands held by defendants-respondents in the *zemindari* of the plaintiff-appellant, inasmuch as those tenants were trespassers and the *zemindar's* only remedy was by the institution of a suit under section 157 of the Bengal Tenancy Act, in which suit he can either eject the trespassers or have a fair and equitable rent determined by the Court.

A preliminary objection was raised that there was no second appeal in a case under section 105 where there was a decision settling rent. But it is obvious in this case there was no decision settling rent, that the Special Judge declined jurisdiction, and the only question before us is whether this appeal should be remanded to the lower Appellate Court to be decided on the merits or whether the learned Judge was right in declining jurisdiction.

Now, the appellant bases his appeal on two very clear grounds. The first is that on an application under section 105 of the Bengal Tenancy Act as it stood before the amendment as regards Eastern Bengal in 1908, neither the Assistant Settlement Officer nor the Special Judge had jurisdiction to decide whether the persons who are entered in the Settlement Record as *ryots* are *ryots* or not. He was bound to take the Settlement Record as he found it and if he was asked by a

KALI PROSANNA DAS v. BHAGABAN MALI.

person who showed that he was the *zemindar* of the property which the *ryots* were occupying, he was bound to settle their rent if asked to do so; and in this connection, the case of *Pandab Dowari Das* v. *Ananda Kishun Chakravarti* (1) was cited.

His second point was that assuming that it was open to the learned Special Judge to decide whether the persons who are occupying the land were tenants or not, he was in error in holding that the respondents are trespassers and not *ryots*. For this proposition, the judgment of Mr. Justice Steer in *Nityanund Ghose* v. *Kishen Kishore* (2) was cited to show the distinction between the English and Indian law which has, undoubtedly, subsisted to this day. The decision of Chief Justice Garth in *Surnomoyee* v. *Denonath Gir* (3), following *Lukhee Kanto Dass Chowdhry* v. *Sumeeruddi Lusker* (4) and *Rani Lalun Monee* v. *Sona Monee Dibee* (5), was also cited for the same purpose. The case of *Azim Sirdar* v. *Ram Lall Shaha* (6) was also referred to in which Chief Justice Maclean says that tenancy in this country is created not only by contract but also by occupation in the case of agricultural land. It is true that he says that this principle of law has now been embodied in section 157 of the Bengal Tenancy Act. That, of course, does not mean that every case where tenancy is created by mere occupation must come under that section and that all other legal remedies are shut off from the landlord. The Full Bench ruling in *Binad Lal Pakrashi* v. *Kalu Pramanik* (7) seems conclusive upon that point; even if a person in occupation is settled on the land by a trespasser, such person is a *ryot* and whether he is an occupancy-*ryot* or a non-occupancy *ryot* will depend as usual upon the term for which he has been occupying the land. It is argued by the learned Vakil on the other side that this case can be distinguished because it held that the respondents in that case were non-occupancy *ryots* within the meaning of section 5 (2) of the former Tenancy Act and, therefore, protected from ejectment by that Act. But this part of the decision has, of course, nothing whatever to do with us. The part with which we are concerned is that a person who is settled on a certain land as a *ryot* and tenant by a trespasser does thereby become a *ryot* of some kind, and, therefore, when the *zemindari* is transferred by operation of law from one *zemindar* to another, he remains a *ryot* on the land; and if he is recorded by the Settlement Authorities in the Record of Rights as a *ryot* on the land, the *zemindar* is entitled to treat him as a *ryot* and is, in our opinion, entitled to ask the Revenue Court to settle a fair rent with him. The decision of the Civil Court that the plaintiff was the *zemindar*, was based upon the finding that the land upon which the respondents were settled was within the ambit of the village of Chalitabari and not within the ambit of the village of Delbari Debra as the respondents still allege in the present case. No doubt, the respondents, or at least not all of them, were not parties in that case, but the effect of the declaration of title of the landlord in that case *plus* the entry in the Record of Rights that these respondents are tenants within that *zemindari* concludes the question so far as the jurisdiction of the Settlement Officer is concerned.

That being so, the Special Judge could not enter upon any question except what was a fair rent for these *ryots* to pay, and we are further of opinion, as was argued by the learned Doctor for the appellant, that the learned Judge has clearly fallen into error in that passage in his judgment, where he says that in order that the relationship of landlord and tenant might be established between the parties before him, the consent of both sides is essential. That may be the law in England, but it is not the law in this country; and this really leads to a third and more direct argument which seems to be fatal to the respondent's case, that there was a tenancy by mutual agreement created by the *zemindar* of Delbari Debra while he was in possession of the land in dispute and that the plaintiff merely stepped into the landlord's shoes when the High Court reversed the decision of the lower Appellate Court, so that from whatever point of view the case be looked at, we are of opinion that the Settlement Officer is bound to treat the respondents

(1) 14 C. W. N. 897; 7 Ind. Cas. 102; 12 C. L. J. 195.
(2) (1864) W. R. Gap. No. Act X Ruiings, 82.
(3) 9 C. 908; 13 C. L. R. 69.
(4) 21 W. R. 208; 13 B. L. R. 243 (F. B.).
(5) 22 W. R. 334.
(6) 25 C. 324.
(7) 20 C. 708.

as *ryots* on the land of the plaintiff and to fix a fair rent in respect of their holding.

The judgment and decree of the Special Judge are, therefore, set aside and the case is remanded to the lower Court for decision on the merits.

The respondents will pay costs of the appellant in this appeal.

This judgment will govern the analogous Cases Nos. 2389 to 2430, 2436 and 2445 of 1910.

We assess the hearing fee in this Court at one gold *mohur* in each case. The costs in the lower Courts will abide the result.

Cases remanded.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 10 OF 1887.

August 28, 1888.

Present:—Mr. Justice Muthusami Aiyar and Mr. Justice Wilkinson.

KADAMBI SRINIVASACHARLU—APPELLANT

versus

DURLABHA SUBUDDHI AND OTHERS—RESPONDENTS.

Civil Procedure Code (Act XIV of 1882*), s.* 539, *scope of—Right to sue—Founder's representatives suing for preventing abuse of trust—Suit in ejectment against trespasser by worshipper—Religious endowment—"Interested", meaning of—Adverse possession*—Pujari—*Limitation Act (XV of* 1877*), Sch. II, Arts.* 47, 144.

Section 539 of the Civil Procedure Code, does not repeal or affect the right of a private individual to institute a suit to enforce the proper observance of a religious endowment.

The representatives of a person, who endowed the property for a religious endowment, are entitled to institute proceedings for the purpose of having abuses in the trust rectified.

Where a religious endowment is founded for carrying on the sectional religious worship of the sect of the founder, persons of the same sect and form of worship as the founder are persons interested in the due performance of the religious worship by a duly qualified person and are entitled to ask for the ejectment of an intruder.

The possession or enjoyment of a *Pujari* for the time being cannot become adverse to the worshipper.

In the case of a sale of the endowed property, the possession becomes adverse to a worshipper or the representative of the founder from the date of the sale-deed.

Article 47 of the Limitation Act, 1877, can be no bar to a person who was no party to the criminal proceedings which terminated in the order.

Appeal from the decree of the District Court of Ganjam at Berhampore, in Original Suit No. 20 of 1885.

Mr. *V. Bashyam Aiyangar*, for the Appellant.

Mr. *R. B. Mitchell*, for the Respondents.

JUDGMENT.—The subject-matter of this suit is a *mutt* in the town of Berhampore and the immoveable properties attached thereto.

The said *mutt* was founded in the year 1789 by one Kodra Kusannu Subudhi, a man of the Kodra caste, and of the Chaitanya sect and the idol Brindavana Chandraswami set up therein is worshipped by Uriya people according to the principles of Gowdiya.

The *mutt* is at present in the possession of the 1st defendant Srinivasacharyulu, a Tamil Brahmin from Mysore and a follower of the principles of Ramanuja. He has been in possession since 1873 when he obtained from 2nd defendant, Balabhadra Doss, the then *Pujari* or *Adhikari* or *Archaka* of the *mutt*, a deed of sale conveying all his (Balabhadra's) rights to 1st defendant.

The plaintiffs claim to be entitled to eject 1st defendant and to obtain possession of the *mutt* and its properties in order that they may appoint a proper *Adhikari* and *Pujari* to manage the affairs and conduct the worship of the *mutt* according to Gowdiya principle. They base their claim on three grounds:—(1) on their being the heirs or representatives of the founder of the *mutt*, (2) on their having always exercised the power of appointing the *Adhikari*, and (3) on their being worshippers in the *mutt*. They impeach the alleged sale by 2nd defendant to 1st defendant as fraudulent and invalid, and state that 1st defendant is totally unfit to be the *Pujari* or *Archaka* of the *mutt*.

The 1st defendant relied on his purchase from 2nd defendant, denied that plaintiffs had ever been *Dharmakartas* or managers of the *mutt*, and asserted that he was, according to Hindu Law, perfectly competent to hold the office of *Pujari*, but offered, if the Court thought otherwise, to appoint a person to officiate as such.

The 2nd defendant sided with the plaintiffs.

The District Judge found that the plaintiffs are the descendants of Kusannu Subuddhi, the founder of the *mutt*, but held that there was no reliable evidence to show that the family of the founder ever took any active part in the management of the institution, or in the appointment of the *Pujari*, which office

had descended from *guru* to *chela* without interference on their part until 1868, that at the instigation of the plaintiffs, the newly appointed temple committee then called 2nd defendant who was in charge to account, and, on his refusing to give an account, dismissed him, that thereupon 2nd defendant in January 1871 attorned to the plaintiffs and executed a deed of submission (Exhibit N); that in May of the same year, the actual *Adhikari* or *Archaka* Nandi Keswara Doss returned from Nowgada and resigned his post to his *chela* 2nd defendant, that thereupon 2nd defendant executed or purported to execute a deed of sale in favour of 1st defendant conveying to him the *mutt* and its properties. The Judge held that this sale was invalid and that 1st defendant was unfit to hold the post of *Archaka* or *Pujari* of the *mutt* and was incompetent to appoint an *Archaka* on the ground that plaintiffs have a general interest in the institution as members of the Chaitanya sect as well as a special interest as descendants of the founder. The Judge, therefore, directed them, with the assistance of the *Guru* of the principal Chaitanya *mutt* at Puri, to nominate a duly qualified *bairagi* and accepting their nominee (who has been made 6th respondent) ordered the 1st defendant to make over the *mutt* and its properties to him.

The 1st defendant appeals.

The first ground of appeal is that the plaintiffs having failed to establish the title upon which the suit was based, the Court was bound, without going into the appellant's title, to have dismissed the suit. Admittedly, the suit was not one brought under the provisions of section 539 of the Civil Procedure Code. The plaintiffs did obtain the necessary permission (Exhibits J. & K.) to bring a suit under that section, but appear to have subsequently changed their mind. It is not contended, nor could it, we think, be successfully contended, that section 539 repeals or affects the right of a private individual to institute a suit to enforce the proper observance of a religious endowment. But it is argued that the District Judge, having found that plaintiffs have no direct interest in the trust, the decree, which to all interests and purposes is such a decree as might have been passed had the suit been brought under section 539, is bad. The argument might be valid if the decree could not be supported on other grounds. The suit was not brought under section 539 and the decree, therefore, was not passed under that section.

It is next urged that the suit has not, with reference to the provisions of section 30 of Civil Procedure Code, been instituted on behalf of all the worshippers of the *mutt*. That is conceded. It is then pointed out that in 1876 plaintiffs Nos. 1—3 and others applied to the District Court (Exhibit L) for permission to institute a suit under Act XX of 1863 against the present defendants and that sanction was refused. The suit, therefore, not having been brought under any of the above enactments, but as a mere suit in ejectment on title, and title having been negatived, the suit must, it is argued, fail. Respondents' Counsel argues that plaintiffs, as beneficiaries of the *mutt* which is a public institution, are entitled to maintain the suit, even if this Court should refuse to uphold their right as trustees (see memorandum of objections). The first question, therefore, for determination is whether the suit is maintainable.

The finding of the Judge that plaintiffs have failed to establish their right to, or their exercise of the right to, manage the affairs of the *mutt* and to appoint the *Archaka*, is in accordance with the evidence. But as pointed above, the plaintiffs base their claim to succeed on three different grounds. They first set forth their right to interfere as being the heirs and representatives of the original founder of the *mutt*. It has been found that they are so and no objection has been taken to the finding. It has been held by the Calcutta High Court in *Brojomohun Doss* v. *Hurrolall Doss* (1) that the representatives of the person who endowed the property are the persons who are entitled to institute proceedings for the purpose of having abuses in the trust rectified. We are, therefore, of opinion that the Judge rightly held that as representatives of the founder plaintiffs were entitled to maintain the suit. Another and third ground on which plaintiffs based their claim was that they were worshippers in the *mutt*. It was held by this Court in *Fakurdin Sahib* v. *Ackeni Sahib* (2) that apart from any pecuniary interest they might have in the

(1) 5 C. 700.
(2) 2 M. 197.

income of the institution, the plaintiffs as resident Muhammadans (the suit was for the removal of defendants from the management of a *durgah*) were sufficiently interested therein to entitle them to maintain the suit. No doubt, as mere worshippers, the plaintiffs would not be entitled to possession but the object of the suit is not actual possession but the appointment of a proper *Archaka* and the management of the institution according to Gowdiya principles. The plaintiffs in their plaint pray "for such other relief as the Court may think proper having regard to the facts of the case in order to carry out the wishes of the founder". Now what are the undisputed facts of the case? The *mutt* was founded by a member of the Chaitanya sect and the idol consecrated therein is one worshipped by Urya people according to Gowdiya principles. After the institution had been managed for 84 years in accordance with the intention of the founder, a foreigner, a man of a different sect and religious persuasion, who is unable to perform religious services for the Chaitanya sect, suddenly through the illegal act of the *Archaka* for the time being, obtains possession. As persons interested in the due performance of religious worship by a duly qualified person, the plaintiffs come forward and ask for the ejectment of the intruder. They have made out that part of the case and in our judgment were entitled to maintain the suit and the Judge was justified in passing the decree he did.

In the second place, it is urged that the suit is barred by limitation. If, it is said, plaintiffs are, as they represent, trustees, the possession of 2nd defendant under whom 1st defendant claims became hostile to plaintiffs on the 16th May 1871 and the suit is out of time. If, it is further argued, plaintiffs are not trustees, the suit is barred by Article 47, Schedule II of the Limitation Act.

In our judgment, the plaintiffs' suit is not barred either by adverse possession or by Article 47. The *mutt* being one founded for the benefit of the Chaitanya sect, the possession or enjoyment of the *Pujari* for the time being cannot become adverse to the worshipper. The renunciation by Nandikeswar Doss, on 16th May 1871, of his office as *Pujari* in favour of his *chela*, 2nd defendant, created in 2nd defendant no title or possession adverse to the worshippers of Brindavana Chandraswami. The deed of relinquishment (Exhibit XVII) itself recognises the fact that the endowment was given, not for the benefit of the manager for the time being, but for the use of the *mutt*. Accepting the principle laid down in *Kannan* v. *Nilakanta* (3) to which we have been referred, although the facts are not on all fours with the present case, the plaintiffs' suit is not barred by Article 144, Schedule II of the Limitation Act, because the suit was brought within 12 years from the date of the sale-deed by 2nd defendant to 1st defendant, and from that time alone was possession adverse to a worshipper of the Chaitanya sect or the representative of the founder.

Article 47 also is not a bar. Subsequent to the alleged sale by the 2nd defendant, he, during the absence of the 1st defendant, re-entered and took forcible possession of the *mutt*. He was prosecuted, found guilty of house-breaking and etc, and sentenced to imprisonment in January 1874. On the 6th February 1874, the Magistrate, who tried the case, ordered possession to be given to 1st defendant. The order was passed under section 534, Act X of 1872 (corresponding to section 522 of the present Code). The plaintiffs were no parties to the criminal proceedings which terminated in the said order, nor can it be said that they claim under the 2nd defendant so that Article 47 has no application.

The appeal fails and is dismissed with costs.

Appeal dismissed.

(3) 7 M. 337.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 554 OF 1912.

November 14, 1912.

Present:—Justice Sir Henry Griffin.

GOPAL DAS—PLAINTIFF—APPELLANT

versus

CHEDI LAL—DEFENDANT—RESPONDENT.

Limitation Act (IX of 1908), Sch. I, Arts. 11 (a), 12 applicability of—Sale of third person's interest after discharge of decree.

GOPAL DAS *v.* CHEDI LAL.

In execution of a decree of *A.* against *B.*, *C.*, a nephew of *A.*, purchased a house on the 22nd September 1908. Three days before the auction-sale, *B.* had sold another house to *A.*, the decree-holder, the consideration of which had been set off against the decretal amount. When the auction-purchaser attempted to get possession, he was resisted by one *D.*, grandson of *B.* *D.*'s objection was disallowed on the 26th of February 1910. *D.* then brought a suit to set aside the auction-sale, so far as his interest was concerned, on the 26th of April 1910:

Held, that the suit was governed by Article 11 (*a*) of the Limitation Act and that it was not barred by limitation.

Second appeal from the decision of the Subordinate Judge of Aligarh, dated 26th March 1912.

Mr. *Durga Charan Banerji* (with him Messrs. *Haribans Sahai* and *G. L. Agarwala*), for the Appellant.

Mr. *Benoy Kumar Mukerji*, for the Respondent.

JUDGMENT.—This appeal arises out of a suit to have it declared that the sale of a certain house held in execution of a decree was null and void, so far as the plaintiff's interest in the house was concerned. Gopal Das, the plaintiff, is the grandson of one Parbhu Lal against whom one Budhsen held a decree. In execution of that decree, a house was sold and purchased by Chedi Lal, respondent in this Court. The date of the auction-sale was the 22nd of September 1908. But on the 19th of September, the judgment-debtor, Parbhu Lal, had sold another house to the decree-holder and in the sale-deed, the decretal amount was set off against part of the consideration. Thus on the date of the sale, the decree had already been satisfied, although satisfaction was not certified to the Court executing the decree. When Chedi Lal sought possession of the house, he was resisted by the plaintiff. The latter's objection was disallowed by the Court on the 26th of February 1910. The present suit was instituted on the 26th of April of the same year. The plaintiff alleged in paragraph 2 of the plaint that the western portion of the house which had been sold was the joint property of the plaintiff, of his two brothers who are defendants second party and of Parbhu Lal. This paragraph of the plaint was admitted in the written statement. Several defences were raised, including one of limitation. The Court of first instance held that the Article applicable was 11 (*a*) of the Limitation Act and, therefore, the suit was within time and that the sale had been held fraudulently, decree-holder and the judgment-debtor being in collusion. The lower Appellate Court, while holding that the decree had already been satisfied before the sale, was unable to hold that there had been fraud or collusion or anything wrong with the sale held, although the sale-deed had been executed only three days before the auction-sale took place and although the auction-purchaser was the nephew of the decree-holder. The Court below, disagreeing with the Court of first instance, held that Article 12 of the Limitation Act was applicable to the case and that the suit was barred. The learned Subordinate Judge further appears to be of opinion that the plaintiff had failed to prove any title to the house. He apparently overlooked the fact that the plaintiff's title was not questioned. On appeal to this Court, it was contended on behalf of the plaintiff-appellant that the Court below was wrong on the question of limitation. In my opinion, the Court of first instance correctly applied the provisions of Article 11 (*a*) to this case. It is not necessary to construe strictly the terms of the plaint. It is apparent what the plaintiff sought was to establish his right to the house and to have the sale set aside so far as it affected his rights. I agree with the Court of first instance that the suit is not barred. While I find some difficulty in following the reasoning of the Court below which holds that the sale was not fraudulent or collusive, I find quite as much difficulty in following the argument now advanced in support of the decision of the Court below that the appellant was bound to discharge the debt of his grandfather. There was no question in the trial of the case as to the pious obligation on a Hindu son to discharge the debt of his father or grandfather. It is only a matter of common sense that no one should be made to pay a debt which has already been discharged. This is what has happened in this case. Plaintiff's share in the house has been sold to satisfy a decree. It has been shown to the satisfaction of both Courts that the decree, in execution of which the house in question was sold, had been satisfied before the auction-sale took place. I allow this appeal, set aside the decree of the lower Appellate Court and restore that of the Court

of first instance with costs including in this Court fees on the higher scale.

Appeal allowed.

MADRAS HIGH COURT.

LETTERS PATENT APPEAL No. 53 OF 1912.

October 15, 1912.

Present:—Mr. Justice Sundara Aiyar and Mr. Justice Sadasiva Aiyar.

Sree Rajah VENKATRAGAYYA APPA ROW BAHADUR ZEMINDAR GARU—APPELLANT

versus

MURALA SRIRAMULU AND OTHERS—RESPONDENTS.

Limitation Act (IX of 1908*), s.* 14—*"Civil proceeding in a Court of Appeal"—Whether includes revision petition to the High Court—Plaint returned for presentation to proper Court—Appeal against order—Confirmation of original order by Appellate Court—Revision to High Court—Limitation.*

A revision petition presented to the High Court under section 622, Civil Procedure Code, 1882, is a "Civil proceeding in a Court of Appeal" within the meaning of section 14 of the Limitation Act.

The expression 'Court of Appeal' in section 14 should be understood in the broad sense of a Court which has the power to bring under review the decision of an inferior Court, whatever may be the extent of jurisdiction that the superior Court may possess in reviewing the decision of the inferior Court.

A plaint was returned for presentation to the proper Court; the plaintiff, having unsuccessfully appealed against that order, moved the High Court in revision under section 622, Civil Procedure Code (Act XIV of 1882), and the High Court dismissed the revision petition :

Held, that plaintiff was entitled to deduct the time during which the revision petition in the High Court was pending in computing the period of limitation for his suit.

Chappan v. *Moidin Kutti*, 22 M. 68, referred to.

Subramania Pillay v. *Sethai Ammal*, (1911) 2 M. W. N. 198; 10 M. L. T. 260; 12 Ind. Cas. 38, distinguished.

Seth Mulchand v. *Seth Samir Mal*, A. W. N. (1882) 59, approved.

Appeal, under section 15 of the Letters Patent, against the judgment of the Hon'ble Mr. Justice Ayling, dated 14th March 1912, in C. R. P. No. 709 of 1910, preferred against that of the Subordinate Judge of Ellore, in S. C. S. No. 138 of 1910. See 14 Ind. Cas. 259.

Mr. *V. Ramesam*, for the Appellant.

Mr. *T. Prakasam*, for the Respondents.

JUDGMENT.—The question in this case is whether the plaintiff's suit is barred by limitation. The suit has been treated as one for rent. The plaintiff instituted the suit at first in the District Munsif's Court of Gudivada on the regular side and it was returned to the plaintiff for presentation to the proper Court on the ground that the suit was one cognizable by a Small Cause Court. The plaintiff did not accept the view taken by the Munsif on the question of jurisdiction, but appealed against it to the District Court, and, on that Court confirming the Munsif's view, he put in a revision petition under section 622 of the repealed Civil Procedure Code to the High Court. The High Court refused to interfere on the ground that there was no question of jurisdiction involved in the petition. If the period occupied by the plaintiff in prosecuting his suit, appeal and revision petition in the Munsif's Court, the District Court and the High Court respectively, be deducted in computing the period of limitation, this suit would admittedly be within time. The Subordinate Judge and the learned Judge of this Court, before whom the civil revision petition came on for hearing, have both held that, although the time taken up by the suit and the appeal should be deducted, the period during which plaintiff was prosecuting his civil revision petition in the High Court could not be deducted. After giving our best consideration to the case we are unable to agree with the view taken by Ayling, J. The wording of section 14 runs thus:—

"In computing the period of limitation prescribed for any suit, the time during which the plaintiff has been prosecuting, with due diligence, another civil proceeding whether in a Court of first instance or in a Court of Appeal against the defendant, shall be excluded." The exclusion, according to the section, relates to the time during which the plaintiff has been prosecuting "another civil proceeding in a Court of Appeal." The language of the Legislature is not that the time occupied in prosecuting an 'appeal' may be deducted, but the time occupied in prosecuting any "civil proceeding in a Court of Appeal." We see no reason why a revision petition in the High Court should not be regarded as a "Civil proceeding in a

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Court of Appeal." We think that the expression "Court of Appeal" should be taken as being used in the broad sense of any Court which has the power to bring under review the decision of an inferior Court, whatever may be the extent of jurisdiction that the superior Court may possess in reviewing the decision of the inferior Court. There is no reason for supposing that the mischief of the statute does not extend to cases where the plaintiff was *bona fide* prosecuting a civil revision petition instead of an appeal. See the explanation of the term 'appeal' in *Chappan* v. *Moidin Kutti* (1). Mr. Prakasam has relied on *Subramania Pillai* v. *Seethai Ammal* (2). There, the question was whether a revision petition could be regarded as an appeal within the meaning of Article 182 of the Limitation Act. The third column of the Article deals separately with an appeal, a review and an application for amendment. It may be that a petition for revision would not be included within the meaning of the word 'appeal' in that clause; but we do not think that that decision shows that the expression "Court of Appeal" in section 14 would exclude a Court of Revision. We have already referred to the fact that what is spoken of in section 14 is not an 'appeal' but 'any judicial proceeding in a Court of Appeal.' Our view would seem to be in accordance with that which was taken by the Allahabad High Court in *Seth Mulchand* v. *Seth Samir Mal* (3), but we have not been able to see that case. There is no reason for holding in this case that the revision petition was not prosecuted in good faith. The plaintiff's mere discontent with the opinions of two Courts is not a reason for believing that he did not prosecute his revision petition in good faith. We must, therefore, hold that the suit is not barred by limitation. We set aside the order of Ayling, J., and the decree of the Subordinate Judge and remand the suit to the Court of the Subordinate Judge for disposal on the merits according to law. The costs in this Court in this appeal and the petition before Ayling, J., will abide the result.

Order reversed.

(1) 22 M. 68.

(2) (1911) 2 M. W. N. 198; 10 M. L. T. 260; 12 Ind. Cas. 38.

(3) A. W. N. (1882) 59.

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL No. 267 OF 1911.

November 13, 1912.

Present:—Sir Henry Richards, KT., Chief Justice, and Mr. Justice Tudball.

ZALIM SINGH AND OTHERS—DEFENDANTS—APPELLANTS

versus

Musammat RADHA BAI—PLAINTIFF—RESPONDENT.

Pre-emption—Wajib-ul-arz—*Evidentiary value of* wajib-ul-arz—*Custom or contract.*

In pre-emption cases, the *wajib-ul-arz* is, no doubt, evidence and, in some cases, evidence of great importance. But the existence or non-existence of a custom of pre-emption does not and cannot depend upon the construction of a *wajib-ul-arz.* The *wajib-ul-arz* is to be taken into consideration by the Court and carefully considered; but there is no class of evidence which varies so much in its importance as does a *wajib-ul-arz.*

First appeal from the decision of the Subordinate Judge of Jhansi, dated the 8th of July 1911.

The Hon'ble Dr. *Sundar Lal* (with him Dr. *Tej Bahadur Sapru*), for the Appellants.

Mr. *Sital Prashad Ghose* (with him Mr. *Shankar Sahai*), for the Respondents.

JUDGMENT.—This appeal arises out of a suit for pre-emption. The pre-emptor is a Marwari lady, that is to say, she belongs to the money-lending caste. The vendors are *Kurmis* and the vendee is also a *Kurmi.* It is true that the vendee was not, strictly speaking, a co-sharer but he was a resident of the village and a fellow caste man of the vendors and he was already in possession of 41 *bighas* odd which had been mortgaged to him by another co-sharer under a mortgage, dated the 21st of June 1903. This mortgage was in part a simple mortgage and in part a mortgage with possession. It is further noteworthy that the mortgagor was a brother of the pre-emptor in the present case. The question, of course, in this case is whether or not a custom of pre-emption prevailed in the village, under which the plaintiff was entitled to pre-empt the property, the subject matter of the suit. The *onus*, of course, lay on the plaintiff. In support of the existence of the alleged custom, the plaintiff adduced in evidence the *wajib-ul-arz* of 1869-70. The learned Pleader for the plaintiff-respondent has admitted that this is the only evidence his client was able to adduce.

In a case of pre-emption, the *wajib-ul-arz* is, no doubt, evidence and in some cases evidence

of great importance. But we wish to point out that, in our opinion, the existence or non-existence of a custom of pre-emption does not and cannot depend upon the construction of a *wajib-ul-arz*. The *wajib-ul-arz* is to be taken into consideration by the Court and carefully considered but, as stated by their Lordships of the Privy Council, there is no class of evidence, which varies so much in its importance. The *wajib-ul-arz* commences with the following preamble:—"We, Peare Lal Jhumari and Devi Das *Lambardars* and Narainjit and other *pattidars* of the *Mauza* Chandora, have embodied in sections the *practices* and *customs* which have been prevailing in the village till now, and the agreements and contracts which we have now made with respect to our mutual affairs and the rights of the tenants of the village admitted in a subsequent writing and present them before you."

It may be noted here that the *wajib-ul-arz* was dealing with not only existing customs and practice but agreements and contracts for the future. As pointed out by the learned Judge, section 1 of the *wajib-ul-arz* shows that there were four *thoks* in the *mauza*, two *thoks* belonging to *Kurmis*, one to Muhammadans and one to *Lodhis*. It would appear that at the time of the Settlement, the ownership of the Muhammadan *thok* had passed into the hands of Jhumari *Bania*. It would also appear that one of the *Kurmi thoks* and the *Lodhi thok* had passed into the hands of Marwaris.

We now come to the clause dealing with pre-emption. The clause is as follows:—If any sharer desires to sell his share, the near *bhai bhatija* will get first, if there be no near *bhai bhatija*, then the share might be offered to *Lambardars* and *pattidars*, (of the *patti*), in case of their refusal, to the sharers of other *pattis*. The biggest *patti* in the *mauza* is that of Devi Das for it consists of eight annas, for the purposes of pre-emption, this *patti* has got the preferential right. If a share in the *patti* of Peare Lal or Jhumari Baqqal, *Lambardar*, be sold, and if the *pattidars* of the *patti* concerned do not pre-empt it, then the *patti* of Devi Das will have the preferential right and the *pattidars* of the *patti* of Peare Lal will have the next right, as this *patti* is the ancestral property of the sharers and the *patti* of Jhumari is smaller in comparison with that of Devi Das and non-ancestral in comparison with that of Peare Lal, for this reason the pre-emptive right of the *patti* of Jhumari is inferior to that of the *pattis* of Devi Das and Peare Lal. After the sharers of the entire *mauza* have refused to purchase the share, the vendor would be at liberty to sell and mortgage it to any body he likes. In case, a sharer mortgages or leases his share, it shall also be subject to the right of pre-emption in the same way "as in the case of a sale".

It will at once be noticed that this pre-emptive clause is, in many respects, peculiar. Devi Das, who certainly was not an original owner in the *mauza*, had become the owner of an 8-annas share. He was evidently a more or less influential man and he is given a preferential right over the owners of other *pattis*. It also extends the right of pre-emption to mortgages and even leases. It further appears that in the *wajib-ul-arz*, as originally framed, there was a further condition which was as follows:—"And the condition is that the share can be sold for the amount extending to six times the amount of the rent-roll. If any sharer of the *mauza* be not willing to purchase up to this value, then the vendor would be at liberty to sell the share for any sum exceeding it to the sharers of other villages." This clause, it would appear, was by resolution of the Government ten years later struck out in the Collector's copy although it remained intact in the Tahsil copy. It seems to us that there are many things to suggest that this reference to pre-emption was a reference either to contract or agreement between the co-sharers or perhaps one might almost go so far as to say that it was a record of what Devi Das wished to prevail in the village. It seems to us that the original constitution of the village in itself rendered the growing of such a custom of pre-emption as is recorded in the *wajib-ul-arz* extremely improbable. The *mauza* belonged in part to *Kurmis*, in part to Muhammadans and in part to *Lodhis*. It is not, of course, impossible that a custom might exist between proprietors of these different castes but we think it is not very probable.

On the whole, we think that the evidence afforded by the *wajib ul-arz*, even if it stood uncontradicted by any other evidence, would be very weak. There was, however, a

considerable amount of evidence adduced by the defendants against the alleged custom of pre-emption. One document that was put in evidence was an extract from the deposition of the *patwari* which was filed with a Settlement Record and is dated the 26th of June 1868. This document will be found at page 4 of the appellant's book. A number of questions are set forth as having been put to the *patwari* at the time of the Settlement. He was asked, among other things, in what year and with whom the prior Settlement was made and whether the property was ancestral or self-acquired. His answer shows that the previous Settlement was made in *Sambat* 1898, equivalent to the year 1841 A. D., that 8-annas was settled with one Ram Kishen, a Marwari, 4-annas with Bhagwan *Kurmi* and 4-annas with Makund *Kurmi*. He also shows that there was only one out of the 3 *pattis* remaining with the original owners, the remaining 12 annas having passed into the hands of strangers. He is then asked about the sales, transfers and mortgages that had taken place and a considerable number are set forth, several of which must have been made in favour of strangers. In our opinion, these answers of the *patwari* go a considerable way in disproving that any custom of pre-emption was in existence prior to the year 1868. Jagannath, a *Kurmi* resident of the village, gave evidence His father was an old co-sharer in the village. He speaks of many transfers to strangers. It is said that he was a partial witness and had had litigation with the plaintiff. No doubt, he was speaking of matters which occurred a considerable time ago but his evidence is corroborated in many respects not only by the extracts from the deposition of the *patwari* but also by documents in the case.

The defendants, however, did not stop short with the evidence relating to what had happened in the village prior to the year 1868. They gave in evidence no less than five mortgages and five sales, the dates of which extend from the year 1876 down to the year 1906. These mortgages and sales were all in favour of strangers. It is said that the mortgages were simple mortgages and they, therefore, gave no occasion for a claim by the plaintiff or other co-sharers to exercise the rights of pre-emption. We do not think that this argument can be much relied upon. In the first place, the *wajib-ul-arz*, which, as already stated, is the only evidence upon which the plaintiff can rely, expressly says that pre emption shall extend to the case of mortgage, and the word used is quite as appropriate to a simple mortgage as to a mortgage with possession. Moreover, one of the mortgages, namely, that of the 21st of June 1903, was to a very substantial extent a mortgage with possession and, of course, in the case of sales, the argument is of no weight whatever. As against these instances of sales to strangers, the plaintiff was apparently unable to give evidence of a single case in which the right of pre-emption was claimed or exercised or even of sales to co-sharers. Indeed it is probable that there were many other mortgages to strangers besides those adduced in evidence by the defendants: for example, we find in the sale-deed of the 6th of September 1904, which will be found at page 22 of the appellant's book, that the sale was made with a view to discharging five mortgages, four of which were made in favour of strangers.

The learned Subordinate Judge seems to have lost sight of this evidence. He says at page 14:—"It is also contended on behalf of the plaintiff that the sales relied upon by the defendants referred to either sharers or their relations. In a case or two if the right of pre-emption is not asserted for certain reasons, it does not extinguish the custom of pre-emption. When a custom of pre-emption is embodied in the *wajib-ul-arz* and the pre-emptor is a sharer of annas 12 in the *mauza*, there is no reason why his pre-emptive right should not be enforced." It is a little uncertain whether the learned Judge intends in these few lines to mention the contention, which was being urged on behalf of the plaintiff, or to give his own reasons for deciding against the defendant. We, however, think that if he intended this to be a reference to the evidence of the defendants, he hardly gave it the amount of consideration which it deserved. He concludes by saying:—"The current of decisions appears in favour of the plaintiff and I hold that the *wajib-ul-arz* of *Mauza* Chandora records a custom of pre-emption and that the custom of pre-emption obtains in the *mouza*" We have no hesitation in saying that no custom of pre-emption is shown by the plaintiff to have

prevailed in the village and we accordingly allow the appeal, set aside the decree of the learned Judge and dismiss the plaintiff's suit with costs in all Courts including in this Court fees on the higher scale.

Appeal allowed.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1339 OF 1911.

October 23, 1912.

Present:—Mr. Justice Sundara Aiyar and Mr. Justice Sadasiva Aiyar.

NEELAM TIRUPATHIRAYUDU NAIDU GARU AND OTHERS—DEFENDANTS—APPELLANTS

versus

VINJAMURI LAKSHMINARASAMMA—PLAINTIFF—RESPONDENT.

Trust—Investment—Unauthorisd securities—Damages—Trusts Act (II of 1882), ss. 15, 20, 23—Liability for interest—Minor's monies.

Trust monies payable to a minor are monies which cannot be applied for the purposes of the trust "at an early date" as the trustees cannot pay the money until the minor has attained majority. And even as regards money capable of being so applied at an early date, if the trustee takes the responsibility of keeping the money in investment for a long time, he is bound to make the investment in accordance with his obligation as trustee.

In the investment of trust money, a trustee is bound to comply with the provisions of section 20 of the Trusts Act, which regulates the mode in which a trustee is to make investments and such regulation is not controlled by the general provisions of section 15.

A trustee is guilty of breach of trust if he invests the money otherwise than in accordance with the provisions of the section, however well-intentioned and honest his act may have been.

The measure of prudence required of a trustee by section 15 must be regulated by any specific provisions applicable to special matters found in the other sections of the Act.

Clause 2 of section 15 must be read with other sections and does not apply where the trustee has committed a breach of trust as by acting contrary to section 20 of the Act. The broad terms of section 23, that a trustee is liable to make good the loss when he commits a breach of trust, are not controlled by section 15. The Indian Courts have not been given the powers conferred on English Courts by successive English Statutes of relieving honest trustees from their liability for breach of trust.

Where a trustee invests money in an unauthorised security, it must be treated as tantamount to failure to invest under clause (*e*) of section 23 and he is liable for interest on the money lost.

Speight v. *Gaunt*, 22 Ch. D. 727; 51 L. J. Ch. 715; *Leeroyd* v. *Whiteley*, 12 A. C. 77, referred to.

Second appeal against the decree of the District Court of Godavari at Rajahmundry, in Appeal Suit No. 15 of 1908, preferred against that of the Court of the Subordinate Judge of Cocanada, in Original Suit No. 7 of 1907.

Messrs. *T. R. Ramachandra Iyer* and *R. V. Seshagiri Row*, for the Appellants.

Mr. *P. Somasundaram* for Mr. *P. Narayanamurthy*, for the Respondent.

JUDGMENT.—The question for decision, in this second appeal, is whether the defendants have been rightly held liable by the District Judge for the damages caused to the plaintiff in consequence of the investment of the money, drawn by them from the Oriental Life Insurance Company as trustees under the Will of one Appalacharlu, with the late Messrs. Arbuthnot and Co. In consequence of the failure of Messrs. Arbuthnot and Co., most of the investment was lost and the plaintiff, who was appointed by the Court as trustee in the place of the defendants, seeks to recover from them the amount lost with interest. According to the provisions of the Will, the trustees, after realising the amount of the insurance, were to pay Rs. 200 to the testator's brother, Rs. 400 to his daughter for her bride's jewels and the remainder to his minor son. The first sum of Rs. 200 was paid to the brother by the trustees. The remaining amount was invested by them with Messrs. Arbuthnot and Co. in 1902 on fixed deposit for a period of one year. The deposit was renewed on each occasion that it fell due before the failure of the firm. The defendants handed over the deposit receipt to the plaintiff on the 19th October 1906; but before the deposit matured again, the firm failed.

Mr. T. R. Ramachandra Iyer, the learned Vakil for the appellants, has argued two contentions before us. The first is that this is not a case where the trust money could not be "applied immediately or at an early date" within the meaning of section 20 of the Indian Trusts Act and that the trustees were not, therefore, bound to invest it on any of the securities enjoined by that section and that they were, therefore, bound only to act as

directed by section 15 of the Act, that is, "to deal with the trust property as carefully as a man of ordinary prudence would deal with such property if it were his own." The second contention is that as they acted with ordinary prudence, the provisions of the latter part of section 15 must be applied that "a trustee so dealing (that is, with ordinary prudence) is not responsible for the loss, destruction or deterioration of the trust property." The first contention cannot be upheld. With respect to the amount payable to the minor, the money could not be applied for the purposes of the trust at an early date as the trustees could not pay the money until the attainment of his majority. It is impossible to hold that they could discharge themselves by payment to the minor's natural guardian who was his mother. They took the place of the guardian so far as the protection of this money was concerned and could not lawfully make payment either to the infant or to the guardian. See Perry on Trusts, Volume II, section 624 and section 41 of the Trusts Act, which expressly authorises the trustee for a minor to "pay to the guardian (if any) of such minor, or, otherwise apply for or towards his maintenance or education or advancement in life, or the reasonable expenses of his religious worship, marriage or funeral, the whole or any part of the income to which he may be entitled in respect of such property." With respect to the sum of Rs. 400 payable to the testator's daughter, the money might perhaps be regarded as capable of being applied at an early date, but the trustees refused to make payment when demanded by the daughter's guardian; and having taken the responsibility of keeping the money in investment for a long time, they were bound to make the investment in accordance with their obligations as trustees. It is contended that section 15 of the Trusts Act lays down the paramount rule applicable to all dealings of trustees with trust property and controls all other special provisions in the Act including section 20, regulating the mode in which they should make investments; and as Messrs. Arbuthnot and Co., had such a high reputation for credit and solvency that any man of ordinary prudence would consider it safe to invest his money with them, there was no obligation to make the investment in one of the securities mentioned in section 20. This contention it is impossible to accept. The specific provisions contained in the other sections of the Act are as obligatory as the general provisions in section 15. The measure of prudence required of a trustee by section 15 must be regulated by any specific provisions applicable to special matters found in the other sections of the Act. There can be no doubt that the defendants were bound to comply with the provisions of section 20 and having failed to do so, they must be held to have committed a breach of trust, although there can be no reason to doubt that they acted honestly and with the prudence which an ordinary man would exercise in the conduct of his own affairs and that they were influenced merely by a desire to secure for the minor a higher rate of interest than could have been obtained by resorting to some of the other modes of investment sanctioned by section 20. In *In re Speight*: *Speight* v. *Gaunt* (1), Bacon, V. C., observed: "That Gaunt was full of friendly and kindly intentions towards the family of the testator, I have no doubt; and that he did his best to promote their interest preceding the 24th of February, I have no doubt. Most perfectly honest intentions alone regulated his conduct ..... but that does not help me to the solution of this question in the slightest degree. It becomes now, after the facts I have mentioned, a question of law only. The law on the subject is, and has been for centuries, too clear to admit of the possibility of doubt, and neither under Lord St. Leonard's Act, nor in any of the cases in which the Court has found excuses for trustees, and on some occasions has been able to relieve them from the burden which was sought to be cast upon them, has the Court lost sight of the plain principle that a trustee, who takes another man's money into his hands, is bound, whatever other duties he may have to discharge, to take care that that shall be preserved, and not to deal with it or to do anything with it which a prudent and reasonable man would not do with his own money. That is the test which is properly to be applied to this and to all such like cases." This observation was in no

(1) (1883) 22 Ch. D. 727; 51 L. J. Ch. 715.

way dissented from by the Court of Appeal, Jessel, M. R. only objecting to the trustee being required to take greater precautions than a prudent man of business should and dissenting from Bacon, V. C. only in so far as that learned Judge observed that resort to a broker for purposes of investment was not justified. In *Leoroyd* v. *Whiteley* (2), Lord Watson observed: "As a general rule, the law requires of a trustee no higher degree of diligence in the execution of his office than a man of ordinary prudence would exercise in the management of his own private affairs. Yet he is not allowed the same discretion in investing the monies of the trust as if he were a person *sui juris* dealing with his own estate. Business men of ordinary prudence may, and frequently do, select investments which are more or less of a speculative character but it is the duty of a trustee to confine himself to the class of investments which are permitted by the trust, and likewise to avoid all investments of that class which are attended with hazard. So long as he acts in honest observance of these limitations, the general rule already stated will apply".

The next question is, whether the defendants can be relieved from the consequences of their breach of trust by anything which can be found in section 15 of the Trusts Act. Their contention is that the clause in section 15 that a trustee acting with prudence is not responsible for the loss, destruction or deterioration of the trust property, would permit the Court in a proper case not to award damages to the beneficiary caused by a breach of trust. This is clearly not the meaning of the section. Chapter III of the Trusts Act treats of the "duties and liabilities of trustees." The various duties of trustees are laid down in sections 11 to 22. Sections 23 to 30 deal with their liabilities in cases of violations of trusts. It cannot be held that provisions in section 15, exempting trustees from responsibility where they have acted with prudence, is intended to exonerate them where by not acting with prudence they have committed a breach of trust. The meaning of the 2nd clause of the section is that where a trustee has acted with prudence, he could not be held to be guilty of breach of trust. But this rule must be applied in conjunction with the other sections which regulate the measure of prudence required in particular cases. Section 23 lays down in broad terms that "where the trustee commits a breach of trust, he is liable to make good the loss which the trust property or the beneficiary has thereby sustained." This statement is followed by certain exceptions to the rule. It is impossible to hold that section 23 can be controlled by interpreting section 15 in such a manner as to exempt a trustee from liability for damages on the ground that he has acted with ordinary prudence. If this were the intention of the Legislature, it would, undoubtedly, have stated so by laying down a rule of liability far less comprehensive than that enacted in section 23. The Indian Trusts Act was closely modelled on the English Law of Trusts. There was no power in the English Courts to save a trustee from the consequences of his breach of trust when the Indian Act was passed. Thus Bacon, V. C., felt bound to award damages against the trustee in *In re Speight: Speight* v. *Gaunt* (1), already referred to, although he held the trustee free from all blame. In England, several statutes have been subsequently enacted to relieve trustees in cases where loss accrues to the estate in consequence of their acts. See sections 8 and 9 of the Trustee Act of 1893. Section 3 of the Trustee Act of 1896 gave relief to the whole extent that Mr. Ramachandra Iyer desires that a trustee should have. It says:—"If it appears to the Court that a trustee whether appointed under this Act or not, is or may be personally liable for any breach of trust, whether the transaction alleged to be a breach of trust occurred before or after the passing of this Act, but has acted honestly and reasonably and ought fairly to be excused for the breach of trust and for omitting to obtain the directions of the Court in the matter in which he committed such breach, then the Court may relieve the trustee either wholly or partly from personal liability for the same." Unfortunately, the Indian Courts have not been given the power to protect trustees in any case when a clear breach of trust has been committed. The ordinary principle must, therefore, apply that when an injury has been caused to the beneficiary by an act done by the trustee in violation of his duty,

(2) (1887) 12 A. C. 77.

he is entitled to claim from him the damages he has sustained by his breach of trust. The District Judge's opinion that the defendants are liable for the re-payment of the amount lost by the failure of Messrs. Arbuthnot and Company must, therefore, be upheld. The only remaining point is whether the award of interest by the District Judge on the amount lost is proper. The appellants rely on section 23 of the Trusts Act, which lays down that a trustee committing a breach of trust is not liable to pay interest except in the cases mentioned therein. None of the enumerated cases would comprise this case unless it can be brought under clause (*e*), which applies "where the breach consists in failure to invest trust money and to accumulate the interest or dividends thereon." Where the trustee invests money in an unauthorized security, this must apparently be treated as tantamount to failure to invest, for a trustee cannot be taken to have fulfilled his duty to invest, unless he does so in the manner required by law. Besides, it may be doubted whether the rule disentitling the beneficiary to interest except in the cases enumerated could be applied where the trust money has been altogether lost. The Court should have power in such cases to award interest as damages. Illustration (*e*) to section 23 shows that where a trustee has failed to invest trust money in the manner directed by the instrument of trust, he is liable for interest, although he may have made some other investment. The same principle should be applicable where the failure is in making an investment in accordance with the provisions of section 20. Illustration (*f*) justifies the same conclusion. The District Judge must, therefore, be held to be right in awarding interest also. In Civil Suit No. 64 of 1909 (on the file of the High Court, Original Side), where certain trustees made an investment of trust monies with Messrs. Arbuthnot & Co., Sankaran Nair, J., held that they were liable for the loss caused by the failure of the firm. He also directed the trustees to pay interest. But the arguments urged in the present case with respect to section 15 of the Trusts Act and with regard to the trustee's liability for interest do not appear to have been addressed to the learned Judge.

The result is that the second appeal must be dismissed with costs.

Appeal dismissed.

CALCUTTA HIGH COURT.
CIVIL RULE No. 2271 OF 1912.
November 27, 1912.
Present:—Sir Cecil Brett, KT., Judge, and Mr. Justice Richardson.

RAM CHANDRA PAL—DEFENDANT—PETITIONER

versus

KRISHNA LAL PAL—PLAINTIFF—OPPOSITE PARTY.

Arbitration—Reference—Resiling from agreement to refer—Sufficient cause—Delay in commencing arbitration proceedings, whether sufficient cause—Partnership in business—Business brought to end—Adjustment of accounts—Dissolution of partnership—Separate suit to recover sums which one partner may have realised.

Where a person has agreed with another that all matters in controversy between them should be referred to arbitration, it is not open to that person to resile from the agreement unless for good and sufficient cause.

Delay of six months in commencing the arbitration proceedings, where it is not shown that a party made any effort at all to push forward the proceedings before the arbitrators and that he was not himself responsible for the delay, is not good and sufficient cause for the party to withdraw from the agreement to refer.

Therefore, under section 21 of the Specific Relief Act, the party is not entitled to sue in respect of a debt which he had contracted to refer.

Where two parties had been partners in a business which had been brought to an end, and the only dispute between them, is with reference to the division of the property, that dispute can only be finally settled in a proper suit for dissolution of partnership and for adjustment of accounts. It is not desirable that each of the parties should proceed by separate suits in order to recover from the other any sums due to the partnership business which he alone may have realised.

Rule against the judgment and decree of the Small Cause Court of Dacca, dated January 26th, 1912.

Dr. *Sarat Chandra Basak* for Babu *Mohendra Nath Roy* and Babu *Probodh Chandra Roy*, for the Petitioner.

Babu *Upendra Lal Roy* for Babu *Harendra Narayan Mitra*, for the Respondents.

JUDGMENT.—This Rule arises out of a suit brought by the opposite party No. 1,

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who was admittedly in partnership with the present petitioner. It is admitted before us that the partnership has been brought to an end and it seems that after the partnership was closed, the present opposite party No. 1 as well as the petitioner entered into an agreement to submit the accounts and all matters in dispute between them relating to the partnership to arbitration in order that all disputes between them might be cleared up and that their dues might be satisfactorily determined. This agreement was admittedly reduced into writing in the form of a contract and was registered. Six months after this agreement had been come to, the opposite party served the present petitioner with a notice that he did not intend to go on with the arbitration and then he instituted the suit in respect of which the present Rule has been granted to recover from the present petitioner a half share of a debt due to the firm which had been realised by the petitioner. A copy of the notice has not been produced before us, but the learned Pleader for the opposite party has been unable to indicate to us what just or good cause the opposite party set out in that notice as a ground for withdrawing from the agreement to submit their dispute to arbitration. When the present suit was instituted, the petitioner in his defence pleaded that no suit would lie on the ground that the opposite party, the plaintiff, had already agreed to submit all matters in dispute between them to the decision of the arbitrators. The suit, it is to be noticed, was brought in the Court of Small Causes, and the learned Judge, who decided the suit, appears to have considered the objection taken by the petitioner to be invalid, and to have given the plaintiff, the opposite party, a decree to recover from the present petitioner a sum representing a half share of the partnership debt which had been realised by him. The petitioner applied to this Court and obtained a rule calling upon the opposite party to show cause why the judgment and decree of the Court of Small Causes should not be set aside on the ground that having regard to the provisions of section 21 of the Specific Relief Act, it was open to question whether the Court of Small Causes had jurisdiction to try the suit. The portion of section 21 on which reliance has been placed runs as follows:—"Save as provided by the Code of Civil Procedure and the Indian Arbitration Act, 1899, no contract to refer present or future differences to arbitration shall be specifically enforced; but if any person, who had made such a contract, and has refused to perform it, sues in respect of any subject which he has contracted to refer, the existence of such contract shall bar the suit." The petitioner, in relying on the provisions of this section, has contended that the contract to refer the matters in controversy to arbitration covered all partnership debts and that it was stated in the defence filed in the suit that other debts due to the firm had been realised by the present opposite party, the plaintiff, and that he had not paid over to the petitioner his share of the sums so realised. It is contended under the circumstances that the plaintiff was not entitled to proceed with this suit in the Court of Small Causes after he had agreed to refer the matters in controversy between them to arbitration.

In opposition to the Rule, it has been argued that the plaintiff, the opposite party, was justified in withdrawing from the contract, because there had been delay on the part of the arbitrators in commencing proceedings for over six months. The learned Pleader, who has appeared for the opposite party, has referred us amongst others to the cases of *Adhibai* v. *Cursandas Nathu* (1) and of *O. R. Coley* v. *V. A. Dicosta* (2). The learned Pleader at the same time admits that the principles, which were laid down by the Privy Council in the case of *Pestonjee Nussurwanjee* v. *Manockjee & Co* (3), must be followed in cases of this description and that in fact the principles laid down in that judgment had been adopted by the Courts in India in the cases decided subsequently to the passing of the Specific Relief Act. In fact, the last case relied on by the learned Pleader for the opposite party itself lays down the same principle. The principle is that it is not in the power of a person to revoke at his mere will and pleasure a submission to arbitration after he has once agreed to the submission. It has been universally held that where a person has agreed with another that all matters in controversy

(1) 11 B. 199.
(2) 17 C. 200.
(3) 12 M. I. A. 112; 10 W. R. 51 (P. C.).

between them should be referred to arbitration, it is not open to that person to resile from the agreement unless for good and sufficient cause. In the present case, the only cause, which has been suggested, is the delay of six months in commencing the arbitration proceedings. The learned Pleader has, however, failed on behalf of the opposite party to show that his client made any effort at all to push forward the proceedings before the arbitrators and that he was not himself responsible for the delay. In our opinion, therefore, it is impossible in the present case to say that the present opposite party was justified in withdrawing from the agreement or in cancelling the reference to arbitration. We think, therefore, that the Rule should be made absolute on the ground on which it has been issued, namely, that under the terms of section 21 of the Specific Relief Act, the opposite party was not entitled to sue in the Court of Small Causes in respect of the debt which he had contracted to refer with the rest, in dispute between him and the petitioner, of the matters to the determination of arbitrators.

We are of opinion that this case should not have been entertained by the Small Cause Court at all. Admittedly, the two parties had been partners in a business. That business had been brought to an end; and the only dispute between them is with reference to the division of the property. That dispute can only be finally settled in a proper suit for dissolution of partnership and for adjustment of accounts. It is certainly not desirable that each of the parties should proceed by separate suits in order to recover from the other any sums due to the partnership business which he alone may have realised.

A point was taken on behalf of the opposite party that the petitioner, when the suit was instituted, ought to have proceeded in accordance with rule 18 of the second Schedule to the Code of Civil Procedure and ought to have applied to the Court for stay of the suit. We do not think that in the present case there is much substance in this point. The present petitioner appears to have put in an objection to the suit proceeding, although, possibly from ignorance of this new provision in the law, he did not expressly apply for stay of the suit. In our opinion, the petitioner in the present case in the course of the suit did put forward the objection which he had to the suit proceeding in the Small Cause Court. We think this objection the Court ought to have accepted and the lower Court ought to have held that the plaintiff was not entitled to recover the sum in a suit in the Court of Small Causes in the way in which his suit was framed. We, therefore, make the Rule absolute and set aside the judgment and decree of the Court of Small Causes and direct that if any sum has been realised in execution of the decree, it should be refunded to the petitioner.

The petitioner is entitled to recover his costs in this case. We fix the hearing fee at four gold *mohurs*. He is also entitled to recover from the opposite party No. 1 his costs in the Court of Small Causes.

Rule made absolute.

MADRAS HIGH COURT.

CIVIL APPEAL No. 150 OF 1909.

October 8, 1912.

Present:—Sir Ralph Benson, KT., Offg. Chief Justice, and Mr. Justice Abdur Rahim.

T. C. LAKSHMINARAYANA NAIDU AND OTHERS—PLAINTIFFS—APPELLANTS

versus

SOMASUNDARAM PILLAI AND OTHERS—DEFENDANTS—RESPONDENTS.

Discretion—Declaratory decree—Fraud.

The Court will not go out of its way to help a plaintiff, who got up a number of fraudulent deeds to cheat creditors, to obtain a declaration that some portion of the alleged consideration actually passed between the parties to the fraud.

Appeal against the decree of the Court of the Subordinate Judge of Trichnopoly, in Original Suit No. 14 of 1908.

Mr. *G. S. Ramachandra Iyer*, for the Appellants.

Mr. *T. R. Venkatarama Sastriar*, for the Respondents.

JUDGMENT.—It is not attempted to be shown that the finding of the Subordinate Judge that the deeds of mortgages and sale (Exhibits A, B, C, and D) were fraudulently executed in order to defeat creditors is wrong.

But it is urged that since it is found that some money was actually due to the mort-

gagees under Exhibits B and C, there ought to be a declaration that those mortgages are valid to that extent. We do not think that there should be such a declaration. The transactions in question were entered into in order to defeat creditors and as such they are void against the creditors [see *Chidambaram Chettiar* v. *Samy Iyer* (1)]. Besides, in such a case when the relief sought is of a discretionary nature, we do not think the Court ought to go out of its way to help a plaintiff, who got up a number of fraudulent deeds to cheat creditors, to obtain a declaration that some portion of the alleged consideration actually passed between the parties to the fraud.

We affirm the decrees of the Subordinate Judge and dismiss the appeal with costs.

Appeal dismissed.

(1) 30 M. 6; 16 M.L. J. 427; 11 M. L. T. 351.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEALS NOS. 2483 AND 3000 TO 3004 OF 1909

December 3, 1912.

Present:—Mr. Justice Holmwood and Mr. Justice Chapman.

SEKH CHAND PRAMANIK—DEFENDANT—APPELLANT

versus

ROMONI MOHAN ROY—PLAINTIFF—RESPONDENT.

Landlord and tenant—Non-transferable holding—Transfer by raiyat*—Suit by landlord to eject purchaser—Plaintiff to prove what—Abandonment and disclaimer, whether necessary to be proved positively as fact—Inference from transfer of holding and giving possession to purchaser—Parties—Whether* raiyat *necessary party to suit—Custom of transferability—Proof—Recognition by landlord without* nazar *or with* nazar *fixed by custom.*

The *raiyat* of a non-transferable holding transferred his interest in the entire holding, and the landlord brought a suit for *khas* possession of the holding against the purchaser:

Held, (1) that it was not necessary for the plaintiff to prove positively as a fact that the *raiyat* had left the holding and disclaimed any interest in it, as this was a direct inference from the fact that he had sold the entire holding and given possession of it to the purchaser;

Kabil Sardar v. *Chunder Nath Nag Chowdhry*, 20 C. 590, referred to.

Mathura Mandal v. *Ganga Charan Gope*, 33 C. 1219; 10 C. W. N. 1033 and *Rajani Kanto Biswas* v. *Ekkari Das*, 34 C. 689; 11 C. W. N. 811; 7 C. L. J. 48, distinguished.

(2) that the *raiyat* was not a necessary party to the suit.

In order to prove a custom of transferability, it is necessary to prove that the transfers had been made with the knowledge and without the consent of the landlord and that they have been recognised by him either without the payment of *nazar*, or upon payment of *nazar* fixed by custom.

Bazlal Karim v. *Satish Chandra Giri*, 10 Ind. Cas. 325; 15 C. W.N. 752; 13 C. L. J. 418; 10 Ind. Cas. 325, followed.

Appeals from the decrees of the Sub-Judge of Dacca, dated June 18th, 1909, reversing those of the Munsif of Manikgunge, dated July 31st, 1908.

Babu *Manmatha Nath Mukherjee*, for the Appellant.

Babu *Gunoda Charan Sen*, for the Respondent.

JUDGMENT.— These are six appeals brought by defendants transferees of alleged entire holdings, which were held under the plaintiffs by the transferors who are no parties to the suit. The learned Munsif held that the landlord was not entitled to eject these transferees. The learned Subordinate Judge reversed his decision and held that the landlord was entitled to eject. He, therefore, gave a decree for *khas* possession to the plaintiff with costs in each case.

Three points are taken by the defendants before us in appeal, *first*, that the suit was not properly framed, inasmuch as it was absolutely necessary to make the original tenants parties; *secondly*, that on the findings of the Munsif, which have not been reversed by the learned Subordinate Judge, it ought to have been held that the holdings are transferable without the consent of the landlord; and *thirdly*, that although there have been transfers, no fresh tenancies have been created and, therefore, there has been no abandonment or forfeiture; the plaintiff must show positive abandonment or disclaimer by the tenant of any interest in the holding.

Taking the third point first, it is sought to distinguish the plain rule of law, laid down in the leading case of *Kabil Sardar* v. *Chandra Nath Nag Chowdhury* (1), following the Full Bench ruling in *Narendra Narayan Roy* v. *Ishun Chundra Sen* (2), by citing two

(1) 20 C. 590.

(2) 22 W. R. 22; 13 B. L. R. (F. B.) 274.

rulings from *Mathura Mandul* v. *Ganga Charan Gope* (3) and *Rajani Kanto Biswas* v. *Ekkari Das* (4). Now in the first of these cases, the *ryot* did not give up his interest and it was held that the transfer was not intended to be operative, and if the transfer was not intended to be an operative transaction, the mere fact that the *ryot* went away from the holding to reside elsewhere would not be sufficient to make it a case of abandonment so as to entitle the landlord to re-enter. The case of *Rajani Kanto Biswas* v. *Ekkari Das* (4) was a case where the transferor re-entered the land as sub-lessee from the purchaser and remained in possession but repudiated his relation as tenant to the landlord: it was held that he was not entitled to hold the land as against the landlord. We do not see how this can help the appellant in this case. The test is, as pointed out by the learned Judges, laid down in section 87 of the Bengal Tenancy Act, namely, that the *ryot* voluntarily abandons his residence and ceases to cultivate without notice to the landlord and without arranging for the payment of his rent as it falls due. Now a person, who transfers the whole of his holding to a third person and accepts full payment for it and ceases thereby to have any interest in the land, cannot be said to have protected the landlord's interest in the way laid down by section 87 of the Bengal Tenancy Act; and in the case of *Kabil Sardar* v. *Chandra Nath Nag Chowdhury*(1), to which we have referred, it was clearly laid down that the reason why the *zemindar* is entitled to *khas* possession of the land of the holding which has been sold and of which possession had been given to the purchaser, is that the sale and transfer of possession to the purchaser conveys no title to him, and as the *ryot* has left the holding and disclaims any interest in it, he must be held to have abandoned it. It does not say that it is necessary to prove as a fact that the *ryot* has left the holding and disclaims any interest in it; on the contrary; it says that this is a direct inference from the fact that he has sold the entire holding and given possession of it to the purchaser and that seems to be the true rule of law, and we in this case are entirely governed by it. It is not necessary that there should be a repudiation or refusal to pay rent to the *zemindar*. We, therefore, think that the argument on the third point fails.

Coming now to the first point, the Munsif held that the transferors were necessary parties. But this is a pure question of law and we think that he is in error, although the learned Subordinate Judge has not distinctly reversed his finding on this point. If the facts show, as the Subordinate Judge says, they do, that the plea of the transferees that the transferor had any interest in the land is false, it is not only not necessary to make them parties but it would be against the trend of modern judicial practice to load the record with parties who are shown to have no interest in the suit. Order I, rule 9 of the present Code of Civil Procedure, makes this very clear. We, therefore, think that there is nothing in the first contention of the learned Vakil for the appellant. The transferees are not bound by the judgment.

Finally, we come to the second contention, that on the findings of fact by the Munsif, which have not been reversed by the Subordinate Judge, it ought to have been held that the holdings were transferable without the consent of the landlord. It is urged that as regards custom, the Munsif found that *nazar* was offered by the defendants to the plaintiff and refused. The Subordinate Judge has not expressly set aside his finding of fact, but his own finding certainly sets it aside by implication. It is further urged that the Munsif has found that the *zemindar* bound himself by a general fixed-rent. We do not think that the finding of the learned Munsif at the bottom of page 9 amounts to this. He says: "It has been proved by Mohin Chandra Mitra that the plaintiff remained there on that occasion for four or five days during which batches of tenants came to him from time to time and learnt of the settlement of fixed rate of *nazar* and *laharis* by the plaintiff." This finding is somewhat vague. It does not show that the *zemindar* once for all fixed the rate of *nazar* for such transfers, nor does it show that such a rate was fixed by custom. Indeed it shows the very reverse. It does show that more than one rate was fixed by the *zemindar* and that different rates were fixed for different tenants. The learned Subordinate Judge differs from this view of the Munsif, though

(3) 33 C. 1219; 10 C. W. N. 1033.
(4) 34 C. 689; 11 C. W. N. 811; 7 C. L. J. 48.

he may be wrong in saying that it was not the defendant's case. However, whether it was the defendant's case or not that case has been found against them by the learned Subordinate Judge. The effect of the right to refuse *nazar*, unless it is fixed by custom, obviously gives the option to the landlord. Reliance has been placed by the defendant on the case of *Buzlal Karim* v. *Satish Chandra Giri* (5). The Court there held that it was necessary to prove that the transfers had been made with the knowledge and without the consent of the landlord and that they have been recognised by him either without the payment of *nazar* or upon payment of *nazar* also fixed by custom. Now in this case, there is no mention of any *nazar* fixed by custom, and there is, therefore, nothing to bind the landlord even if the defendants did offer him *nazar*, which appears, on the findings of the Subordinate Judge, not to be the case. The examples, which the defendants put forward in their evidence, are all cases where the transfers had been made with the knowledge of the landlord and with his consent, and no number of such cases can prove the case of custom of making transfers with his knowledge and without his consent.

We are, therefore, of opinion that these appeals fail upon every ground and must be dismissed with costs.

This judgment will govern Second Appeals Nos. 2483 and 3000 to 3004 of 1909.

Appeals dismissed.

(5) 15 C. W. N. 752 at p. 756; 13 C. L. J. 418; 10 Ind. Cas. 325.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1489 OF 1911.

October 8, 1912.

Present:—Mr. Justice Sundara Aiyar and Mr. Justice Sadasiva Aiyar.

KAYAKOOL NATUVLAPURAYIL MOIDIN KUTTI—PLAINTIFF—APPELLANT

versus

POTTARKULAR KOMAN NAIR AND OTHERS—DEFENDANTS—RESPONDENTS.

Suit for damages for trespass—Setting fire to and destroying pepper vines on one's land—Limitation Act (XV of 1877), Sch. II, Arts. 36, 39.

A suit for damages for unlawfully setting fire to and destroying pepper vines on one's land is governed by Article 39 of the Limitation Act.

Trespass includes the mischief which the trespasser commits after entering on the land.

Mangun Jha v. *Dolhin Golab Koer*, 25 C. 692; 2 C. W. N. 265; *Surat Lall Mondal* v. *Umar Haji*, 22 C. 877, *Lukhimoni Dosi* v. *Karuna Kant Moitro*, 3 C. L. R. 509 and *Boyle* v. *Tamlyn*, 6 B. & C. 329; 9 D. & R. 430; 5 L. J. (o. s.) K. B. 134; 30 R. R. 343, relied upon.

Article 36 can apply only to cases of malfeasance, misfeasance or non-feasance not provided for by other Articles.

Second appeal against the decree of the Court of the Subordinate Judge of North Malabar, in Appeal Suits Nos. 458 and 474 of 1909, preferred against that of the Court of the District Munsif of Taliparamba, in Original Suit No. 276 of 1908.

Mr. *K. P. Govinda Menon*, for the Appellant.

Mr. *V. Ryru Nambiar*, for the Respondents.

JUDGMENT.—This is a suit for damages sustained by the plaintiff by the defendants' unlawfully setting fire to and destroying pepper vines on his land. Both Courts have found that the act assigned by the plaintiff was committed at the instigation of the 1st defendant by the 5th defendant, a tenant of his. It is contended that there is no legal evidence to support the finding of instigation by the 1st defendant. This observation is only correct in the sense that there is no direct evidence of any one who actually saw the act of instigation. There was strong circumstantial evidence against the 1st defendant and we must accept the concurrent findings of the Courts below that it was proved against him. The Subordinate Judge reversing the District Munsif's decree dismissed the suit on the ground that it was barred by limitation. He applies Article 36 of the Limitation Act which provides for "compensation for any malfeasance, misfeasance or non-feasance independent of contract and not herein specially provided for." It is clear that the Article can apply only to cases of malfeasance, misfeasance and nonfeasance not provided for by other Articles. The appellant contends that the case really falls within the purview of Article 39 for compensation for trespass upon immoveable property. We are of opinion that his contention must be upheld. We are entirely unable to agree with Mr. Ryru Nambiar's argument that trespass consists only of unlawful entry upon

another man's land. It certainly includes the mischief which the trespasser commits after entering on the land. The majority of the Full Bench of the Calcutta High Court held, in *Mangun Jha* v. *Dolhin Golab Koer* (1), that a suit for damages for cutting crops on the owner's land would come within Article 39. See also *Surat Lall Mondal* v. *Umar Haji* (2). Maclean, C.J., was inclined to hold that even if the crops cut were carried away, the same Article would apply. Fishing in the owner's tank without his permission was held to be trespass [*Lukhimoni Dasi* v. *Karuna Kant Moitro* (3)]. Entry of the defendants' cattle on plaintiff's land and the causing of damage thereby was regarded as trespass, *Boyle* v. *Tamlyn* (4). Rampini, J., no doubt, held in several cases that the doing of an unlawful act by a person, who has already wrongfully entered on another's land, would not be trespass within the meaning of Article 39, but a malfeasance coming within Article 36. We can only say with respect to the learned Judge's opinion that it ignores the well understood signification of trespass in law. It is unnecessary to consider whether if a trespasser carries away anything from the land, a suit for damages for the loss of what is carried away would not fall within Article 49. That Article itself provides that a suit for an injury to moveable property might be instituted within three years, such a suit would not, therefore, fall within Article 36. It would be curious if the period of limitation for suing for compensation for injury to immoveable property should be less than that for compensation for injury to moveable property. We entertain no doubt that Article 39 is the proper one to be applied in this case. Mr. Ryru Nambiar contends that the plaint does not allege that the defendants trespassed on his land. The allegation in the plaint is that the defendants set fire to his pepper vines. The plaintiff's case, undoubtedly, was that they did so, having entered on the land for the purpose. He asked for permission in the Court of first instance to make a specific allegation in the plaint. To that effect leave to amend was refused. We agree with the Court of first instance that the plaint, properly read, does charge trespass against the defendants. We do not consider any amendment is necessary. With regard to the amount of damages, we see no reason to differ from the award made by the District Munsif. The appeal will, therefore, be allowed, the Subordinate Judge's decree set aside and the Munsif's decree restored. The claim for an amount larger than that allowed by the Munsif must be disallowed. The parties will pay and receive proportionate costs in this Court and in the lower Appellate Court.

Appeal allowed.

(1) 25 C. 692; 2 C. W. N. 265.
(2) 22 C. 877.
(3) 3 C. L. R. 509.
(4) 6 B. & C. 329; 9 D. & R. 430; 5 L. J. (o. s.) K. B. 134; 30 R. R. 343.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No 436 OF 1911.
July 30, 1912.
Present:—Mr. Batten, A. J. C.
KANHAYALAL—APPELLANT
versus
DULARSINGH—RESPONDENT.

Landlord and tenant—Tenancy—Acquisition by prescription—Limitation—Central Provinces Tenancy Act (XI of 1898), ss. 39, 44, 62 (1)—Limitation Act (IX of 1908), Sch. I, Arts. 142, 144.

A tenancy cannot be acquired by prescription in the Central Provinces.

A person, occupying land without the consent of the landlord, and claiming to hold it as a tenant, does not hold even the limited right of a tenant adversely to the landlord.

Article 142 of the Limitation Act does not apply if the possession taken by the defendant of even a limited interest in land is not adverse to the plaintiff landlord.

Limitation time under Article 144 does not begin to run until possession becomes adverse.

Appeal against the decree of the District Judge, Raipur, dated the 21st July 1911, confirming that of the Subordinate Judge, Drug, dated the 7th March 1911.

Dr. *H. S. Gour*, for the Appellants.

Mr. *Atmaram Bhagwant*, for the Respondent.

JUDGMENT.—This appeal relates to a plot of land bearing the number 1644/12 in *Mauza* Balodi in the Drug Tahsil. The plaintiffs-appellants are the *malguzars* of the village while the defendants are joint occupancy-tenants of certain garden lands in the village. The plaintiffs' case is that the plot No. 1644/12 forms part of the waste land of the village, and that the defendants

occupied the plot without the landlord's permission in 1905, and have been cultivating it without paying rent. The suit is brought for the purpose of ejecting the defendants. The case of the defendants is that the plot has been in the possession of the defendants for the last 50 years and forms part of their occupancy holding, its rent being included in the rent of the holding. The learned Subordinate Judge found on the evidence that at the last incomplete Settlement, the number 1644 was given to a large area of land measuring 88·25 acres which comprised the bed of the river Sheonath. These 88·25 acres had been entered as river bed in the previous Settlement of Mr. Carey. The whole number is sub-divided into plots bearing sub-numbers, of which the plot in dispute, No. 1644/12 is one. In *Mauza* Balodi, there is a large extent of garden land along the bank of the Sheonath river, portions of which garden land are held by different tenants. The learned Subordinate Judge found that the plot in dispute originally formed portion of the defendants' garden land which they held in occupancy tenure and has been in their possession for at least 40 years but that at the time of Mr. Carey's Settlement, the plot was by mistake recorded as forming portion of the river-bed. He, therefore, dismissed the suit on the ground that the plot formed part of the defendants' occupancy holding, and was not part of the village waste. He also held that even if it had been found that the plot was not part of the defendants' occupancy holding but had been excluded from the holding when the garden was planted, as a barrier in order to prevent the garden land being washed away by the stream, nevertheless the plaintiffs cannot succeed in their suit for ejectment because the suit is time-barred, the plaintiffs having failed to prove that they were in possession of the plot within 12 years prior to the institution of the suit, while the defendants have proved that they have been in continuous possession for 40 years.

The learned District Judge in deciding the appeal expressly refrained from deciding whether the plot in dispute was part of the defendants' original occupancy holding. He dismissed the appeal on the ground that the suit was time-barred. He agreed with the Subordinate Judge in finding that the plaintiffs had failed to prove that they had been in possession within the 12 years prior to the institution of the suit. In holding the suit to be time-barred, the learned District Judge has relied on and followed the ruling of *Ishan Chandra Mitter* v. *Raja Ramranjan Chakarbutty* (1), in which it was held that possession of a limited interest in immoveable property may be just as much adverse for the purpose of barring a suit for the determination of that limited interest, as adverse possession of a complete interest in the property operates to bar a suit for the whole property, though such adverse possession of a limited interest, though a good plea to a suit for ejectment, is good only to the extent of that interest. So, it was held, when a tenant takes possession of lands outside his tenancy and professes to do so in his character as tenant, the landlord is dispossessed in a limited sense, being dispossessed of *khas* possession, though not of proprietary possession; in such a case, a tenant, who occupies for over 12 years more of his landlord's land than is covered by the lease, should be regarded as having dispossessed him under Article 142 of the Limitation Schedule and a landlord must, if he wishes to eject, bring his suit within 12 years of the commencement of the possession of the excess area by the tenant, though his right to recover rent would never become barred, the possession of the tenant as regards this right having never been adverse. The learned District Judge, in applying this ruling, held that the suit fell under Article 142, and was time-barred, on the finding that the plaintiffs had failed to prove that they were dispossessed within twelve years prior to the suit.

Before the District Judge, it was argued on behalf of the plaintiffs that, on the authority of *Gadi Kunbi* v. *Ramlal* (2), when a tenant takes into his holding land which has not been let to him and holds it under colour of his tenancy, his possession cannot be said to be adverse and he would not be protected from ejectment. As to this argument, the learned District Judge has merely remarked that "for the purposes of the present case, the question which arises is really not one of adverse possession but of limitation," and that "the

(1) 2 C. L. J. 125.
(2) 16 C. P. L. R. 36.

title of the plaintiffs to recover possession has been extinguished by the law of limitation." The learned Judge has failed to observe that the argument rejected by Ismay, J. C., in the case cited was that the landlord's right to recover possession was extinguished if the tenant has been in possession of the excess area for more than twelve years, and that the acquisition of a title by adverse possession is merely another aspect of the loss of the right to sue for possession unless the suit is brought within the prescribed time. Under section 28 of the Limitation Act, a prescriptive title by adverse possession is obtained by the failure of the owner of the property to bring a suit for possession within the prescribed time, and the dispossession contemplated by Article 142 is an assumption of adverse possession; under Article 142, the contemplated possession of the defendant is adverse from the first, while under Article 144, it is not at first adverse, if adverse at all. That the possession of the defendant contemplated under Article 142 is adverse is clear from the whole tenor of the Calcutta ruling cited. If the possession taken by the defendant of even a limited interest in the land was not adverse, to the landlord, then Article 142 does not apply. The only other Article that can apply to a suit for possession of land is Article 144 and until the possession becomes adverse, limitation time under that Article does not begin to run. The *crux* is whether the defendants' possession was adverse or not and on this point, there can be no blinking the fact that the ruling of Ismay, J. C., is in direct conflict with the Calcutta ruling, supposing the Tenancy Laws in the two Provinces to be similar, a resemblance which has been assumed by the District Judge, and which has not been denied or even alluded to by the learned Counsel for the appellant in this Court. The two Acts, however, are not identical, and it is possible that in Bengal, the view might be taken that a *ryot* can acquire rights otherwise than by contract with the landlord, vide *Binad Lal Pakrashi* v. *Kalu Pramanik* (3). The view taken in *Ishan Chandra Mitter* v. *Raja Ramranjan Chakarbutty* (1) has been followed and approved in the recent case of *Gopal Krishna Jana* v. *Lakhiram Sardar* (4). In *Gadi Kunbi* v. *Ramlal* (2), Ismay, J. C., upheld the view taken in the cases of *Jugaraj Singh* v. *Ratan* (5), *Bhan* v. *Sadoo* (6) and *Khemchand* v. *Ramkisan* (7). In none of these Central Provinces cases, have any express reasons been given for the view that a person, occupying land without the consent of the landlord and claiming to hold it as a tenant, does not hold even the limited right of a tenant adversely to the landlord. But the view seems to me to be based on and to follow from the policy and provisions of the Central Provinces Tenancy Act. In section 62 (1) of Act XI of 1898, it is enacted that every tenant, who is not an absolute occupancy-tenant or an occupancy-tenant or a village service tenant or a sub-tenant, is an ordinary tenant. These tenures are exhaustive and there is no other possible class of tenant. And for practical purposes in inquiring into the possibility of acquiring tenancy right by adverse possession, we need only contemplate ordinary tenancies, for the status of an absolute occupancy tenant or occupancy-tenant as defined in sections 39 and 44 of the Act is one that under the definitions cannot possibly be acquired by prescription; at any rate, if an ordinary tenant right cannot be acquired by prescription, *a fortiori* the right of an absolute occupancy or occupancy-tenant cannot be so acquired. In *Wasudeo Gharpure* v. *Ganu Kunbi* (8), Stanyon, A. J.C., has very emphatically pointed out that "a tenancy can, in the first instance, be created only by a contract between the landlord of the soil and a person whom he is willing to accept as his tenant." From the definition of "Tenant", he says it is clear that a landlord at his option first makes a tenant. Similarly in *Ghanya* v. *Ukund Rao* (9), the same learned Additional Judicial Commissioner speaks of an occupancy holding as "an estate created by contract and statute." Contract and prescription are the very antitheses of each other, and if a tenancy can only be created by contract, it cannot be created by something which rests on the denial that there was a contract. It appears to me that while the Limitation Act contemplates, in section 28 and in the Articles in the Limitation Schedule, applicable to suits for possession of land or

(3) 20 C. 708.
(4) 16 C. W. N. 634; 14 Ind. Cas. 212.
(5) 1 C. P. L. R. 37.
(6) 1 C. P. L. R. 58.
(7) 5 C. P. L. R. 39.
(8) 3 N. L. R. 185.
(9) 4 N. L. R. 9.

S. N. DAR, B. A. LL. B.,
Vakil High Court
SRINAGAR (Kashmir)

of any interest in land, only such possession by the defendant as is possible under the ordinary law, the special law embodied in the Tenancy Act creates or recognises special tenures which can only come into existence in a particular manner, namely, by contract and which cannot come into existence by reason of any provisions of the Limitation Act. In so far, therefore, as the defendants in this case seek to defeat the plaintiffs through the provisions of the Limitation Act, combined with their assertion of tenancy, they are setting up a kind of tenancy which has no existence in law. It is impossible to hold what is incapable of existence, and, therefore, if there had been no agreement of tenancy, express or implied, with the landlord, the defendants never held, for however short a time, even the limited interest of a tenant in the land in dispute. They can, in the words of Mookerjee, J., in *Ishan Chandra Mitter* v. *Raja Ramranjan Chakarbutty* (1), plead their adverse possession to the extent of the interest claimed by them, but the interest claimed was incapable of existence and the claim to be tenants must be regarded as non-existent. They never held at all the limited interest of a tenant, and they can, therefore, never have held that limited interest adversely to the plaintiffs. They do not claim to have held any other interest in the land, so they have never held adversely to the plaintiffs. I am thus of opinion that while there may be adverse possession of a limited interest in land, this principle is over-ridden by the special provisions of the Tenancy Act, and there are no grounds whatever for taking a different view from that expressed in *Gadi Kunbi* v. *Ramlal* (2), a view strictly applicable to the present case. The defendants' long continued possession of the land may be evidence of an express or implied contract of tenancy or of the landlord having acquiesced in their occupancy and accepted them as tenants, but this is a very different thing from the landlord's rights being lost under the Law of Limitation. As the District Judge has dismissed the appeal on a wrong ground, I set aside the decree of the District Court and remand the appeal for re-trial under its original number. Certificate for refund of Court-fee will issue, other costs in this Court will be costs in the suit.

Case remanded.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1283 OF 1911.

October 11, 1912.

Present:—Mr. Justice Sundara Aiyar and Mr. Justice Sadasiva Aiyar.

VEMBU IYER *alias* RAMANADHA IYER—PLAINTIFF—APPELLANT

versus

SRINIVASA IYENGAR AND OTHERS—DEFENDANTS—RESPONDENTS.

Minor—Guardian—Power of natural guardian—Sale of minor's property—Validity discussed—Necessity—Benefit.

Per *Sundara Aiyar, J.*—Where the mother of a Hindu minor sells his property for the discharge of certain debts due by the minor's father, the validity of the sale must depend upon the general powers and duties of a guardian under the Hindu Law apart from the provisions of the Guardians and Wards Act.

There is a difference between the powers of a natural guardian and one appointed by the Court. The latter class of guardian is under the supervision of the Court, the powers of guardianship are in large part exercised by the Court itself and the appointed guardian can only act subject to its supervision and control. Definite restraints are put upon an appointed guardian by Statutes. These restraints will not be applicable to a natural guardian whose duties must be regulated by considerations of what should be regarded as best in the interests of the minor.

The powers of a manager for an infant heir to charge his estate not his own is under the Hindu Law a limited and qualified power. It can only be exercised rightly in the case of need or for the benefit of the estate. The question in each case would be whether any alienation or other transactions for the benefit of the minor is necessary so as to satisfy the phrase 'in a case of need.' Again, if a person dealing with a guardian acts *bona fide* and after due inquiry believes that the transaction is for the minor's benefit or necessary, it can be upheld against him though a ward may have good reasons to complain of the conduct of the guardian.

The words 'necessity' and 'benefit' really import two different ideas. Necessity seems to connote the idea of warding off an evil or the doing of something that cannot be avoided or of something which is one's legal duty to do, such as avoiding a sale of a minor's property for a debt, conducting necessary repairs, maintenance of a minor and performance of his father's funerals, but over and above all these acts that are necessary, there may be acts which are positively beneficial to the minor and an alienation which would conduce positively to the benefit of the minor would be upheld apart from any necessity unless, of course, it is accompanied by other evil.

Demand is not necessary to justify an alienation to discharge a debt. A debt may be a pressure on the estate even though the creditor has not yet demanded payment of it. Whether it would be so, would depend on the circumstances.

It is the duty of the guardian to pay off debts incurred by the father. As a natural guardian has in this country no right to ask the advice of the

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Court like a statutory guardian, the discretion as to how the duty of discharging the debts binding on the minor should be performed, must rest with him. The question in each case would be, whether the discretion vested in a guardian has been exercised properly. He would be taken to have done so, if he acted with due prudence and caution. As to the degree of prudence required, the right view to take is, whether in the circumstances that existed at the time of the alienation, the act would be regarded as a prudent one by men of ordinary prudence in dealing with the property of a ward.

If the guardian consulted proper advisers, that would be a good test whether the act would be prudent but the mere consultation of others would not be a ground for upholding a transaction if the Court is convinced that both those consulted and the guardian made a grave mistake.

The powers of a manager of a Hindu family, a guardian of an infant and a trustee, contrasted.

Per *Sadasiva Aiyar, J.*—If the guardian of a Hindu minor alienates the minor's property because he considers it, after weighing all the then existing circumstances, to be in the best interests of the minor to make that alienation, the minor is clearly bound by that act of alienation.

Even if the guardian has acted wrongly, the alienee is protected if he acts in good faith after making due inquiry and if he is satisfied, on the representations of the guardian and on his own independent inquiry, that the guardian's act appears then to be clearly for the minor's benefit.

Any comparison between the powers of a natural guardian and of a guardian to whom the Guardians and Wards Act applies is of very little utility in deciding as to the powers of a natural guardian under the Hindu law. The Legislature is not bound to follow the common law and can give powers and impose restrictions on certain kinds of guardians according to pleasure.

Second appeal against the decree of the Subordinate Judge of Kumbakonam, in A. S. No. 555 of 1910, preferred against that of the District Munsif of Mannargudi, in O. S. No. 292 of 1908.

Mr. *T. V. Seshagiri Iyer* for Mr. *T. R. Venkatrama Sastriar*, for the Appellant.

Mr. *T. Rangachariar*, for the Respondents.

JUDGMENT.

SUNDARA AIYAR, J.—This is a suit for setting aside a sale made by the plaintiff's guardian in the year 1889. The suit was instituted on the 28th October 1908. The plaintiff was born on the 23th October 1887. He delayed the suit until the last day on which it was open to him to institute it. The sale was admittedly made for the discharge of certain debts due by the plaintiff's father.

Both Courts have upheld the sale. The District Munsif found that the sale was necessary in the interests of the minor. On appeal, the Subordinate Judge seems to have confirmed the decree with some hesitation. He observed:—"I am unable to hold that with prudent management the debts could not have been cleared from out of the income." He also held that there was no clear necessity to support the sale. With respect to a plea of the defendants that the guardian had to take into account at the time of the sale the fact that two sisters of the plaintiff had shortly to be married, the Sub-Judge says:—"The prospective marriages of daughters of the family and the consequent fear of not being able to clear off debts are too speculative reasons to justify a sale by a mother during the son's minority." He, however, confirmed the Munsif's decree on the ground that he was unable to say that the trustee did not act with due care and prudence in selling the properties and that the discretion vested in the mother as a guardian cannot be said to have been misused. He observed:—"The case falls within the discretion of a trustee and the discretion cannot be said to have been misused." He held that "the case did not fall within the words of the decisions supporting sales by a guardian." He continues:—"But the logical extension of the ideas on the subject does not exclude the present sale from the category of legally valid sales." It is not surprising that the plaintiff considered that there were good grounds for an appeal from a judgment pronounced with so much doubt. I confess I have not felt any difficulty in confirming the decree of the Subordinate Judge. I am of opinion that the circumstances show that the sale was necessary. The decision of the case must depend on the general powers and duties of a guardian under the Hindu Law, apart from any provisions of the Guardians and Wards Act. There are numerous cases in the Indian Courts which have dealt with the position of a guardian, but hardly any one in which the precise question for determination in this case was the subject of judicial pronouncement. In England, it would appear, a guardian has no power to sell or mortgage the real estate of his ward. Infants came very early under the jurisdiction of the Court of Chancery in that

country. All power to sell or to mortgage a ward's estate was vested in the Court and the guardian could not exercise it without the consent of the Court. See the matter discussed in *Dagdu* bin *Daud Teli Pardeshi* v. *Shekh Saheb* valad *Bahuruddin Kamble* (1). In this country, on the other hand, only a guardian appointed or declared as such by a Court is under the supervision of the Court. The powers and duties of other guardians are governed by considerations, primarily, of what would be for the welfare of the minor. During the arguments, the learned Vakils on both sides cited various cases relating to the powers of a natural guardian, a guardian appointed by Court, the manager of a Hindu family and a trustee. And it was contended by Mr. Seshagiri Iyer that the powers of a natural guardian were of the narrowest kind as compared with the others. I do not propose to enter on a comparison of the powers of these different classes of persons. It is true that the manager of a Hindu family is one possessing an estate in the property that he deals with, while a guardian has no estate in his ward's property. He is in management of the property solely belonging to another. But at the same time, it may be said that it is open to a manager to obtain the consent of all adult co-parceners to any transaction which he thinks proper to undertake; and that a guardian who has no so such means open to him ought to be invested with a larger discretion than a manager. Again in some respects, the powers of a guardian must be taken to be inferior to those of a trustee, for a trustee has the legal ownership vested in him and, although his obligations to the beneficiary are no less than those of a guardian, persons who deal *bona fide* with him would receive larger protection on the ground that they are dealing with a person who is regarded by law as the owner of the property notwithstanding that he is under obligations to another. On this ground, it was held in *Muthu Subbiah Chettiar* v. *Rungiah Gounden* (2) that a guardian's powers were less extensive than those of a trustee. It was assumed in that case that a natural guardian's powers would be inferior to those of one appointed by Court. This seems to me to be not quite correct. The latter class of guardian is under the supervision of the Court. The powers of guardianship are, in large part, exercised by the Court itself and the appointed guardian can only act subject to its supervision and control. Definite restraints are put upon an appointed guardian by statute. Those restraints would not be applicable to a natural guardian. There is no provision in Indian Law for a natural guardian, not declared as such by the Court, to take the opinion of the Court as to the propriety of any transaction he may have to enter into on behalf of his ward. His duties must be regulated by considerations of what should be regarded as best for the interests of the minor. The leading case on the subject is *Hanooman Persaud Pandey* v. *Musammat Babooee Munraj Koonwaree* (3). The following passage, to be found at page 423, may be regarded as the text on which the subsequent decisions of the Indian Courts have been based :—"The power of the manager for an infant heir to charge an estate not his own, is, under the Hindu Law, a limited and qualified power. It can only be exercised rightly in a case of need, or for the benefit of the estate." The question then would be whether any alienation or other transaction is for the benefit of the minor or necessary, so as to satisfy the phrase 'in a case of need'. There is, of course, another rule based on considerations of equity to the person dealing with the guardian, namely, that, if he acts *bona fide* and after due inquiry believes that the transaction is for the minor's benefit or necessary, it must be upheld as against him though a ward may have good reason to complain of the conduct of the guardian. Prior to the enunciation of the law by the Privy Council, there appears sometimes to have been an idea in India that the creditors of a minor had no right to demand their debts during his minority and that they must wait till the minor attained age. This would, of course, affect the guardian's power to deal with the estate for the discharge of the minor's father's debts. See Menaughten's "Principles of Hindu Law", Chapter VII,

(1) 2 B. H. C. R. 369 at p. 380; 2nd Ed. 348.
(2) 7 M. L. J. 191.
(3) 6 M. I. A. 393; 18 W. R. 81 *note*.

page 105 ; Trevelyan's "Law Relating to Minors," page 183; *Dagdu* bin *Daud Teli Pardeshi* v. *Sheik Sahib* valid *Baduruddin Kamble* (1). This view was, however, subsequently given up and Mcnaughten himself in his 'Precedents' cites a case decided in pages 120-121, where it was held that the discharge of debts would be regarded as a 'necessity.' The word 'necessity' appears, at first sight, not to be calculated to give a clear idea of the scope of the cases coming within it. Necessity and benefit were not properly distinguished. Thus Trevelyan observes:—"Apart from necessity, it is not easy to say what is for the benefit for a minor's estate," and in an early case in Calcutta, Sudder Dewani Adawlat Reports, 1856, page 980, benefit to a minor seems to have been regarded as making the alienation necessary. The Court observed:—"It is enough for us now to say that we hold that a mortgage entered into by the mother of a minor of a portion of the minor's property for the benefit of the minor is valid under the Hindu Law, that benefit being the cause of or creating the necessity which has arisen." This confusion induced me to say in *In re Krishnaswami Das Reddi* (4) that it might be desirable to avoid the use of the word 'necessary' and 'necessity' and to substitute 'reasonable' and 'probable'. I am convinced, however, 'necessity' and 'benefit' really import two different ideas and that it is desirable to keep in view the distinction between them. 'Necessity' seems to connote the idea of warding off an evil or the doing of something that cannot be avoided or of something which it is one's legal duty to do. To avoid the sale of a minor's property for a debt would be warding off an evil; conducting necessary repairs would also be an act of the same class. The maintenance of the minor would be a necessity as something which cannot be avoided. Performing his father's funerals would be a necessity as an act which it is his duty to perform. But over and above all these acts that are necessary, there may be acts which are positively beneficial to the minor, and an alienation which would conduce positively to the benefit of the minor would be upheld apart from any necessity, unless, of course, it is accompanied by other evil. Mr. Seshagiri Iyer's main contention was that the discharge of debts cannot be regarded as a necessity unless the creditors pressed for the debt or at least demanded payment. The Sub-Judge has found that there was no demand in this case. It was contended that, therefore, it cannot be held that there was any necessity. No case has been cited, nor have we been able to find any, which has laid down that a demand is necessary to justify an alienation to discharge a debt. It is impossible to lay down any such broad proposition. The creditors may be quite content to allow their debts to run on if they carry heavy interest. They might wait until the whole estate might be swallowed up by their debts. It would be unreasonable to say that a guardian in such circumstances cannot sell a portion of the estate so that the remainder may be saved for the minors' benefit. There can be no doubt that it is the duty of a guardian to pay off debts incurred by the ward's father. In England, where, as I have already observed, a guardian cannot mortgage or sell a ward's estate of his own accord, the discharge of the debts binding on the minor has been recognised to be a duty. There is, no doubt, in order to fulfil that duty, the guardian should apply to the Court for permission to mortgage or sell and the Court may make an order for either according to the circumstances of the case. But as a natural guardian, not declared as guardian, has in this country no right to ask for the advice of the Court, the discretion as to how the duty of discharging the debts binding on the minor should be performed must rest with him. I do not mean to lay down that if there is an estate earning a large income and the debts could be discharged in a short time out of the usufruct, a sale by the guardian for the discharge of the debt would be always upheld. The question in each case would be whether the discretion vested in a guardian has been exercised properly. He would be taken to have done so if he acted with due prudence and caution. Mr. Seshagiri Iyer contended that the prudence which a man would exercise in the management of his own affairs would not necessarily be sufficient in the administration of the property of a ward and relied on the observations contained in *Muthu Subbiah Chetty* v. *Rungiah Gounden* (2) to that effect with respect to a trustee. I agree with him to a considerable extent. It is true that it would not be

(4) (1912) M. W. N. 167; 11 M. L. T. 182; 13 Ind. Cas. 648.

enough for the Court to say that if an adult had acted in the management of his own property in the way in which a guardian has dealt with his ward's property, the adult owner's action would not be pronounced imprudent. There are risks which an owner may take that might be consistent with the conduct of a prudent man. A trustee or a guardian has no right to take the same risk in dealing with the property of another. This is the rule which has been applied in the English Courts with respect to the acts of a trustee. At the same time, the Court has certainly to judge of the act of a guardian as it would appear to a prudent man at the time that the act was done. It will not set aside his acts on the ground that years after the act has been done, it appears to the Court that the guardian might have acted better. If the guardian consulted proper advisers, that would be a good test as to whether the act was prudent, for it would show that other disinterested persons took the same view of the propriety of the act as he himself did. The right view to lay down appears to me to be to consider, whether, in the circumstances that existed at the time of the alienation, the act would be regarded as a prudent one by men of ordinary prudence in dealing with the property of a ward. No hard and fast distinction can be made between a sale and a mortgage. See *Mohanund Mondul* v. *Nafur Mondul* (5). Where an act is sought to be supported, not on the ground that it was 'necessary' but on the ground that it was calculated to procure some benefit for the minor, there might be some difference in the application of the test to determine the validity of the guardian's act. There might also be a difference in applying this rule that a *bona fide* purchaser would be protected. If the act which was calculated to procure benefit for the minor was of a risky or speculative character, it would not be supported by the Court. And it may be that the Court would apply a rather strict test in deciding what should be regarded as speculative in such a case. It may also be that a *bona fide* purchaser would find it difficult to obtain protection on the ground that a speculative transaction appeared to be beneficial to a minor. But in deciding whether an act, which came within the purview of 'necessity', should be upheld, I think considerable latitude should be allowed for the exercise of the guardian's discretion. See *Babaji Mahadaji* v. *Kristnaji Devaji* (6). In *Arunachala Reddy* v. *Chidambara Reddy* (7), an alienation, which was made partly for the discharge of debts binding on the minor, was upheld. In the cases bearing on the question, there was generally, no doubt, some circumstance beyond the mere existence of a debt relied on to justify the alienation. Thus in *Sucaram Morarji* v. *Kalidas Kanhayi* (8), there were no other assets left out of which the debt could be discharged. In *Daglu* bin *Daud Teli Pardeshi* v. *Sheik Sahib Badruddin Kamble* (1), the Court found that the alienation was for the discharge of debts. But it added "and it was absolutely necessary," but no other circumstance relied on is mentioned as supporting the necessity for sale. In *Kaihur Singh* v. *Roop Singh* (9), it was observed that no immediate pressure or suit need be proved in order to support a sale for discharging a debt. In *Babaji Mahadaji* v. *Krishnajee Devaji* (6), it appears that the debt had not become due at the time of the alienation. The language of the Privy Council in *Hanuman Persaud Pandey* v. *Musammat Babooee Munraj Kunwaree* (3) does not, in my opinion, support the contention that unless there was a demand by the creditor, a sale for the discharge of his debt would not be justified. Their Lordships say:—"The actual pressure on the estate, the danger to be averted or the benefit to be conferred on it in the particular instance is the thing to be regarded." The words 'actual pressure' are relied on to support the argument that the person in possession as guardian must have been *pressed* by the creditor to pay the debt. I do not think that the language 'pressure on the estate' necessarily signifies this. A debt may be a pressure on the estate even though the creditor has not yet demanded payment of it. Whether it is so in any particular case would depend on the circumstances In this case, it is found that there were debts at the time of the death of the minor's father. Three sales were made in 1888 for the discharge of a portion of

(5) 26 C. 820; 3 C. W. N. 770.

(6) 2 B. 666.
(7) 13 M. L. J. 223.
(8) 18 B. 631.
(9) 3 N. W. P. H. C. R. 4.

them. Apparently soon after the death of the father, the guardian considered it desirable to take measures to discharge all debts. The sale which is called in question here took place shortly after the previous sales. All were probably parts of one single scheme that the debts should be discharged if possible. The Sub-Judge is, in my opinion, not justified in holding that the guardian acted in a speculative spirit in having regard to the fact of the prospective expenditure on account of the minor's sisters' marriages. The District Munsif's judgment shows that about Rs. 1,000 was required for the current expenditure of the family. After making provision for Government *kist*, and this expenditure, there was apparently very little to save for the discharge of debts, and the prospect of having to incur further debts for the marriages of two girls would certainly influence a prudent guardian in deciding what steps should be taken for the discharge of the debts. I am of opinion that the discharge of the debts was necessary in the circumstances of the case and that the defendants need not rely solely on the fact that the alienation was an act done by the guardian honestly and after taking advice from others. The mere consultation of others would not always be a ground for upholding a transaction, if the Court is convinced that both those consulted and the guardian made a grave mistake. The conclusion arrived at by the Subordinate Judge is right and this second appeal must be dismissed with costs.

The respondent has preferred a memo. of objections against the Subordinate Judge's disallowance of his costs in the appeal. I do not think that the fact that the questions of law raised in the case were not easy of solution was a good ground for disallowing the costs of the successful litigant. The order as to costs must be set aside. The respondent will have his costs in this Court and in the lower Appellate Court.

SADASIVA AIYAR, J.—The important question of law argued in this case relates to the power of the natural guardian of a minor Hindu to effect an alienation of the minor's property so as to bind the minor. Numerous cases have been quoted on both sides in which the disputed alienation has been upheld, sometimes on the ground of legal necessity, sometimes because it was reasonable and proper, again because the guardian did not act through caprice and extravagance but in the best interests of the minor, sometimes because it was "for the minor's benefit" and so on. In a few cases, the alienation has been upheld because the alienee acted *bona fide* in obtaining the alienation from the guardian after making proper inquiries as to the actual necessity or as to the alienation being for the minor's benefit or as to the existence of pressure from creditors. In Mayne's Hindu Law, paragraph 218 it is said :—"He will also be bound by the act of his guardian, in the management of his estate, when *bona fide* and for his interest and when it is such as the infant might reasonably and prudently have done for himself, if he had been of full age. But not where the act appears not to have been for his benefit and the person who so deals with the guardian is bound to inquire into the propriety of his act. And where the act is done by a person, who is not his guardian but who is the manager of the estate in which he has an interest, he will equally be bound, if, under the circumstances, the step taken was necessary, proper or prudent." In *Succaram Morarji* v. *Kulidas Kanhaii* (8), it was said quoting from West and Buhler, that a widow managing for her infant son (like any other manager when minors are interested as co-parceners) can deal with the property only to meet existing necessities but the other party is protected by good faith and reasonable inquiry. In *Mahammad Mundal* v. *Nofur Mundal* (5), it was held that the principle of the decision in *Hanooman Persaud Pandey* v. *Musammat Babooee Munraj Kunwaree* (3), was applicable also to the *bona fide* manager of an infant's estate (in that case the grandmother of the plaintiff), that an alienation by sale stands on the same footing as an alienation by mortgage and that Mr. Mayne's opinion, in his Hindu Law, section 196, is correct that when the act is done by the person who is not his guardian but who is the manager of the estate in which he has an interest, the minor will equally be bound, if, under the circumstances, the step taken was necessary, proper or prudent. In *Kaihur Singh* v. *Roop Singh* (9), it was held that even without actual pressure upon the minor's estate, an act of the guardian which at the time of the alienation appeared on the reasonable grounds to be dictated by pru-

dence and for the minor's benefit is binding on the minor. In *Tejpal* v. *Ganga* (10), the learned Judges say:—"We think that the preponderance of authority is in favour of the proposition that a Hindu mother as the natural guardian of her minor son has a right to deal with and dispose of her minor son's estate for his benefit". It will be seen that the learned Judges say nothing about "pressure" and do not use the phrase 'necessity' or 'legal necessity' which vague phrase has been interpreted in various ways in different decisions. In *Subba Reddy* v. *Kotamma* (11), Davies and Sankaran Nair, JJ., held that where a guardian has acted in the interests of the minors after consideration of the circumstances then in existence, his act, was binding on the minors, though it was afterwards found that the act was really injurious to the minors (as the minors got only 4 acres through the said guardian's act while they were really entitled, as afterwards found, to 7 acres of land). This case shows that where a guardian acts according to his best lights for the minor's benefit and his act was what an ordinary man of prudence would do where his own property was concerned, such act is binding on the minor. In the case in *Arunachala Reddi* v. *Chidambara Reddy* (7), it was held that alienations made in part for the purpose of discharging the liability incurred by the father of the minor and in part in connection with litigation in which the question of the validity of the minor's adoption was involved, was binding on the minor if there was nothing to suggest that in making the alienation, even though the alienees were her relations, the minor's mother was acting otherwise than in the interest of the minor's estate. I think the only safe and convenient rule is (*a*) that if the guardian of a Hindu minor alienates the minor's property because he considers it, after weighing all the then existing circumstances, to be in the best interests of the minor to make that alienation, the minor is clearly bound by that act of alienation, (*b*) that even if the guardian acted wrongly, the alienee is protected if he acts in good faith after making due inquiry and if he is satisfied on the representations of the guardian and on his own independent inquiry that the guardian's act appears then to be clearly for the minor's benefit. I think that any comparison between the powers of a natural guardian and of a guardian to whom the Guardians and Wards Act applies, as was done in the case of *Muthu Subbiah Chettiar* v. *Rungiah Gounden* (2), is of very little utility in deciding as to the powers of a natural guardian under the Hindu Law. The Legislature is not bound to follow the common law and can give powers and impose restrictions on certain kinds of guardians according to pleasure. In the present case, I understand both Courts to find that the alienee (the 6th defendant) acted *bona fide* and that he did not want to make any profit at the expense of the minor in obtaining the alienation of 1889 from the minor's mother acting as the minor's guardian. Though no specific issue as to the alienee's good faith and the inquiries made by him was raised in the suit, the first issue is generally worded as to the binding character of the alienation on plaintiff and the cross-examination of the 6th defendant (defendant's witness No. 15) by the plaintiff's Vakil was directed to the question whether 6th defendant did make proper inquiries as to the debts due by the minor's deceased father and as to whether there was pressure upon the estate and so on. The plaintiff was, therefore, not taken by surprise and I do not think it necessary that specific issue should now be raised on the question of the alienee's good faith or that an opportunity should be given to the parties to adduce further evidence in this case. I am also clear on the evidence that (as found by both Courts) the plaintiff's mother, after consulting her husband's relations and friends, considered it the most prudent course and for the clear benefit of the minor to make the sale of the property to the 6th defendant, who offered the highest price then available for it. I might state that the learned Subordinate Judge was not justified in his findings on three questions of fact, his findings being at variance with those come to by the learned Munsif. The Subordinate Judge held that a debt of only Rs. 4,000 remained due on the date of the plaintiff's father's death whereas plaintiff's own 16th witness admitted the existence of a debt of Rs. 7,000 at the father's death. The Subordinate Judge also ignored the documents Exhibits I and II which show the existence of debts to the extent of about Rs. 3,500 in addition to the

(10) 25 A. 59.
(11) 14 M. L. J. 442.

Rs. 4,000 due under Exhibits III, V, VI, VIII, IX and X. The learned Subordinate Judge also disbelieved the genuineness of documents Exhibits XI and XIII, while even the plaintiff in the ground of appeal before him (see ground 8) did not deny the genuineness of those Exhibits but only stated that they should not have been admitted in evidence as they were produced too late and that importance should not have been attached to them. On the question of pressure by creditors also, the Subordinate Judge ignored the fact that some properties had already been sold to discharge debts and erred in differing from the Munsif by brushing aside the circumstantial evidence indicating the pressure of creditors on the guardian and in practically requiring direct evidence to be given by the creditors themselves of such pressure after the lapse of twenty years. In the result, I agree that this second appeal should be dismissed with costs, and the memorandum of objections, put in by the respondents Nos. 1, 3, 4, 5, 6, and 10 in respect of the costs disallowed by the Subordinate Judge, must be allowed with costs.

Appeal dismissed.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 265-B OF 1911.

July 25, 1912.

Present:—Mr. Stanyon, A. J. C.

AGYARAM—APPELLANT

versus

DEORAO—RESPONDENT.

Berar Land Revenue Code (Act of 1896), *ss.* 205 *to* 209,211(*d*)—*Pre-emption—Decree for foreclosure against mortgagor's representative—Representative also co-occupant—Subsequent suit for pre-emption.*

The right of pre-emption arising in respect of a mortgage under the Berar Land Revenue Code is quite independent of any obligation to redeem the mortgage which may fall on the pre-emptor as a representative of the mortgagor.

A. owned a certain survey number. He partitioned the field equally between his two sons, *B.* and *C.*, reserving no share for himself. Subsequently, *A.* and *B.* mortgaged the half share of *B.* to *D.*, who sued *A.* and *B.* for foreclosure of the mortgage. A decree *nisi* was passed in the usual form. Before it became absolute, *A.* died, and *C.* was brought on the record in his place. No redemption took place, and the decree for foreclosure was made absolute. *C.*, thereupon, sued to enforce his right of pre-emption under the Berar Land Revenue Code:

Held, that the decree for foreclosure was no bar to the suit for pre-emption by *C.*

Appeal against the decree of the District Judge, East Berar, Amraoti, dated the 27th June 1911, reversing that of the Subordinate Judge, Morsi, dated the 9th July 1909.

Dr. *H. S. Gour* and Mr. *M. B. Kinkhede*, for the Appellant.

Mr. *J. Mitra*, for the Respondent.

JUDGMENT.—It is necessary to state the facts as found by the lower Appellate Court. One Raibhan had two sons, Sitaram and Deorao, and the family once jointly owned Survey Nos. 1 and 8 in a village called Simora, in the Morsi *Taluq* of the Amraoti District in Berar. Some 12 years before the suit, out of which this appeal has arisen, Raibhan partitioned the two fields equally between his two sons, reserving no share for himself. Thereafter Raibhan and Sitaram executed a mortgage of the half share of Sitaram in favour of the present defendant Agyaram. A suit was brought to enforce this mortgage by foreclosure. It was expressly held in that suit that Sitaram's brother Deorao, the present plaintiff, had no present interest in the mortgaged half share. A decree for Rs. 7,192-13-3 was passed against the mortgagors, in the usual form of a foreclosure decree *nisi*. Before it was made absolute, Raibhan died, and, though he had no interest in the mortgaged half share, and was wrongly retained on the record as a defendant and judgment-debtor, the error was perpetuated by substituting Deorao for him as his legal representative. No redemption took place, and the decree for foreclosure was made absolute. Thereupon, Deorao lodged the present suit to enforce his right of pre-emption under the Berar Land Revenue Code. It was pleaded, *inter alia*, that plaintiff had lost the right to pre-emption owing to his failure to exercise it by redeeming the mortgage decree before it was made absolute. This plea succeeded in the first Court, which dismissed the suit on that ground. The lower Appellate Court, however, reversed that decision, and has given the plaintiff a decree for pre-emption. Hence this second appeal by the defendant. The lower Appellate Court has held that the right to pre-emption did not arise till after the foreclosure decree had been made absolute, and this proposition is contested before me.

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I am bound to say that the provisions as to pre-emption contained in the Berar Land Revenue Code, 1896, are extremely ambiguous in places, and it is not easy to answer the question raised in this appeal. Section 205 states that the right to pre-empt arises when the interest of the co-occupant "is transferred by sale, foreclosure of mortgage, or relinquishment in favour of a specified person for valuable consideration." It seems to me to be a misnomer to describe as pre-emption, a right to cancel a transfer already made and compel another transfer in favour of the so-called pre-emptor. Sections 206 to 209, which lay down the procedure to be followed by the holders, and intending purchasers and mortgagors, of shares subject to pre emption, contemplate true pre emption, namely, that before any other transfer is completed, the pre emptor shall be given his option: and in case of an impending transfer by foreclosure, the pre-emptor practically exercises the right of redemption for his own benefit. It is this that is made the bed-rock of the case for the appellant before me. It is urged that the plaintiff, as pre-emptor, received notice of the mortgage by being made a party to the mortgage suit before foreclosure absolute: that he thus had an opportunity of satisfying his right of pre-emption by way of section 208 (1) of the Berar Code, and that, having abstained from availing himself of his option, the decree absolute now restrains him from reviving that option. It seems to me, however, that this contention overlooks the provisions of section 211 of the said Code. It cannot be disputed that due notice, as required by section 206, was not given to the plaintiff. It is also clear from clause (*d*) of section 211 that, if a pre emptor finds the mortgage-debt in excess of the fair market-value of the property mortgaged, then he may abstain from redemption, and bring a suit under section 211. In the present case the mortgage decree was for Rs. 7,192-13 3, whereas the Courts below have found the price of pre-emption to be Rs. 3,680-9 9. The plaintiff, as a representative judgment-debtor in the mortgage suit, could not have claimed to *redeem* for this amount; and clause (*d*), of section 211, seems to me to make the right to bring a pre-emption suit quite independent of any duty of redemption, *qua* representative of the mortgagor.

For these reasons, I am not prepared to hold that the view taken by the lower Appellate Court is wrong. I, therefore, dismiss this appeal with costs

Appeal dismissed.

MADRAS HIGH COURT.

APPEAL AGAINST ORDER No 203 OF 1911.

October 16, 1912.

Present:—Mr. Justice Sundara Aiyar and Mr. Justice Sadasiva Aiyar.

DHARANI MUDALI—APPELLANT

versus

MEENAMBA BAI AMMANI—RESPONDENT.

Civil Procedure Code (Act V of 1908), *s.* 146, *O. XXI, r.* 16—*Assignment of decree—Limitation—Execution of decree—Petition by transferee decree-holder to enter up satisfaction.*

A transferee decree-holder may put in a petition to enter up satisfaction of a whole or a part of a decree without puttinglin an application for execution. There is no necessity, according to the Code, for the assignee getting any previous order recognising his assignment before doing so.

It is open to a decree-holder to certify satisfaction of a decree at any time.

The date of assignment has nothing to do with the question of limitation applicable to execution of decree.

A transferee decree-holder is not precluded from receiving payment from the judgment-debtor of the amount due under the decree by the mere fact that he had not paid some portion of the consideration to his transferor.

Appeal against the order of the Court of the Subordinate Judge of Tanjore, dated 30th March 1911, in E. A. No. 447 of 1910, in O. S. No. 30 of 1902.

Messrs. *L. A. Govindaraghava Aiyar* and *G. S. Ramachandra Aiyar*, for the Appellant.

Mr. *T. R. Ramachandra Aiyar*, for the Respondent.

JUDGMENT.—We shall deal with each of the objections to the application put in by the transferee decree-holder separately. The first point raised is that the assignee's right to execute the decree is *res judicata* by the orders, Exhibits G, H, I*a* and II*a*. We are of opinion that what was decided

in every one of these orders was no more than that so long as an attachment on the decree sought to be executed subsisted, the assignee could not execute the decree. It is conceded that there was no subsisting attachment on the date of the present application except the attachment by Nilakanta Iyer. We are of opinion that Nilakanta Iyer's attachment had also ceased to subsist. He put in a petition to the Court abandoning the attachment. Any application, therefore, to execute the decree would not be barred by the rule of *res judicata*.

The most important objection argued is that the present application by the assignee is not maintainable because it does not come within the purview of Order XXI, rule 16, which lays down that an assignee of a decree in writing may apply for execution and the Court may allow execution under the same rules and subject to the same conditions as a decree-holder may execute. The application in the present case by the assignee states that the amount due under the decree had been discharged by the sale by the judgment-debtors to the assignee of the mortgaged property (the decree being one on a mortgage) and asks the Court that satisfaction may be entered in respect of the whole decree, or of a portion in case it should be found that there is any valid objection to complete satisfaction being entered. The contention is that there is no provision in any section or rule contained in the Civil Procedure Code entitling the assignee to put in such an application. There is no reason why section 146 of the Civil Procedure Code should not be applicable to a petition put in by the assignee of a decree. A decree-holder may, undoubtedly, apply for recording satisfaction of the decree without putting in an application for execution. It stands to reason that his representative, the assignee, should also be entitled to do so. There is no necessity according to the Code for the assignee getting any previous order recognizing his assignment or his right to execute the decree before actually applying for execution or putting in a petition for recording satisfaction. We should certainly be prepared to hold, even apart from section 146, that an assignee of a decree would be entitled to maintain an application of the kind in question in the absence of any provision preventing him from doing so.

In *Ramachandra Aiyar* v. *Subramanya Chettiar* (1), which has been referred to on behalf of the appellant, Bhashyam Iyengar, J., says that the only application that a decree-holder can put in, is for execution of the decree under section 232, Civil Procedure Code. The question in that case was whether an assignee of a decree could put in an application merely for getting his assignment recognised. The observation of the learned Judge was that no petition for such a purpose alone is provided for in the Code. A proceeding of that sort is quite superfluous as an assignee could apply for execution without such preliminary step. The learned Judge cannot be understood to have stated that there is no application that an assignee could put in except for execution. Any other application open to a decree-holder is equally open to his assignee. This contention must, therefore, be disallowed.

The next contention is that the execution of the decree is barred by limitation. This argument is based solely on the ground that the assignment to the petitioner was in January 1906, more than three years before his present application which was in February 1910. The argument is entirely unsupportable. The date of the assignment has nothing to do with the question of limitation applicable to the execution of a decree. The various starting points determining the question of limitation are laid down in Article 182 of the Schedule to the Limitation Act. Apart from this, the present application is not one for execution. It is open to a decree-holder to certify satisfaction of the decree at anytime.

It is then contended that the finding of the Subordinate Judge that the consideration for the assignment has been fully satisfied by the petitioner is not correct. We consider it unnecessary to go into this question inasmuch as even if some portion of the consideration has not been paid, that would not make the assignment itself incomplete, or prevent the assignee from receiving payment from the judgment-debtor of the amount due under the decree.

(1) 14 M. L. J. 393.

VELAYUDAM PILLAI v. VAITHYALINGAM PILLAI.

It is perhaps necessary to refer to a further contention that the Subordinate Judge disallowed evidence to be gone into relating to two matters, *viz.*, (1) that the petitioner was only a *benamidar* for one Scindia, and (2) that there was a condition precedent agreed upon between the parties before the assignment could come into operation. Neither of these questions was definitely raised in the objection statement of the appellant in answer to the petitioner's application. The Subordinate Judge was not wrong in disallowing evidence to be given on those questions. We dismiss the appeal with costs.

Appeal dismissed.

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 313 OF 1911.

November 6, 1912.

Present:—Sir Ralph Benson, KT., Judge, and Mr. Justice Sundara Aiyar.

VELAYUDAM PILLAI—PLAINTIFF—PETITIONER

versus

VAITHYALINGAM PILLAI AND ANOTHER—DEFENDANTS—RESPONDENTS.

Limitation Act (IX of 1908), s. 20—Payment by a donor—How far keeps debt alive against universal donee—"Party liable."

Where a person was sought to be made liable as a universal donee on a debt contracted by his donor and payments made by the latter after the gift were relied on as saving the bar of limitation:

Held, that the debt was kept alive against the donee by the payments made by the donor.

Section 20 of the Limitation Act requires that the payer should be one liable to pay the debts and provides that the result of the payment would be to give to the creditor a fresh period of limitation from the date of payment; it does not restrict the benefit accruing to the creditor with respect to his debt to his remedy against the payer alone. The debt being kept alive, the result must be to make it enforceable against any one liable for it.

The 'party liable' includes any person or persons against whom an action on the debt could be brought whether liable originally or as representing or taking the estate, real or personal, of the obligor.

Petition, under section 25 of Act IX of 1887, praying the High Court to revise the decree of the Court of the Subordinate Judge of Kumbakonam, in S. C. S. No. 627 of 1910.

Mr. *T. Ramasawami Iyer*, for Mr. *T. R. Venkatrama Sastriar*, for the Petitioner.

Mr. *S. Muthia Mudaliar*, for the Respondent.

JUDGMENT.—The petitioner in this Court instituted a Small Cause suit in the Subordinate Judge's Court of Kumbakonam for the recovery of the amount due to him on a promissory-note executed by the 1st defendant on the 22nd June 1902. The 2nd defendant was also sought to be made liable for the debt under section 128 of the Transfer of Property Act as a universal donee, she having received in gift from the 1st defendant under an instrument, dated the 29th November 1903, a house which was the only property possessed by the latter. The 2nd defendant pleaded that as against her, the suit was barred by limitation and that the payments made by the 1st defendant, subsequent to the deed of gift and relied on as saving the suit from limitation, could not keep the debt alive against her. This plea was upheld by the lower Court. It is contended before us that this view is wrong. We are of opinion that the contention must succeed. According to section 20 of the Limitation Act, "where the interest on a debt or legacy is before the expiration of the prescribed period, paid as such by the *person liable to pay the debt or legacy* .....a fresh period of limitation shall be computed from the time when the payment was made." The section requires that the payer should be one *liable to pay the debt* and provides that the result of the payment would be to give the creditor a fresh period of limitation from the date of the payment. It does not restrict the benefit accruing to the creditor with respect to his debt to his remedy against the payer alone. According to the language of the section, the debt being kept alive, the result must be to make it enforceable against any one liable for it. In *Krishna Chandra Saha* v. *Bhairab Chandra Saha* (1), Maclean, C. J., and Mitter, J., held that a payment made by a mortgagor and an acknowledgment by him after the sale of a portion of the mortgaged property would give the mortgagee a fresh period of limitation not only against the mortgagor but also the purchaser. The learned Chief Justice observed: "In our opinion, having

(1) 32 C. 10 7; 9 C. W. N. 868.

regard to the language of the section, we do not think the action is barred as against property No 3." We may add that the principle to be deduced from the case of *Maria Chinnery* v. *Eyre Evans* (2), is applicable to the present case, namely, that "a mortgagee cannot, by the act of the parties entitled only to the equity of redemption, be deprived of his right to resort to any estate comprised in his mortgage so long as he has not released or given it up and so long as that mortgage is legally kept alive." The learned Judge was of opinion that section 21 was not applicable to the case. In *Domi Lal Sahu* v. *Roshan Dubey* (3), the same view was taken by Maclean, C.J., and Holmwood, J.; *Newbould* v. *Smith* (4), which was relied on in support of the purchaser was not followed. The learned Chief Justice observed that the case should not be followed in construing the words of section 20 of the Indian Limitation Act. In *Roddam* v. *Morley* (5), it was held that the expression "party liable" includes any person or persons against whom an action on the debt could be brought whether liable originally or as representing or taking the estate, real or personal, of the obligor. In *Howard* v. *Lightfoot* (6), the question arose whether payment of interest by the specific devisee of part of a testator's real estate, which was subject to a mortgage created by the testator, was sufficient to keep the mortgagee's right of action alive against the specific devisees of other parts of the real estate which were not subject to the mortgage. The Court of Appeal held that it was sufficient. The question was considered at great length and the principle enunciated in *Roddam* v. *Morley* (5) was followed. Vaughan Williams, L.J., observed: "I think that in principle the decision in *Roddam* v. *Morley* (5) involves this: that payment made by a person, who is not a stranger to the transaction in interest, binds those who are interested in the payment to the extent of preventing the statute running." Farwell, L. J., said : "*Roddam* v. *Morley* (5) appears to me to rest upon the joint liability of a number of persons standing in equal peril of suit and who all benefit by the discharge of all or any part of such liability." It is unnecessary for us to discuss the question at length after the full exposition of that principle in the last case. Reliance is placed for the respondent on section 21, which lays down that payment or acknowledgment made by one of several joint contractors, partners, executors or mortgagees shall not be available to prevent the statute running against any others of them. The present case does not come within this rule. It stands to reason that where several persons render themselves liable under one contract, an act done by any one of them alone should not render the others liable. But the 2nd defendant in this case derived her right from the 1st defendant and is in privity with him. The act of the 1st defendant may, therefore, be well held to bind her. See section 19, which provides that an acknowledgment is sufficient, if made, by a person through whom the person charged has derived his right. The respondent argues that a part payment, or acknowledgment is taken as evidence of a fresh promise to pay and should not, therefore, operate except against the person making the part payment or acknowledgment; but the Indian Statutes of Limitation have never proceeded on any such interpretation of the effect of a payment or acknowledgment and although the implication of a promise was the basis of the extension of the period of limitation in England under 21 Jac. I, C. 16, it is not so under 3 and 4 Will. IV, C. 42 and under the later statutes, according to which a part payment or acknowledgment is a withdrawal, by virtue of the statute, of the abrogation of the remedy and leaves the old debt still recoverable at law. See *Howard* v. *Lightfoot* (6) per Farwell, J. It is also argued that where there are several persons liable to pay a debt, the expression " the person liable to pay the debt" in section 20 must be construed as meaning all the persons liable to pay, the singular being taken to include the plural. This contention is obviously untenable as the result of such a construction would be to make the acknowledgment by one of several debtors alone useless even as against himself. The respondent's Vakil has referred to *Gopal Daji* v. *Gopal* bin *Sonu* (7), where Jenkins, C. J. and Ashton,

(2) 11 H. L. C. 115; 10 Jur. (N. S.) 855; 11 L. T. 68; 13 W. R. 20; 4 N. R. 520.
(3) 33 C. 1278; 11 C. W. N. 107.
(4) 33 Ch. D. 127.
(5) 1 De. G. & J. 1; 26 L. Ch. 438; 3 Jur. (N. S.) 449; 5 W. R. 510.
(6) (1907) 1 Ch. 330; 76 L.J. Ch. 316; 96 L. T. 306.
(7) 28 B. 248; 5 Bom. L. R. 1020.

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J., held that part payment of a debt by a principal debtor would not prevent limitation running against the surety. In that case, both the principal and the surety seem to have agreed to pay by the same contract. It may be that they were regarded as joint contractors. Jenkins, C.J., observed that the principal's debt was distinct from that of the surety and that the principal was not the person liable to pay the debt of the surety. The decision is hardly in accordance with *Allison* v. *Frisby* (8), although the learned Judge has observed that that case turned on a statute and considerations which have no place here. Abdur Rahim, J., followed *Gopal Daji* v. *Gopal* bin *Sonu* (7) in *Sami Aiyangar* alias *Srinivasa Varathachariar* v. *Laxim* alias *Echammal* (9), but the learned Judge observed:—"The respondent's Pleader has not attempted to argue that the exposition of the law in that case is not correct." The case before us is not one of principal and surety and is not governed by the above rulings. Justice requires that a person, who has received all the property of another without, it may be, the knowledge of his creditors should not be at liberty to plead the Statute of Limitation against them, whereas the donor has kept the debts alive by part-payment or acknowledgment which may have been made even before the gift. In the result, we modify the decree of the Subordinate Judge by awarding the plaintiff the amount claimed and costs against the 2nd defendant also to the extent of the property received by her from 1st defendant.

The respondent will pay his petitioner's costs of this petition.

Decree modified.

(8) 43 Ch. D. 106; 59 L. J. Ch. 94; 61 L. T. 632; 38 W. R. 65.

(9) 21 M. L. J. 455; 9 M. L. T. 263; 9 Ind. Cas. 8.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION PETITION No. 35 OF 1912.

August 26, 1912.

Present:—Mr. Drake-Brockman, J. C.

GANESHLAL—APPLICANT

versus

DHONDIBA—NON-APPLICANT.

Central Provinces Court of Wards Act (XXIV of 1899), ss. 10, 12, 26, 27—Suit pending against defendant—Death of defendant—Representative ward of Court—Continuance of suit—Civil Procedure Code (Act V of 1908), O. XXII, rr. 1, 4—Interpretation of statutes—Statute imposing restrictions—Superfluity.

Section 12 of the Central Provinces Court of Wards Act has no application to a claim already submitted to the arbitrament of a Civil Court before publication of a notification under section 10 and still awaiting the Court's adjudication on the expiry of six months from the date of that publication.

Section 26 of the Act does not apply to a suit already filed against the predecessor-in-title of a Government ward and continued against the ward as legal representative of the original defendant in accordance with Order XXII, rule 4, Civil Procedure Code.

Statutes imposing restrictions upon the subject's right of suit should be construed strictly and such restrictions should not be extended beyond what the words used actually cover.

There is always a presumption against superfluity in a statute.

A restricted sense is the right one to give to words which cut down existing remedies.

The jurisdiction of a Civil Court is not to be construed as excluded in any case beyond the clearly expressed will of the Legislature.

Revision against the decree of the Judge, Small Cause Court, Nagpur, dated the 7th October 1911.

Mr. *S. R. Pandit*, for the Applicant.

Mr. *M. K. Pandhye*, for the Non-Applicant.

JUDGMENT.—The applicant's suit to recover money and the value of grain advanced by him with interest thereon has been dismissed by the Small Cause Court, Nagpur, under the following circumstances.

The suit was filed on the 14th December 1910, against the alleged borrower Ramchandra Rao, commonly known as Moti Baba. The first hearing was fixed for the 2nd March 1911, and the case was actually taken up the next day, the 2nd being a holiday. Ramchandra Rao had died on the 20th February 1911. After two adjournments given to enable the plaintiff to apply under rule 4, Order XXII, Civil Procedure Code, he moved the Court on the 24th April to cause the minor son of the deceased to be made a party with his mother Gunia Bai as guardian *ad litem*. The Court granted this application and ordered notices to issue to the son Dhondiba and to Gunia Bai. At the next hearing, it was discovered that the Court of Wards had assumed superintendence of the minor's property on the 23th February 1911. The Court of Wards was accordingly served with a notice under rule 3, Order XXII, Civil Procedure Code, and appeared by agent on the 16th September 1911,

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The plaintiff was then ordered to furnish the Court of Wards with a copy of the plaint and the hearing was adjourned to the 30th September. On the 7th October, after hearing arguments, the Court dismissed the suit on two grounds (1) that notice had not been given to the Court of Wards as required by section 26, Central Provinces Court of Wards Act, 1899, (2) that the claim must be deemed under section 12 (2) *ibid.* to have been duly discharged. It should be stated here that the notice to claimants prescribed by section 12 (1) of the said Act was published on the 27th March 1911.

It is now urged on behalf of the plaintiff that of the two sections relied on by the Small Cause Court, No. 26 has no application whatever. This is conceded by the learned Pleader who represents the Court of Wards and is sufficiently obvious from the terms of the section, the very proviso to which imposes an important restriction on its operation. The suit was filed before the Court of Wards assumed seperintendence of the property left by the original defendant and could not abate by reason of the original defendant's death, inasmuch as the right to sue survived: see rule 1, Order XXII, Civil Procedure Code. Under rule 4, Order XXII, the Court was bound to make the legal representative of the deceased a party and to proceed with the suit, while section 27, Court of Wards Act, made it equally essential to name the Court of Wards as the minor's guardian *ad litem*. In these circumstances, it would require the clearest and most unequivocal language to justify a Court in applying to a suit already filed against the predecessor-in-title of a Government ward the provisions of section 26, Court of Wards Act. In the words of Farran, C. J., in *Ranchod Haribhai* v. *Secretary of State for India*(1), statutes imposing restrictions upon the subject's right of suit should be construed strictly and such restrictions should not be extended beyond what the words used actually cover. The same principle should, in my opinion, be applied to the right of continuing a suit already in progress.

For similar reasons, I hold that section 12, Court of Wards Act, has no application to a claim already submitted to the arbitrament of a Civil Court before publication of a notification under section 10 *ibid.* and still awaiting the Court's adjudication on the expiry of six months from the date of that publication. The effect of construing the former section as the lower Court has done would be to make a debt irrecoverable, although the Civil Court had not decided the suit in which its recovery was sought. Such a cutting down of the plaintiff's remedy by suit and ouster of the jurisdiction of a Court already seised of a matter cannot readily be assumed to have been intended by the Legislature, A restricted sense is the right one to give to words which cut down existing remedies and the jurisdiction of the Civil Court is not to be construed as excluded in any case beyond the clearly expressed will of the Legislature: see *Tulsidas* v. *Virbasapa* (2) and *Great Indian Peninsular Railway Company* v. *Amraoti Municipality* (3). So in *Prosonno Coomar* v. *Koylash Chunder* (4), Sir Barnes Peacock, C. J., said :—

"An act by which the jurisdiction of the ordinary Courts of Judicature is taken away must be construed strictly. The jurisdiction of the ordinary Courts of Judicature is not to be taken away by putting a construction upon an Act of the Legislature which does not clearly say that it was the intention of the Legislature to deprive such Courts of their jurisdiction." In support of this view, I may refer to section 31 (2), Punjab Court of Wards Act, 1903, which provides as follows :—

"On the publication of a notice under section 26, all suits and all proceedings in execution of any decree against a ward or as affecting any property under the superintendence of the Court of Wards then pending in any Civil Court shall be stayed until the plaintiff or the decree-holder files a certificate that the claim has been notified in accordance with section 26." Section 26, Punjab Court of Wards Act, corresponds closely with sub-section (1) and the proviso to sub-section (2) of section 12 in the Central Provinces Act, while the rest of sub-section (2) in section 12 of the latter Act finds a counterpart in section 29 of the Punjab Act. There is always a presumption against super-

(1) 22 B. 583 at p. 588.

(2) 4 B. 624 at p. 628.
(3) 8 N. L. R. 107 at p. 112; 16 Ind. Cas. 449.
(4) 8 W. R. 428 at p. 436; B. L. R. Sup. Vol. 759; 2 Ind. Jur. (N. S.) 327.

fluity in a statute: see *Damodar Das* v. *Gokal Chand* (5). If then section 31 (2), Punjab Court of Wards Act, is not insignificant, the suit contemplated therein would, in the absence of that provision, have to proceed in accordance with law, being unaffected by the publication of a notice calling for claims.

Moreover, there is in this case a special reason for declining to allow the Court of Wards to take shelter behind such an arbitrary provision as that in section 12 (2) of the Central Provinces Act. A copy of the plaint must have been delivered to its agent on or within a few days of the 16th September 1911, and the period of six months prescribed in the notice published on the 27th March 1911 did not expire till the 27th September following. The plaint furnished the Court of Wards with all necessary particulars of the plaintiff's claim and the documents relied on to support it were open to inspection under this Court's Civil Circular No. III-7 along with the rest of the record in the suit.

The decree of the Small Cause Court is set aside and the case is remanded to that Court with a direction to try it on the merits. Costs in this Court will be paid by the non-applicant (defendant). I allow Rs. 10 as Pleader's fee. Other costs already incurred will be costs in the cause.

Case remanded.

(5) 7 A. 79 at p. 82.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 846 OF 1908.

October 8, 1912.

Present:—Mr. Justice Sundara Aiyar and Mr. Justice Sadasiva Aiyar.

VEERARAYAN *styled* ANUJAN VALIYA RAJAH OF PUDIAKOVILAGAM AND OTHERS—APPELLANTS

versus

PARAKAL GOPAL MENON AND ANOTHER —RESPONDENTS.

Lease—Claim for rent—Advance of kattakonam *to lessor by lessee—Assignment by lessor of his reversion* —Kattakonam, *whether can be set-off—Assignor or assignee liable for* kattakanom.

On the execution of a lease deed, the lessee advanced a certain sum as *kattakanom* to the lessor, whereby the interest due on the latter was to be deducted from the rent due every year and the principal amount of the *kattakonam* was re-payable at the termination of the lease, which was a lease from year to year. Soon after the lease, the lessor assigned his reversion to a third party. The lessor then sued for rent:

Held, (1) that the lessee could not set off the *kattakanom* as against plaintiff's claim;

(2) that the tenant was entitled to proceed for his *kattakanom* against either assignor or assignee and;

(3) that in the absence of a special agreement, the right to enforce the *kattakanom* did not accrue due on the date of the assignment; but on the termination of the tenancy.

Second appeal against the decree of the Subordinate Judge of Palghat, in A S. No. 740 of 1907, preferred against that of the District Munsif of Alatur, in O. S. No. 156 of 1906.

The Hon'ble Mr. *J. L. Rosario*, and Mr. *C. V. Ananthakrishna Iyer*, for the Appellants.

Messrs. *T. R. Ramachandra Aiyar* and *V Ryru Nambiyar*, for the Respondents.

JUDGMENT.—The plaintiff sues for rent due on a lease executed to him by the defendant. Sometime after the lease, he assigned his reversion to a third party. The defendant had advanced *kattakanom* to the plaintiff. It has been found by the lower Courts that when an advance of this nature is made by a tenant, the interest due on the amount every year is deducted from the amount due for the year and the principal amount of the *kattakanom* is re-payable at the termination of the lease. Although the original lease was only for one year, it is not denied that the defendant, on the termination of the year, became a tenant from year to year. The tenancy has not been put an end to. *Prima facie*, therefore, the defendant would not be entitled to claim his *kattakanom* at present or set off the amount of it against the amount claimed by the plaintiff for two years. The District Munsif did not permit him to make the set off, but the Subordinate Judge has allowed him to do so. It appears that the assignee has reason to anticipate difficulties with respect to the adjustment of this *kattakanom* reserved in his hands in the settlement of accounts between him and the assignor's family with respect to the consideration due for the assignment, and that, for that reason, the tenant is disinclined to enforce his claim to the *kattakanom* against the assignee and would prefer to enforce it against the

assignor himself. He, no doubt, has the option to decide whether he would proceed against the assignor or assignee, but this does not affect the question, when re-payment is due to the defendant of the *kattakanom* amount. It was not alleged by the defendant that there was any special agreement in the case making the *kattakanom* re-payable if the lessor made an assignment of his reversionary right; and no authority has been cited in support of the argument that, if the tenant chooses to proceed against the assignor himself instead of against the assignee, the right to re-payment would accrue when the assignment is made. We must, therefore, set aside the Sub-Judge's decree. The plaintiff would be entitled to recover the rent without deducting the *kattakanom* amount, but only the interest due on it for the two years in question. It is also argued by the appellant that the plaintiff is entitled to the commutation value of the *paddy* rent due to him as it stood at the date of the suit. The plaintiff, as we read the plaint, does not seem to have claimed payment of *paddy* in kind. His claim was for a sum of money as damages for non-payment of rent. Whatever doubt there may be about the construction of the plaint, it is quite clear that when the Munsif gave the plaintiff a decree only for damages, he did not appeal against it claiming payment of *paddy* instead of money. On the footing that the plaintiff was entitled only to damages for the defendant's breach of contract, there can be no doubt that the damages must be computed as they stood at the time of breach of the contract. The plaintiff is, therefore, entitled to the value of *paddy* only according to the rate prevalent at the end of the years 1080 and 1081 respectively. The amount found by the Subordinate Judge is accepted. It is contended by the respondent that the original defendant being dead and the lease having been taken by him for his own benefit, the decree against the present respondents, who have been placed on the record as his representatives, should be only against the assets of the deceased Gopala Menon. It does not appear from anything in the record, whether the lease was taken by him in his individual capacity and whether the suit was against him only as an individual and not as representing the *tarwad*. If the lease was taken by him on behalf of the *tarwad*, then the rent would be payable out of the *tarwad* property in the hands of the present respondents. The form of the decree may be that the defendants should pay rent out of the assets of Gopala Menon in their hands, such assets comprising the *tarwad* property in their hands, if the lease was taken by the deceased on behalf of the *tarwad*. The parties will pay and receive proportionate costs throughout. It is unnecessary to pass separate orders on the memorandum of objections.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 513 OF 1911.

September 9, 1912.

Present:—Mr. Drake-Brockman, J. C.

PAGA—APPELLANT

versus

SADASHEO—RESPONDENT.

Limitation Act (IX of 1908*), s.* 14—*Time requisite for obtaining copy—Copy applied by post—Period between completion of copy and delivery to applicant —Central Provinces Courts Act (II of* 1904*), s.* 8 (1) *(c), rules under.*

A decree was passed by a Munsif on 12th May 1911. On 15th May, defendant applied by post for copy of Munsif's judgment and decree.

The application did not reach the office till after it had closed for the vacation and, consequently, the application was treated as received on 16th June when the Courts re-opened after vacation. The copy was ready on 3rd July but it was not despatched by post to the defendant, as the latter took delivery on 4th July in person. The appeal was filed in the District Judge's Court the same day:

Held, (1) that the 3rd and 4th July should be included as part of the time requisite for obtaining the copy;

(2) that the appeal was within time.

Krishna v. *Balia*, 8 N. L. R. 11; 14 Ind. Cas. 403, followed.

Appeal against the decree of the District Judge, Bhandara, dated the 12th August 1911, confirming that of the Munsif, Sakoli, dated the 12th May 1911.

Rao Bahadur *V. R. Pandit*, for the Appellant.

JUDGMENT.—This second appeal arises out of a suit in which the plaintiff's claim was partially decreed by the Munsif, Sakoli, on the 12th May 1911. The defendants, or one of them, applied on the 15th May by post for copy of the Munsif's judgment and

decree, but the application did not reach the office of the District Judge, Bhandara, till after it had closed for the vacation and in accordance with practice, the application was treated as received on the 16th June when the Courts re-opened after the vacation. The copy was ready on the 3rd July, but it was not despatched by post to the applicant, as the defendant Paga took delivery on the 4th idem in person and himself filed an appeal in the District Judge's Court the same day. That appeal was dismissed as time-barred on the ground that the latest day on which it could be filed was that on which the copy was ready.

The District Judge correctly held that the right of appeal was still subsisting on the 16th June and that the appellant was consequently entitled to exclude the time requisite for obtaining the copy then applied for. The question raised here is, whether the 4th July should not be excluded as well as the 3rd idem seeing that the copy was not despatched by post on the latter day. This I would answer in the affirmative on considerations similar to those forming the basis of the decision in *Krishna* v. *Balia* (1). Paga has filed an affidavit in this Court stating that he attended the District Judge's office on the 3rd July and asked for the copy but was told it was not ready. I see no reason to disbelieve this statement, but even if it be rejected, the fact remains that the office was not in a position to despatch the copy by post on the 3rd July. As in the case above cited, there was no delay resulting from any want of action on the applicant's part, the decree of the District Judge dismissing Paga's appeal is accordingly set aside and the case is remanded to his Court with a direction to re admit the appeal under its original number in the register and to decide it on the merits. The usual certificate for refund of the Court-fee on the memorandum of second appeal will be granted. Other costs here and below will abide the event.

Case remanded.

(1) 8 N. L. R. 11; 14 Ind. Cas. 403.

BOMBAY HIGH COURT.

CIVIL APPEAL No. 11 OF 1912.

August 16, 1912.

Present:—Sir Basil Scott, KT., Chief Justice, and Sir N. G. Chandavarkar, KT., Judge.

JETHA BHIMA AND CO.—APPELLANT

versus

LADY JANBAI—RESPONDENT.

Civil Procedure Code (Act XIV of 1882), ss. 275, 276, 295—Execution of decree—Attachment—Private alienation after attachment—Subsequent attachment by another creditor—Debtor declared insolvent—First attachment raised by satisfaction of decree—Claim enforceable under attachment—Validity of private alienation—Civil Procedure Code (Act V of 1908), s. 64.

A. obtained a decree against *B.* and attached the right, title and interest of *B.* in certain property. On 6th January 1896, *B.* assigned the whole of his right, title and interest in the property to *C.* In 1898, *D.* obtained a decree against *B.* In 1903, *B.* was adjudged an insolvent, and in 1904, *D.* levied an attachment on the same property as was already attached by *A.* In 1907, the judgment-debt due to *A.* was paid and his attachment raised. In 1910, *C.* got an order raising the attachment of *D.*

Held, (1) that the assignment to *C.* was not void as against *D.*;

(2) that as no assets were realized by sale or otherwise in execution of decree which could be divided rateably between the creditors, *D.* was not the possessor of a claim enforceable under section 295, Civil Procedure Code, or as a consequence enforceable under the attachment within the meaning of section 276.

Appeal from the judgment of Beaman, J., reported at 15 Ind. Cas. 950; 14 Bom. L. R. 511.

Mr. *Robertson*, (with him Messrs. *Talyarkhan* and *Gupte*), for the Appellants.

Mr. *Shortt* (with him Mr. *Desai*), for the 1st Respondent.

JUDGMENT.—The material facts are that Balkrishna, a judgment-creditor of Mahomed Mehdi, attached on the 21st of December 1895 the right, title and interest of the judgment-debtor in certain securities for money held by the Receiver in the suit for the administration of the estate of Tharia Topan, the father of the judgment-debtor. On the 6th of January 1896, the judgment-debtor assigned the whole of his right, title and interest in the estate of his father to his mother, the defendant in this suit. In the year 1898, the present plaintiffs brought Suit No. 566 against the judgment-debtor, Mahomed Mehdi and obtained a decree on the 16th of September 1898. In 1899, Mahomed Mehdi took the benefit of the

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Insolvent Act but after a time his petition was dismissed. A fresh petition was filed in February 1903 and he was again adjudged insolvent but has not yet obtained his final discharge. In 1904, the present plaintiffs levied an attachment upon the same property as had already been attached, *viz.*, the right, title and interest of Mahomed Mehdi in the securities held by the Receiver in the administration suit relating to his father's estate. On the 15th of October 1907, the judgment debt owing to Balkrishna was satisfied and his attachment was raised. Subsequently Lady Janbai, the assignee of the judgment-debtor under the assignment of the 6th of January 1896, applied to the Judge in Chambers and got the present plaintiffs' attachment raised and it is in consequence of the order raising that attachment that this suit has been instituted.

The plaintiffs pray that it may be declared that the property described in the schedule to the plaint to the extent of the interest of Mahomed Mehdi Tharia Topan at the date of the several attachments is liable to be attached and sold in execution of the plaintiffs' decree.

By reason of the law of limitation, the plaintiffs are unable to challenge the assignment in favour of Lady Janbai upon any ground except that it is void under the provisions of section 276 of the Civil Procedure Code of 1882. For the purpose of this suit, therefore, the assignment must be considered to be a *bona fide* assignment of the property of the judgment-debtor to Lady Janbai made in January 1896.

Now, in that year, the plaintiffs were not attaching creditors, nor had they even filed a suit against Mahomed Mehdi. It is said, however, that the assignment was by virtue of the provisions of section 276 of the old Code void against the judgment-creditor Balkrishna who had attached on the 21st of December 1895 and that the claim of the present plaintiffs was a claim enforceable under the attachment of Balkrishna, and, therefore, the assignment in favour of Lady Janbai is void against the present plaintiffs. Balkrishna's attachment has been got rid of under the provisions of section 275 of the Code, the section immediately preceding section 276, upon which the plaintiffs based their claim. Section 275 provides that if the amount decreed with costs and all charges and expenses resulting from the attachment of any property be paid into Court, or if satisfaction of the decree be otherwise made through the Court, or if the decree is set aside or reversed, an order shall be issued, on the application of any person interested in the property, for the withdrawal of the attachment. In accordance with the provisions of that section, the attachment of Balkrishna was withdrawn on the 15th of October 1907.

The question now is whether, although that attachment is non-existent, the plaintiffs' claim is a claim enforceable under it. The argument, advanced on behalf of the plaintiffs, is that under section 295, a creditor who has applied to the Court for execution of a decree for money against the same judgment-debtor and has not obtained satisfaction thereof, shall be entitled to a rateable distribution, with the other judgment-creditors in the same position, of all the assets realised by sale or otherwise in execution of the decree; and it was held by Mr. Justice Telang, in *Sorabji Edulji Warden* v. *Govind Ramji* (1), that claims for rateable distribution of assets under section 295 are claims enforceable under an attachment within the meaning of section 276. That decision has received the mark of Legislative approval since the introduction of the Code of 1908, because section 64, which is to the same effect as section 276 of the old Code, explains that for the purposes of this section claims enforceable under an attachment include claims for the rateable distribution of assets. Under section 295, the essential condition of enforcement of claims for rateable distribution was that there should be assets realised by sale or otherwise in execution of a decree. That was a condition which was satisfied in the case of *Sorabji Edulji Warden* v. *Govind Ramji* (1) but it is not so in the present case. There are, in our opinion, no assets realised by sale or otherwise in execution of a decree which can be divided rateably amongst the creditors who have applied for the execution of their decrees, and, therefore, the plaintiffs are not the possessors of a claim enforceable under section 295 or as a consequence enforceable under the attachment within the meaning of section 276. The assignment to Lady Janbai is, therefore, not void as against the plaintiffs.

(1) 16 B. 91.

We, therefore, agree with the lower Court in thinking that the plaintiffs' case fails and must be dismissed with costs. We affirm the decree of the lower Court and dismiss the appeal with costs.

Appeal dismissed.

Attorneys for the Appellants: Messrs. *Manchershaw B. Chothia.*

Attorneys for the first Respondent: Messrs. *Mulji Khambatta & Thakordas.*

PRIVY COUNCIL.

APPEAL FROM THE BOMBAY HIGH COURT.

November 6, 1912.

Present:—Lord Macnaghten, Lord Moulton, Sir John Edge and Mr. Ameer Ali.

MULRAJ KHATAU—APPELLANT

versus

VISHWANATH PRABHURAM VAIDYA —RESPONDENT.

Insurance policy—Transfer of Property Act (IV of 1882 as amended by Act II of 1900), s. 130 (1)—Deposit of policy—Assignment by writing—Deposit by way of security—Priority.

A. assigned in writing a policy of insurance in the form of an absolute assignment to *B.*, though it was intended only to be by way of security. Previously to this, *A.* had merely deposited the same policy with *C.* by way of security for debts already existing as well as for future debts.

The deposit was not accompanied by anything in writing:

Held, (1) that *C.*, with whom the policy was merely deposited, acquired no title whatever therein or in its proceeds;

(2) that *B.* acquired an absolute right to the proceeds of the policy.

Section 130 (1) of the Transfer of Property Act covers actionable claims and transfers by way of security as well as absolute transfers.

The principle of the English law that "a deposit of a document of title without either writing or a word of mouth" creates 'in equity' a charge upon the property to which the document relates to the extent of the interest of the person who makes the deposit, does not apply in India in view of the positive language of section 130.

Appeal from a judgment and decree of the High Court of Bombay, dated April 3rd, 1911,* reversing a judgment and decree of the same High Court in Original Suit No. 976 of 1909†, dated June 23rd, 1910.

FACTS.—One Dwarka Das Dharamsey deposited in 1904 with Vishwanath Vaidya, plaintiff in this suit, a life policy for Rs. 30,000, issued by the London and Lancashire Life Assurance Company, by way of security for monies owing by him as well as for debts to be incurred in the future. The said Dwarka Das had, by a deed of assignment, transferred the aforesaid policy to Mulraj Khatau, the defendant in this suit, which was presentd to the Life Assurance Company on the 27th of August 1909 and duly registered then. Prior to the assignment of the said policy, Mulraj Khatau had made inquiries about the life policy but was told that it was missing. On the 28th of August 1909, the said Dwarka Das committed suicide. Then the question arose as to who would be entitled to the proceeds of the policy on the life of Dwarka Das, that is to say, whether Vishwanath Vaidya, by virtue of deposit of the said policy, or Mulraj Khatau by virtue of assignment.

On October 16th, 1909, Vishwanath Vaidya instituted a suit in the High Court of Bombay, Original Side, against the Insurance Company as well as against Mulraj Khatau praying for a declaration that he had a charge or lien on the said policy. The Insurance Company then paid the amount into Court to be paid to the one who established his claim, and retired from the suit. The judgment of the High Court (Original Side) was given on the 23rd of June 1910, by which the defendant Mulraj was held entitled to the proceeds of the policy as a *bona fide* purchaser for value without notice of the plaintiffs' claim. From this judgment the plaintiffs appealed to the High Court (Appellate Side), which reversed the judgment, in favour of defendant on the ground that both the claimants had equal equitable rights to the deposited money and that the claims of the plaintiff being prior in date prevailed.

Mr. *Younger, K. C.*, and Mr. *Lowndes*, on behalf of the Appellant (defendant), contended that under the Indian law, the bare deposit of a policy created no right or interest whatever as was clearly laid down by section 130 of the Transfer of Property Act (IV of 1882) as amended by Act II of 1900. If notwithstanding the terms of the said section, the respondent could acquire by the deposit a charge upon the said policy monies, the appellant had nevertheless gained priority over such charge by reason of his having first

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* 11 Ind. Cas. 964; 13 Bom. L. R. 590.

† 7 Ind. Cas. 952; 12 Bom. L. R. 717.

given notice to the Company of his said assignment.

Messrs. *De Gruyther, K. C., and Brown*, on behalf of the respondent, contended that the assignment in question was not taken in good faith without notice of Respondent's rights, who was entitled in priority to the present appellant whether or not the appellant had notice of his rights. [LORD MOULTON:—Section 130 prevents you getting it; you must get over section 130], Section 130 refers to absolute assignment and not to a charge.

Mr. *Younger* replied.

JUDGMENT.

LORD MOULTON.—The question in this appeal is as to whether the appellant or the respondent is entitled to a sum of Rs. 29,426-14-0 now standing in Court to abide the result of the action. It represents the net proceeds of a policy of insurance on the life of Dwarkadas Dharamsey, who died on 28th August 1909.

The appellant bases his claim on an assignment in writing under the hand of Dwarkadas Dharamsey, dated the 13th of August 1909. It is in form an absolute assignment, and was, according to the evidence, given under pressure from the appellant to whom Dwarkadas Dharamsey was then indebted in a much larger sum. The validity of the assignment is, therefore, established. It may well be that although absolute in form, it was intended to be only by way of security so as to be subject to a right of redemption, but this does not affect the rights of the parties under the circumstances of the present case.

The respondent bases his claim upon a deposit of the policy with him by Dwarkadas Dharamsey undoubtedly with the intention of its acting as security for the re-payment of a debt then owing by him to the respondent. This deposit was made in November 1904 and was unaccompanied by anything in writing. The particular debt owing at the time was subsequently paid off, but in, and subsequent to, April 1909, Dwarkadas Dharamsey again became indebted to the respondent, and it is claimed that the deposit was made on the terms that it should act as security not only for the then existing debt but for any indebtedness that might subsequently arise. Whether or not this contention of fact is established, is not in their Lordships' opinion material.

The decision of the matter in issue turns entirely on the interpretation of section 130, sub-section 1, of the Transfer of Property Act, 1900. It is as follows:—

"The transfer of an actionable claim shall be effected only by the execution of an instrument in writing signed by the transferor or his duly authorised agent, and shall be complete and effectual upon the execution of such instrument, and thereupon all the rights and remedies of the transferor, whether by way of damages or otherwise, shall vest in the transferee, whether such notice of the transfer as is hereinafter provided be given or not:

Provided that every dealing with the debt or other actionable claim by the debtor or other person, from or against whom the transferor would, but for such instrument of transfer as aforesaid, have been entitled to recover or enforce such debt or other actionable claim, shall (save where the debtor or other person is a party to the transfer, or has received express notice thereof as hereinafter provided) be valid as against such transfer."

It is submitted that the right to the monies becoming due under the policy is an actionable claim. Their Lordships are also of opinion that the section covers transfers by way of security as well as absolute transfers. If any doubt existed on either of these two points, it would be set at rest by the second illustration to the section which is given in the Act.

In the present case, the respondent bases his claim on a deposit of the policy and not under a written transfer, and claims that this creates a charge on the policy. The section specifically enacts that such a proceeding shall not have any such effect; such a charge can only be created by a written document. It follows that the respondent acquired no right whatever to the policy or its proceeds by reason of the deposit.

The appellant, on the other hand, claims under an instrument in writing conforming in all respects to the provisions of the section. He, therefore, acquired by the execution of that instrument an absolute right to the proceeds of the policy.

MAHOMAD MEHDI FAYA THARIA v. SAKINABAI.

The decision of the Court below was, therefore, erroneous. The error arose from the learned Judges not having appreciated that the positive language of the section precluded the application in India of the principles of English law on which they base their decision.

Their Lordships will, therefore, humbly advise His Majesty that the appeal be allowed, and that it be declared that the appellant be entitled to the monies standing in Court, and that the respondent pay the costs in the Courts below as well as the costs of this appeal.

Appeal allowed.

Solicitors for the Appellant: Messrs. *Walton & Co.*

Solicitors for the Respondent: Messrs. *Latteys & Hart.*

BOMBAY HIGH COURT.

ORIGINAL CIVIL APPEAL No. 3 OF 1912.

Suit No. 456 of 1911.

September 2, 1912.

Present:—Sir Basil Scott, Kt., Chief Justice, and Sir N. G Chandavarkar, Kt., Judge.

MAHOMAD MEHDI FAYA THARIA TOPAN—APPELLANT

versus

SAKINABAI—RESPONDENT.

Limitation—Restitution of conjugal rights, suit for—Demand and refusal—Failure to bring suit for two years after refusal while old Limitation Act in force—Suit brought after fresh demand and refusal while new Act in force—Limitation Act (XV of 1877), Sch. II, Art. 35—Limitation Act (IX of 1903)—General Clauses Act (X of 1897), s. 6.

A., the wife of *B.*, left her husband in 1896 and lived with her mother since then. In 1906, *B.* sent to *A.* a formal demand to return to him; she equally formally refused to do so.

On 16th June 1911, *B.* sent to *A.* a fresh notice to return to his house and allow him to exercise the conjugal rights. As the notice was not complied with, *B.* sued *A.* on 20th June 1911 for restitution of conjugal rights:

Held, (1) that the suit was barred;

(2) that *B.*'s right to sue had become barred by virtue of Article 35 of the Limitation Act, 1877; and

(3) that the right could not be revived by the passing of the Limitation Act, 1903, which repealed Article 35 of the old Act.

Dhanjibhoy Bomanji v. *Hirabai*, 25 B 644; 3 Bom. L. R. 371, (F. B.) and *Vinayak Govind* v. *Babaji*, 4 B. 230, followed.

Appeal from the following judgment of

HEATON, J.—There is a point of limitation in this case and the parties are agreed, the defendant having given an undertaking not to marry pending the final disposal of this litigation, that this point of limitation shall be decided first.

Plaintiff and defendant are husband and wife. The wife either voluntarily or by compulsion, it does not for the present purpose matter which, left her husband in 1896 and has since lived with her mother. In 1906, the plaintiff sent the defendant a formal demand to return to him; she equally formally refused to do so. Two years elapsed during which the plaintiff did not bring a suit for restitution of conjugal rights. By the operation of the Limitation Act of 1877, Article 35, and the ruling in the Full Bench decision of this Court in *Dhanjibhoy Bomanji* v. *Hirabai* (1), a suit brought thereafter by the plaintiff for the restitution of conjugal rights was barred. But some time after the two years had elapsed, on 1st January 1909, the new Limitation Act of 1903 came into force. This suit was then brought and by the provisions of that Act considered alone it is in time.

Does the new Act apply or is the bar created by the old Act still operative? The defendant's Counsel gives broadly two reasons for holding that the bar is still operative. These two reasons are: (1) that a decided case of this Court so rules; and (2) that the wife had acquired a right to freedom from molestation from suits of this kind, a right to refuse her body to her husband and that this right is of the kind dealt with by section 6 of the General Clauses Act and, consequently, remains unaffected by the new law of limitation. The decided case is that of *Vinayak Govind* v. *Babaji* (2). A suit for money was brought which had become barred by the Limitation Act of 1859, when the Act of 1871 came into force. The suit was brought after the later Act became operative: and under that Act taken alone was in time. That Act, however, was held not to apply and the suit was held to be barred by limitation. Melville, J., said: "I

(1) 25 B. 644; 3 Bom. L. R. 371 (F. B.).

(2) 4 B. 230.

have no doubt that it could not be revived by the passing of that Act." I am not aware that this decision has been overruled and I am bound by it unless it can be distinguished. I do not feel able to distinguish it. No doubt there is a great difference in the facts, but the rule, on which the decision in *Vinayak Govind's* case (2) proceeded, is that a claim once barred by limitation cannot be revived. This, if it be a rule, is as applicable to the present case as to any other.

It is true that the Calcutta decisions are not to the same but to a contrary effect as appears from the cases of *Ram Chunder Ghosaul* v. *Juggutmonmohiney Dabee* (3) and *Mohesh Lal* v. *Busunt Kumaree* (4). The Madras view is the same as that in Calcutta. Nevertheless, I am bound by the Bombay decision.

But whilst feeling myself to be bound by that decision, as this case is almost certain to be the subject of an appeal, it is advisable for me to say something on the principles referred to in argument. I may say at once that I do not understand the principle on which the decided case already quoted is based unless it be that the rules of limitation defining the periods within which suits may be brought, create and annul certain rights. But if this be the principle, I am driven to the conclusion that it is erroneous. The rights are, to sue or not to be sued, and not to sue within or not to be sued after a particular time. The time is a matter of procedure only. The right to sue or not to be sued is not the proper subject of a law of limitation and is not dealt with by such law or rather by such part of it as prescribes the periods after which a suit will not be heard by the Courts. This is very fully and clearly brought out by the observations at pages 35—38 of the judgment in *Her Highness Ruckmaboye* v. *Lulloobhoy Moottichund* (5). It is also clearly indicated in the recent case of *Rex* v. *Chandra Dharma* (6), and reference may be made to Maxwell, 4th Edn., pages 338—340. Other cases have been referred to, but it is unnecessary here to comment on them: the principle appears to me to be clear. Applying the principle to this case, the matter, as I apprehend it, stands thus: the plaintiff and defendant are husband and wife: their rights, as regards each other, are based on this relationship. They include a right to conjugal or marital union. That right does not disappear; it is not annulled because one party or the other is unable to sue for it. An instance of this will be found in the very recent case of *Krishna Iyer* v. *Balammal* (7). The period within which a suit may be brought is not a matter of right but of procedure. The word 'right', as used in section 6 of the General Clauses Act, means broadly, for the purposes of this case, a right to sue or a right which may be the subject of a suit not a claim (mis-called a right in its strict sense) to a particular period within which to sue or to be sued.

As there is a right to sue, I cannot, it is true, see anything illogical in describing immunity from being sued as a right also. But the word 'right' has many meanings. The authorities show, or seem to me to show, that it is not the intention of the law to regard as a right, mere immunity from suit brought about by the operation of the law of limitation. This immunity, except as otherwise specifically provided, is, I apprehend, in law a mere consequence of our legal procedure, not a right in itself. The distinction is a fine one, but it is there. Section 6 of the General Clauses Act seems to me to refer to real rights, immunities, etc, and not to such as are mere consequences of our law of procedure.

In this case, the defendant's alleged immunity from suit arises exclusively from the former law of limitation and from that part of it which regulated procedure, namely, that part which fixed the period within which a suit could be brought. That is all I need say on the general principle and I will only add a few words to indicate what is to be gathered from the written law of this country.

The present Limitation Act applies to all suits filed after it came into operation unless the contrary appears. Therefore, it

(3) 4 C. 283; 3 C. L. R. 336.
(4) 6 C. 340; 7 C. L. R. 121.
(5) 8 M. P. C. 4 at pp. 35, 38.
(6) (1905) 2 K. B. 335; 74 L. J. K. B. 450; 92 L. T. 700; 53 W. R. 431; 69 J. P. 198; 21 T. L. R. 353.
(7) 34 M. 398; 8 M. L. T. 314; 8 Ind. Cas. 412.

applies to this suit unless the contrary appears. Did the former Act extinguish the right to sue? If it did, then by reason of section 6 of the General Clauses Act that right is not revived, and there is a case where the contrary does appear. Now, by the former Act, provision was implicitly made for the creation and for the extinction of certain rights by the mere lapse of time (see sections 26 and 28). Impliedly, therefore, where these sections did not operate, the right was not extinguished by lapse of time. In the old Act itself, therefore, there is no support for the proposition that the right was extinguished. The present Act, by sections 30 and 31, makes special provision for certain cases in which there are differences between the Schedules of the old and the new Act. No provision is made for a case like the present. Impliedly, therefore, the Schedule to the present Act applies and that Schedule does not provide a bar. Moreover, the present Act, like the former, does in section 23 contain a provision which affects cases like the present, and it seems to me that provision must apply. To sum up: the present law of limitation in terms governs the present case and by implication does not contemplate that its application to this case should be modified by anything contained in the former Act. Therefore, I think, the present Act does apply and that the present suit is in time, but I am of opinion that authority, which I cannot overrule, compels me, sitting as a single Judge, to decide otherwise and I decree that the suit be dismissed with costs.

The plaintiff contended that the letter of refusal sent by defendant's attorneys was not authorized by her and did not represent her wishes and, therefore, was not a real refusal. I can see no good reason to suppose this contention is sound. The attorney's managing clerk has given a clear and credible account of the matter and I believe him. The defendant herself was not put into the witness-box to depose on this point. That would be a serious defect had there not been good reason for it; but there was. Plaintiff's Counsel had intimated that he would have to cross-examine on many of the disputed facts of the case in connection with this letter of refusal. The purpose of the defendant's Counsel, in desiring a decision on the point of limitation, was, if possible, to avoid publicity in respect of the disputed facts. Therefore, after the intimation of the plaintiff's Counsel as to the line of his cross-examination, the former, to be consistent, was bound to keep his client out of the witness-box at that stage of the case. I do not think, therefore, that her absence from the box raises any doubt that the letter of refusal really represented her wishes.

The plaintiff appealed.

Mr. *Jafferbhai Rahimtoolla* (with him Mr. *Jinnah*), for the Appellant.

Mr. *Jardine* (with him Mr. *Weldon*), for the Respondent.

JUDGMENT—The plaintiff was married to the defendant in 1894. In 1896, the defendant left him. On the 11th of July, the plaintiff sent her a notice demanding restitution of conjugal rights. This demand was refused by the defendant on 19th of July. The plaintiff took no action for more than two years after this refusal. Consequently under the provisions of section 4 and Article 35 of the Limitation Act of 1877, any suit for restitution was liable to dismissal. The particular form of remedy was barred even though the plaintiff's right to the services of his wife remained. This is the effect of the decision of the Full Bench in *Dhanjibhoy Bonanji* v. *Hirabai* (1). On the 1st of January 1909, however, the Limitation Act of 1877 was repealed and superseded by the Limitation Act of 1908. In that Act, Article 35 of the Act of 1877 has not been re-produced. It contains no Article prescribing a special period for suits for restitution.

On the 16th of June 1911, the plaintiff sent to the defendant a fresh notice to return to his house and allow him the exercise of conjugal rights. As the notice was not complied with, this suit was filed on the 20th of June 1911 for restitution. The question is, whether this remedy is now open to the plaintiff or whether it has become barred by the expiry, during the currency of the Act of 1877, of two years since the refusal of the defendant in 1896.

The learned Judge, considering himself bound by the decision of this Court in *Vinayak Govind* v. *Babaji* (2) that a remedy which had become barred could not be revived by

the passing of a new Limitation Act, dismissed the plaintiff's suit. In our opinion, his decision must be affirmed. Section 6 of the General Clauses Act of 1897 provides that the repeal of an enactment shall not revive anything not in force or existing at the time when the repeal takes effect, or affect the previous operation of any enactment so repealed. These provisions couched in general terms have reference to all repealing Acts and produce the result effected specially for the purpose of limitation by section 2 of the Limitation Act of 1877, which provided that nothing in that Act contained should be deemed to revive any right to sue barred under the Act of 1871 or any enactment thereby repealed. The Judicial Committee, in *Mohesh Narain Munshi* v. *Taruck Nath Moitra* (8), say with reference to section 2 of the Act of 1877: "It is clear that on the 1st of April 1873, the plaintiff's suit was barred by limitation under the Act of 1871 and the Act of 1877 could not revive the plaintiff's right so barred—a point which was indeed decided in regard to the Limitation Acts of 1859 and 1871 in the case of *Appasami Odayar* v. *Subramanya Odayar* (9)."

On behalf of the plaintiff, reference was made to *Rex* v. *Chandra Dharma* (6), and this case also appears to have raised doubts in the mind of the trying Judge; but as pointed out by Channell, J., in all the cases before the Court of King's Bench, "the defendants were, at the time the Act came into operation, liable to prosecution and an alteration of the time within which they might be prosecuted, whether by extension or diminution, was a matter of procedure only. If the time under the old Act had expired before the new Act came into operation, the question would have been entirely different." In the case now before us, the right of suit was barred long before the new Limitation Act came into force; it is not revived by the repeal of Article 35.

We affirm the decree of the lower Court and dismiss the appeal with costs.

Appeal dismissed.

Attorneys for the Appellant: Messrs. *Mulji & Khambata.*

Attorneys for the Respondent: Messrs. *Payne & Co.*

(8) 20 I. A. 30 at p. 38; 20 C. 487.

(9) 15 I. A. 167 at p. 168; 12 M. 26.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 985 OF 1911.

June 24, 1912.

Present:—Sir George Knox, KT., Judge, and Mr. Justice Karamat Husain.

NANDAN SINGH—DEFENDANT—APPELLANT

versus

JUMMAN AND OTHERS—PLAINTIFFS—RESPONDENTS.

*Estoppel—Denial of mortgagee's right by representatives of mortgagors—*Waqf *property—Simple mortgage—Adverse possession against mortgagor, whether extinguishes mortgage security.*

Although the representatives of a mortgagor are estopped from denying the mortgagee's right, yet it is open to them as *mutawallis* to plead that the property was *waqf* and that the mortgage was, therefore, void.

Gulzar Ali v. *Fida Ali*, 6 A. 24, distinguished.

After the execution of a simple mortgage, a trespasser ousted the mortgagor from the possession of the property:

Held, that such ouster did not constitute adverse possession against the mortgagee and did not extinguish the mortgage security.

Second appeal from a decree of the District Judge of Benares.

Messrs. *B. E. O'Conor* and *Gokul Prasad*, for the Appellant.

Dr. *S. C. Banerji* and Dr. *Tej Bahadur Sapru*, for the Respondents.

JUDGMENT.

KARAMAT HUSAIN, J.—The facts of the case are these:—Kudrat Shah and others, the predecessors-in-title of defendants Nos. 2 and 3, made a simple mortgage of two plots of land with houses and trees, one of which is near Taksal and the other near Kabir Chaura, in favour of the plaintiff, on the 5th of July 1875. They again mortgaged the same property to the same mortgagee on the 12th of March 1878. One Subhan, alleging himself to be the son-in-law of Kudrat Shah, on the 15th of September 1893, sold the land near Taksal to *Musammat* Biraiya, who made a mortgage of it to Babu Sital Prasad and Bisheshar Prasad on the 22nd of December 1893. They obtained a decree on their mortgage on the 7th of November 1900, in execution of which the land was purchased by Ram Dei, who built on it a house with a cost of about Rs. 6,000.

The plaintiff on his two mortgages sued on the 4th of May 1910, claiming Rs. 1,628-6-3. Defendants Nos. 1, 2 and 3, as *mutawallis*,

pleaded that the property near Kabir Chaura was *waqf* and that the mortgage of it was void. Ram Dei pleaded that the suit relating to the land near Taksal was barred by limitation.

The first Court dismissed the suit. Regarding the property near Kabir Chaura, the dismissal was based on the unlawfulness of the mortgage of *waqf* property. Regarding the property near Taksal, it was based on limitation. The lower Appellate Court affirmed the decree of the first Court.

In second appeal, two points are taken :—

(1) The representatives of the mortgagors cannot question the validity of the mortgage, and (2) the adverse possession of a trespasser against a mortgagor is not, in every case, adverse to his simple mortgagee. On the first point, I am of opinion that it is open to the representatives of the mortgagors as *mutawallis* to plead that the property was *waqf*, and that the mortgage of it was void. They could be estopped from raising such a plea as representatives of the mortgagors, but as *mutawallis* they cannot be regarded as the representatives of the mortgagors. When the law renders the mortgage of *waqf* property void, the mortgagee of such property is presumed to know the law, and if he takes a mortgage of such property, he does so at his own risk. *Gulzar Ali* v. *Fida Ali* (1) has no application. There a trustee, representing the property as his own, mortgaged it, and when the mortgagee had got a decree, the trustee sued to recover the property. In these circumstances, the trustee was held to be estopped.

There is a conflict of authority on the second point, and before going into the case-law on the subject, I deem it fit to set forth the conclusion to which the legal principles lead. Adverse possession in the nature of things is impossible against a person who has no right to possession and hence the legal maxim "*Contra non valentem agere nulla currit præscriptio*" (Prescription does not run against a person who is unable to act). On the same foundation rests the exposition of law by Parke, B., quoted by the Lords of the Privy Council in the *Trustees, Executors and Agency Company* v. *Short* (2) as follows:—"In the latter case, *Smith* v. *Lloyd* (3), which was decided in 1854, Parke, B., in giving the judgment of the Court, says:—

'We are clearly of opinion that the Statute applies not to cases of want of actual possession by the plaintiff, but to cases where he has been out of, and another in, possession for the prescribed time. There must be both absence of possession by the person who has the right, and actual possession by the another, whether adverse or not, to be protected, to bring the case within the Statute.'"

Their Lordships re-affirm the opinion of Parke, B., in *Secretary of State for India* v. *Krishnamoni Gupta* (4). They remark:—

"In the case of the *Trustees, Executors and Agency Company* v. *Short* (2), it was laid down by this Board that 'if a person enters upon the land of another and holds possession for a time, and then, without having acquired a title under the statute, abandons possession, the rightful owner on the abandonment is in the same position in all respects as he was before the intrusion took place, and the opinion of Parke, B., is there quoted that there must be both absence of possession by the person who has the right and actual possession by another to bring the case within the Statute."

On the same principle proceeds *Ismdar Khan* v. *Ahmad Husain* (5). The portion of the judgment bearing on the point is as follows:—

"As the defendants wrongfully dispossessed the mortgagees and themselves took possession, their possession was undoubtedly adverse to the mortgagees, and as this adverse possession has continued for a longer period than twelve years, the right of the mortgagees has, under section 28 of the Limitation Act, become extinct and has vested in the defendants. The possession of the mortgagees was not full proprietary possession but was possession of a limited nature. It is this possession of which they were deprived by the defendants; so that the adverse possession of the defendant was also

(1) 6 A. 24.

(2) (1888) 13 A. C. 793; 58 L. J. P. C. 4; 59 L. T. 677; 37 W. R. 433; 53 J. P. 132.

(3) (1854) 9 Exch. 562; 2 C. R. 1008; 23 L. J. Ex. 194; 2 W. R. 271; 22 L. T. (o. s.) 289; 96 R. R. 837.

(4) 29 C. 518 at p. 535; 6 C. W. N. 617; 4 Bom. L. R. 537; 29 I. A. 104.

(5) 30 A. 119 A. W. N. (1908) 25; 5 A. L. J. 85; 3 M. L. T. 125.

of a limited character and had the effect of extinguishing the limited interests of the mortgagees and vesting those interests in the defendants. The possession of the defendants was not, therefore, adverse to the plaintiff. There may be cases in which adverse possession against the mortgagee would also be adverse possession against the mortgagor, for example, where the mortgagor is entitled to immediate possession or where the possession of the trespasser is coupled with a denial of the title of the mortgagor. But as held in *Muhammad Husain* v. *Mul Chand* (6), following *Chinto* v. *Janki* (7), possession obtained by the ouster of a mortgagee in possession is not necessarily adverse to the mortgagor also. In the present case, it has been found that the title of the plaintiff was never denied by the defendants. It is also an admitted fact that when the defendants took possession, the persons entitled to remain in possession were the mortgagees and not the mortgagors, and that the mortgage was unsatisfied. As the plaintiff had, therefore, no right to immediate possession, the defendants cannot be held to have been in possession adversely to the plaintiff. As observed by Mr. Justice Markby in *Bejoy Chunder Banerjee* v. *Kally Prosonno Mookerjee* (8), by adverse possession is meant possession by a person holding the land on his own behalf or on behalf of some person other than the true owner, the true owner having a right to immediate possession. We are, therefore, unable to accept the defendants' contention that their possession is adverse to the plaintiff and that the claim is time-barred."

A mortgage under the Transfer of Property Act (IV of 1882) is "the transfer of an interest in specific immoveable property for the purpose of securing the payment of money." In a simple mortgage, therefore, an *interest in the property* mortgaged is carved out of the aggregate interests symbolised by the legal term "ownership" and vested in the mortgagee and the *residue* of those interests remains in the mortgagor. This *residue* may be called "the equity of redemption with possession." A mortgagee under a simple mortgage, by virtue of the interest in the property mortgaged which he acquires, has the right to bring it to sale for the realisation of the mortgage-debt. (Section 67, Transfer of Property Act). Such a mortgage gives him no right to take possession of the property mortgaged. The legal position of the parties to a simple mortgage is as follows. The mortgagor owns the equity of redemption with possession and is in possession of the property as a limited owner. The mortgagee owns an interest in the property which entitles him to have the property sold by Court for the satisfaction of the mortgage-debt but has no right to enter into possession of the property. In these circumstances, if a trespasser ousts the mortgagor *after the execution of the simple mortgage*, he can take possession of what belongs to the mortgagor and can hold adversely to him to the extent of his limited interest. In other words, he can hold the property adversely subject to the liability of being sold for the satisfaction of the mortgage-debt. His adverse possession cannot, in any way, affect the right of the mortgagee to bring the property to sale. Adverse possession of the limited ownership in the property, which is all that remains in the mortgagor, is not recognised by law as one of the causes which extinguish the mortgagee's right to bring the property to sale. Adverse possession affects rightful possession and such rights as go with it and cannot destroy such rights as are independent of it. A necessary corrollary of the above mentioned principles is that a trespasser, who ousts a mortgagor under a simple mortgage and holds the property adversely to him, may by prescription become the owner of the limited estate which the mortgagor had in the property, but such adverse possession cannot extinguish the right of the mortgagee. This, of course, happens when adverse possession begins after the simple mortgage. If adverse possession *precedes* the simple mortgage, it will run against the mortgagor and the mortgagee both. Similarly, if the mortgagee is entitled to the possession of the property mortgaged, adverse possession will run against him from the date of his right to possession. In two reported cases, it has, however, been held that adverse possession against the

(6) 27 A. 395; A. W. N. (1905) 4; 1 A. L. J. 725.
(7) 18 B. 51.
(8) 4 C. 327.

mortgagor extinguishes the security of the mortgagee.

Abdur Rahim, J., in *Ramaswami Chetty* v. *Ponna Padayachi* (9), took that view. The reasons which led him to it are that the mortgage is only a security for the debt, that the interest in the land remains with the mortgagor, that a decree for sale in favour of the mortgagee cannot bind the trespasser, and that *Karan Singh* v. *Bakar Ali Khan*, (10) covers the point. With due respect to the learned Judge, a simple mortgage is not *merely a security for the debt*, it is the *transfer* of *an interest in the property mortgaged* which interest cannot be affected by the adverse possession of a trespasser over the *limited interests of the mortgagor*. No one can doubt the correctness of the proposition that a decree for sale against a mortgagor cannot bind a trespasser who is no party to the decree, but it must not be forgotten that the property which the trespasser acquires is the property which is liable to sale at the instance of the mortgagee, and the adverse possession of the limited estate of the mortgagor is not sufficient to free it from that liability. If a simple mortgage did not create *an interest in the property* in favour of the mortgagee, adverse possession against the mortgagor, who would have been the full owner of the property, would have extinguished the security. In the case before us, the law gave the mortgagee sixty years to enforce his remedy and the ouster of the mortgagor by the trespasser, in the absence of statutory provisions to that effect, cannot cut it down to twelve years, and force the mortgagee to sue the trespasser in ejectment who may well plead that no suit for ejectment lies and that there is no cause of action for sale against him. *Karan Singh* v. *Bakar Ali Khan* (10) has no application to the case of adverse possession, which begins *after the execution* of a simple mortgage against the mortgagor. In that case, the village Khard Khera was in dispute between Karan Singh on one hand and Kharag Singh and Rudar Singh on the other. The Collector took possession of it as Kurk Tahsil in April 1861. The guardian of Kharag Singh and Rudar Singh mortgaged it on the 7th of January and the 6th of October 1862. Karan Singh obtained a decree for the village, and the Collector delivered possession of it to Karan Singh in October 1863, making over to him the surplus profits too. In 1874, the mortgagee sued on the mortgages of 1862. Karan Singh pleaded limitation attempting to tack on the Collector's possession, which began in April 1861, to his own. Their Lordships ruled that the Collector's possession was not adverse to the owner and could not be tacked on to that of Karan Singh. From this ruling, it is sought to be inferred that their Lordships were of opinion that the adverse possession against a mortgagor which begins *after a simple mortgage* is adverse to the mortgagee. They have not expressly so ruled, and to rely on an inference is very dangerous. Moreover, the possession of the Collector in that case began *before the mortgage* and it had been adverse to the mortgagee also inasmuch as the mortgagor at the commencement of adverse possession was not the mortgagor but the absolute owner of the property. In that case, the Collector's possession *began before the mortgage*, and the rule that his possession, if adverse to the mortgagor, was also adverse to the mortgagee, would have been sound law but could not have governed cases in which adverse possession *began after a simple mortgage*. The distinction has been noticed by Munro, J., in *Parthasarathi Naiken* v. *Lakshmana Naiken* (11). He says:—"Had the Collector's possession which began before the mortgage been adverse to the mortgagors and had the defendant claimed through the Collector, then the mortgagee's suit would have been barred as in *Nallamuttu Pillai* v. *Betha Naickan* (12). This supplies a reason why it was considered necessary to consider the question of tacking."

Abdur Rahim, J., is also of opinion that the result of holding that adverse possession against a mortgagor does not extinguish the security of his mortgagee "would be that when a property is under mortgage and the mortgagor or his successor-

(9) 21 M. L. J. 397; 2 M. W. N. 209; 9 M. L. T. 264; 9 Ind. Cas. 28.

(10) 5 A. 1; 9 I. A. 99.

(11) 21 M. L. J. 467; 2 M. W. N. 201; 9 M. L. T. 399; 35 M. 231; 9 Ind. Cas. 791.

(12) 23 M. 37.

in-interest goes on paying interest on the debt or otherwise, acknowledges his liability, persons in peaceable and unchanged possession and enjoyment of such property in assertion of their own rights, whatever the length of the time during which their possession and enjoyment might have lasted, would not be secured in the title." This, in his opinion, is monstrous. With due respect, I am unable to agree with him. I see no reason why the invader of the possession and the limited rights of the mortgagor should be so favoured by law as to acquire the right of the mortgagee also.

The other case, which is against the view I take is that of *Partap Bahadur Singh* v. *Maheshwar Baksh Singh* (13). In it, one of the learned Judges based his decision on what appeared to him to be the view of their Lordships of the Privy Council in the case of *Karan Singh* v. *Bakar Ali Khan* (10). He said:—

"And it appears to me that in the case of a simple mortgage, when the mortgagor is not entitled to possession, twelve years' adverse possession against the mortgagor must be held to extinguish the security as far as regards the property held adversely to the mortgagor. This appears to have been the view of their Lordships of the Privy Council in the case of *Karan Singh* v. *Bakar Ali Khan* (10)."

I have already explained that the inference sought to be drawn from the case of *Karan Singh* v. *Bakar Ali Khan* (10) would apply to those cases in which adverse possession against the mortgagor commenced before the mortgage. That ruling does not, therefore, cover those cases in which adverse possession begins after a simple mortgage. The learned Judge gave no other reason for the view he took and no principle favours it. The other learned Judge says:—

"It will be seen that practically the rulings under both heads are concurrent upon the general principle that a person, who is in possession of mortgaged property when there is no privity between him and the mortgagor (like the respondents in the present case), can assert his title as against the mortgagee from the date, on which the mortgagee was entitled to take action on his mortgage-deed by suing for possession or *for sale of the property in case of default*."

With due respect, no ruling, so far as I have been able to understand it, lays down that a mortgagee under a simple mortgage who is not entitled to take possession of the property mortgaged is *bound* to sue the trespasser. The following cases are in favour of the view I take. *Aimadar Mandul* v. *Makhan Lal Dey* (14) and *Parthasarathi Naiken* v. *Lakhsmana Naiken* (11). Munro, J., in the last named case, has with great ability distinguished all the rulings which seem to be in conflict with that view. I fully agree with him and need not repeat what he has so well set out in his judgment.

For the above reasons, I would hold that the suit for the enforcement of the two mortgages against the property near Taksal, which is in possession of Ram Dei, is not barred by twelve years' limitation.

KNOX, J.—On the former of the two questions raised in this appeal, I never had any doubt. I quite agree with what my brother has said on the question.

The second question raised is of more difficulty, but after reading the various authorities and after giving full consideration to the question, I agree with my brother in holding that limitation does not bar the claim.

The result is that the decree of the lower Appellate Court is so far modified that the plaintiff will get a decree for sale of the property situate at *Muhalla* Taksal in the city of Benares, with costs, in proportion to his success and failure in which the fees of this Court will be calculated on the higher scale.

BY THE COURT—The decree of the lower Appellate Court is modified and the plaintiff will get a decree for sale of the property situate at *Muhalla* Taksal in the city of Benares, with costs in proportion to his success and failure.

Decree modified.

(13) 12 O. C. 45; 2 Ind. Cas. 52.

(14) 33 C. 1015; 10 C. W. N. 904.

BOMBAY HIGH COURT.

CIVIL EXTRAORDINARY APPLICATION No. 50 OF 1912.

July 29, 1912.

Present:—Sir Basil Scott, Kt., Chief Justice, and Mr. Justice Beaman.

SIDHANATH DHONDDEV GARUD—APPELLANT

versus

GANESH GOVIND GARUD—RESPONDENT.

Civil Procedure Code (Act V of 1908), ss. 2, 115—Preliminary decree—Decision on issues relating to misjoinder, limitation and jurisdiction—Suit for mesne profits—Refusal to draw up preliminary decree—Material irregularity—Appeal—Revision.

In a suit for mesne profits, the trying Judge first gave a decision on some issues relating to misjoinder, limitation and jurisdiction, and after finding on these issues, he directed the parties to adduce evidence on the remaining issues, which were issues of accounts. He was then asked to draw up a preliminary decree in accordance with his findings but he declined to do so:

Held, (1) that in so declining, the Judge committed a material irregularity in the exercise of his jurisdiction;

(2) that the decision of the issues conclusively determined the rights of parties regarding some matters in controversy so far as his Court was concerned; consequently, the decision on each of those issues was sufficient to constitute a preliminary decree;

(3) that the Judge should be forthwith directed to draw up a preliminary decree upon the questions decided and that an appeal would then lie against the decision.

A party has a right to appeal from a decision of the Court amounting to a preliminary decree but he can only appeal if the decree is existent in formal shape.

It is the duty of the Court, where it is applied to after the passing of a preliminary decree, to have the decree drawn up so as to enable the party aggrieved to appeal.

Application for revision from an order passed by the first class Subordinate Judge of Dhulia, in Suit No. 477 of 1907.

Mr. *T. R. Desai*, for the Appellant.

Mr. *G. K. Dandekar*, for the Respondent.

JUDGMENT.—In this case,* the Subordinate Judge has given a decision upon six issues in the case, one of them being an issue of misjoinder, another limitation, and the third of jurisdiction, and, after finding on these issues, directed that the parties should be allowed to adduce evidence on the remaining issues, which were issues of accounts. He was then asked to draw up a preliminary decree in accordance with his findings. This, however, he declined to do.

We are of opinion that in so declining, he committed a material irregularity in the exercise of his jurisdiction. The decision of the issues to which I have referred conclusively determined the rights of parties regarding some matters in controversy so far as his Court was concerned; the decision on each of those issues, therefore, was sufficient to constitute a preliminary decree.

The defendant has a right to appeal from a decision of the Court amounting to a preliminary decree, but he can only appeal if the decree is existent in a formal shape. This we decided in *Bai Divali* v. *Vishnu Manordas* (1). It is the duty of the Court, where it is applied to after the passing of a preliminary decree, to have the decree drawn up so as to enable the party aggrieved to appeal.

It is suggested on behalf of the plaintiff that this application is made solely for the purpose of delay, but the defendant, in order to rebut that suggestion, is willing to be put on terms with regard to the time within which he shall file his appeal from the preliminary decree.

We order the lower Court forthwith to draw up a preliminary decree upon the questions decided in the issues dealt with in its judgment of the 7th of February 1912, the defendant undertaking to prefer his appeal, if any, to this Court within one month from the drawing up of such decree.

Costs costs in the appeal if preferred.

If no appeal, is preferred, costs costs in the cause.

Order accordingly.

(1) 11 Bom. L. R. 1326; 4 Ind. Cas. 829.

*The suit was for the recovery of mesne profits. *Ed.*

GANESHDAS *v.* *Mussammat* NIMBI.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 286-B OF 1911.

September 9, 1912.

Present:—Mr. Stanyon, A. J. C.

GANESHDAS—APPELLANT

versus

Mussammat NIMBI—RESPONDENT.

Limitation, question of—Court's duty to decide—Practice—Pleadings—Appeal—Suit found time-barred—Limitation Act (IX of 1908), s. 3—Civil Procedure Code (Act V of 1908), O. XLI, rr. 2, 33.

A question of limitation, when it arises upon the facts before a Court, must be heard and determined, whether or not it is directly raised in the pleading or in the grounds of appeal.

In such a case, section 3 of the Limitation Act, 1908, is not controlled by any rule of pleadings, *e. g.*, Order XLI, rule 2, Civil Procedure Code

Where the claim, or any part thereof, has been decreed in a suit, which, on appeal from such decree, is found to be barred by limitation, the Appellate Court is not only competent, under Order XLI, rule 33, Civil Procedure Code, but is compelled, by section 3 of the Limitation Act, to dismiss the suit whichever party may have made the appeal.

Appeal against the decree of the Additional District Judge, East Berar, Amraoti, dated the 19th July 1911, reversing that of the Munsif, Ellichpur, dated the 21st September 1910.

Mr. *A. C. Roy*, for the Appellant.

JUDGMENT.—The suit, out of wh ch this appeal has arisen, is based on a mortgage-deed for Rs. 99, said to have been executed, on the 17th March 1892, by two persons, Sakharam and Bayaji, both now dead, and allegedly represented by the first defendant, Nimbi. The mortgage-deed is unregistered, and the property which it purports to cover consists of a house and a field at Sirasgaon, in the Ellichpur *Taluq* of East Berar. The further allegations in the plaint are that the second defendant, Shrawan, bought the house and a share in the field, and subsequently sold the land to the third defendant, Suryabhan, and the house to the fourth defendant, Mukaji. A sum of Rs. 52, in four instalments, was said to have been paid in March, April and June 1892, and in March 1893. The claim was for Rs. 99, and, in default, for foreclosure. Future interest and costs were also claimed.

The suit was filed in the Court of the Munsif of Ellichpur, on the 8th August 1907. On the 24th January 1908, it was realized that, under the recent decision of the Privy Council in *Vasudeva* v. *Srinivasa* (1), the suit was beyond time. The Limitation Act, 1908, was then impending, and, in expectation of a period of grace being given in such cases under that enactment, the plaintiff's Pleader withdrew the suit on the date last stated, after obtaining the leave of the Court *to bring a fresh suit* upon the same cause of action.

The Indian Limitation Act, 1908, was passed on the 7th August 1908, and was applied to Berar on the 28th August 1908. Section 31 (2) of that enactment provided that a suit for foreclosure or sale, wholly or in part dismissed or withdrawn, after the 22nd July 1907 and before the passing of the Act, on the ground that a twelve years' rule of limitation applied to such suit, might be restored on a written application made within six months "from the date of the passing of this Act." In *Sonba* v. *Muniruddin*, Second Appeal No. 284-B of 1911, I have held, in a reasoned judgment, that the words "the date of the passing of this Act" must be interpreted to mean the 7th August 1908, as well in Berar as in the Central Provinces. Therefore, the plaintiff had one of two courses open to him, namely—

(*i*) to file a fresh suit altogether, on or before the 8th August 1910 (the 7th August 1910 being a Sunday), under sub-section (1); or

(*ii*) to apply for restoration of his withdrawn suit on or before the 7th February 1909, under sub-section (2) of section 31, Indian Limitation Act, 1908.

He did not take the precaution of following either course. He applied to restore the original suit on the 15th July 1909. The law was overlooked by the Munsif, and by everybody else concerned with the case in the first Court, and the trial ended in a preliminary decree for foreclosure against the first defendant, in respect of that fraction of the mortgaged property (a share in the field) left untransferred in her hands. The remaining defendants, with the property transferred to them, were discharged, on the ground that

(1) 30 M. 426; 17 M. L. J. 444; 11 C. W. N. 1005; 4 A. L. J. 625; 6 C. L. J. 379; 2 M. L. T. 333; 9 Bom. L. R. 1104 (P. C.); 34 I. A. 187.

they were transferees for value by registered deeds.

The plaintiff then appealed to the District Court of East Berar, and here again the parties were oblivious of the limitation bar standing against the suit. It was discovered by the learned Additional District Judge, who thereupon very properly called up the Pleader of the plaintiff-appellant, and heard him upon the point. The decree was thereafter reversed and the whole suit dismissed as time-barred.

The plaintiff has now made this second appeal, and the only ground which is, and can be, urged on his behalf is that, upon the appeal of the plaintiff as to a part of his claim which had been dismissed, the lower Appellate Court has reversed even the partial decree which the appellant had obtained, and, moreover, has done so upon a ground not raised by the defendants in either Court. On the face of it, this argument seems to carry force, and in many cases would be irresistible. But that is not the position here. The decision of the lower Appellate Court is quite correct. The bar of limitation is patent upon the face of the record. Therefore, section 3, Indian Limitation Act, 1908, applies, and the dismissal of the whole suit was compulsory. Even if Order XLI, rule 33, Civil Procedure Code, 1908, had not been in existence, the application of the statutory mandate as to limitation could not have been avoided by applying any rules of pleading. It was remarked by their Lordships of the Privy Council in *Raja Har Narain Singh* v. *Chaudhrain Bhagwant Kuar* (2) (with reference to a patent legal defect in an award)—

"This objection to the award was apparently not brought to the notice either of the Subordinate Judge or of the High Court. But the statute is there, and the Judges were bound to take judicial notice of it."

A case exactly in point is the decision of a Special Bench in *Balaram* v. *Mangta Dass* (3), and I concur in the view there adopted by a majority of six to one. To the same effect is the ruling in *Bechi* v. *Ahsan-ullah Khan* (4). It is not necessary to enter into the merits of the distinction drawn in *Kandasamy* v. *Annamalai* (5) and the cases there relied on, as the question of a partial bar is not before me. The whole suit is barred in this case. *Raghu Nath Singh* v. *Pareshram* (6) is also not in point. In *Dattu* v. *Kasai* (7), the limitation bar was not patent on the proceedings, and the ruling has, therefore, no application here. The same remark applies to *Ahmad Ali* v. *Waris Husain* (8).

I am of opinion—

(1) that a question of limitation, when it arises upon the facts before a Court, must be heard and determined, whether or not it is directly raised in the pleadings or in the grounds of appeal;

(2) that, in such a case, section 3, Indian Limitation Act, 1908, is not controlled by any rule of pleading, *e. g.*, Order XLI, rule 2, Code of Civil Procedure, 1908; and

(3) that, where the claim, or any part thereof, has been decreed, in a suit which, on appeal from such decree, is found to be barred by limitation, the Appellate Court is not only competent, under Order XLI, rule 33, Code of Civil Procedure, 1908, but is compelled, by section 3, Limitation Act, 1908, to dismiss the suit, whichever party may have made the appeal.

It was urged that if the objection, that the application to restore the suit was beyond time, had been taken by the defendants, or pointed out by the Court, when the application was made, the plaintiff could have filed a fresh suit. This may be so, but it raises no equity in favour of the plaintiff. It was not the business, either of the Court, or of the defendants, to protect the plaintiff against his own neglect. In any case, no equitable considerations could override the law here The appeal is dismissed with costs.

Appeal dismissed.

(2) 13 A. 300 at p. 304; 8 I. A. 355.
(3) 34 C. 941; 6 C. L. J. 237; 11 C. W. N. 959.
(4) 12 A. 461.
(5) 28 M. 67; 15 M. L. J. 402.
(6) 9 C. 635; 13 C. L. R. 89.
(7) 8 B. 535.
(8) 15 A. 123.

BOMBAY HIGH COURT.

FIRST CIVIL APPEAL No. 48 OF 1912.

July 30, 1912.

Present:—Sir N. G. Chandavarkar, Kt., Judge, and Mr. Justice Batchelor.

THE RAJNAGAR SPINNING, WEAVING AND MANUFACTURING Co., LD. APPELLANT

versus

MANILAL MAGANLAL—RESPONDENT.

Companies Act (VI of 1882), s. 58—Company—Articles of Association providing for registration of transferee if proper person—Refusal of Agent of Company to register transferee—Transferee's right to go to Court—Jurisdiction of Court.

One of the Articles of Association of a Company provided that if the transferee of a share was a proper person, the share would be transferred to his name. A transferee applied for registration of his name but the Agent of the Company refused peremptorily, without giving any reason, to allow the transferee's name to appear on the register, and the Company merely adopted the action of the Agent. The transferee thereupon applied to the Court for rectification of the Company's register by the substitution of his name in place of his transferor:

Held, that the Court had jurisdiction, even without reference to the Directors or the Company, to determine whether the transferee had a right under the Article to get his name registered or not, and, for that purpose, to determine whether he was a proper person.

First appeal from the decision of the District Judge of Ahmedabad, in Application No. 23 of 1909.

Mr. *G. K. Parekh*, for the Appellant.

Mr. *G. S. Rao*, for the Respondent.

JUDGMENT.

CHANDAVARKAR, J.—The District Judge has taken the correct view of Article 29 of the Articles of Association of this Company. The Article provides:—"The fees for the transfer of shares will be charged at the rate of eight annas per each share. And if nothing is due to the Company by the share-holder who sells his share or transfers it to another and if the transferee is a proper person, the share will be transferred to the name of the transferee." One condition, therefore, of the transfer is that the transferee should be a proper person. The Article is silent on the question who is to decide whether the transferee is a proper person—the Directors or the Company. It is unnecessary to decide who is to determine that question before the transfer is registered. There cannot be any the slightest doubt that the Court has ultimately jurisdiction to decide whether the transferee has a right under that Article to get his name registered or not, and for that purpose to determine whether he is a proper person. The Article itself being silent as to the authority, either of the Company or of the Directors, to determine the question as a preliminary one, before registering the name of the transferee, the proper inference to be drawn is that the words "a proper person" are introduced there as a qualification of the transferee, such qualification being dependent ultimately upon the decision of the Courts, should the question be carried to the Court. It is a condition of the right, but who is to determine that condition is not said in the Article. And in the absence of any express provision to that effect, I think it is a reasonable inference that that is a question which has to be determined by the Courts even without reference to the Directors or the Company. If that is so, when a would-be transferee goes to the Company and shows the transfer-deed, the Directors must accept him, unless they show that he is an improper person. He has a right to come before the Court and say that his right has been violated. For these reasons, the order of the Court below must be confirmed with costs.

BATCHELOR, J.—I am of the same opinion. It may be that under clause 29 of the Articles of Association, the power of pronouncing this would-be transferee to be a fit person rested with the Company, and if they had sought to exercise that power in a suitable manner, it is possible that they would have achieved their aim. But all that they have done is to adopt the action of the Agent and to refuse peremptorily to allow the transferee's name to appear on the register. No reason whatever is given for this decision, which is, therefore, so far as we can judge of it, merely capricious. In this Court, the most that Mr. Gokuldas could urge against the fitness of the transferee to appear on the register was that he was a cantankerous person, but there is nothing on the record to sustain even so flimsy an accusation as that. I agree, therefore, that the District Judge's order should be confirmed.

Order confirmed.

CHIMMAN LAL *v.* SIKANDAR KHAN.

ALLAHABAD HIGH COURT.

CIVIL REVISION PETITION No. 43 OF 1912.

October 24, 1912.

Present:—Sir George Knox, Kt., Judge, and Mr. Justice Rafique.

CHIMMAN LAL AND ANOTHER—APPLICANTS

versus

SIKANDAR KHAN—OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908), O. I, r. 3, O. XXII, r. 10—Addition of parties.

By a compromise, effected between *A.* and *B.*, *A.* was to remain in possession of ⅛th of certain property as her legal share and of the balance in lieu of dower. *A.* gifted the property to *C.* who mortgaged it to *D.*

After the death of *A*, *B.* sued *C.* for possession of ⅞th of the property. After the institution of the suit, *C.* sold the property to *D.* *D.* applied to be made a party to the suit of *B.* as a defendant:

Held, that as no relief was sought against the applicant and the case against him was not the same as against other defendants already on the record, he could not be made a party to the suit.

Civil revision against an order of the Subordinate Judge of Saharanpur.

Mr. *D. C. Banerjee*, for the Applicants.

Mr. *Nehal Chand*, for the Opposite Party.

JUDGMENT.—This is an application in revision from an order of the Subordinate Judge of Saharanpur, rejecting an application of the applicants, by which they had asked the lower Court to be brought on the record as defendants in the suit brought by Sikandar Khan against Imam-ud-din and others. It appears that one Rao Ghulam Husain Khan was the proprietor of the property which is the subject-matter of the suit of Sikandar Khan. After Ghulam Husain Khan's death, his son, Khadim Husain Khan, entered into possession of the property. After the death of Khadim Husain, there was a dispute as to the succession to the property, between *Musammat* Latif-un-nisa, widow of Ghulam Husain Khan and Haji Hemu Khan, who described himself as the nephew of Ghulam Husain. Sikandar Khan stated in that suit that he was the son of Ghulam Husain Khan by his second wife. It was decided by this Court that Sikandar Khan was the legitimate son of Ghulam Husain. Subsequently, there was a dispute between Sikandar Khan and *Musammat* Latif-un-nisa, and the dispute was compromised in this way that she was to remain in possession of ⅛th of the property as her legal share and of the balance in lieu of dower. *Musammat* Latif-un-nisa executed a deed of gift on the 11th of January 1899, in favour of Imam-ud-din, son of Rahim Bakhsh, in respect of 555 *bighas*, 16 *biswas*, situated in *Mauza* Sakraura. Imam-ud-din, in turn, executed a deed of mortgage in favour of the applicants in respect of the property gifted to him. The mortgage was renewed on the 31st of March 1911. *Musammat* Latif-un-nisa died in April 1908. After her death, Imam-ud-din and some others entered into possession of the property left by her. Sikandar Khan instituted a suit in the Court of the Subordinate Judge of Saharanpur on the 28th of April 1911, against Imam-ud-din and others, who were in possession of Ghulam Husain's property after Latif-un-nisa's death, on the allegation that he was entitled to get possession of ⅞th of the property as the legitimate son of Ghulam Husain Khan. After the institution of Sikandar Khan's case, Imam-ud-din executed a deed of sale on the 28th of June 1911, in respect of the property which he had mortgaged to the applicants in favour of the latter. The applicants, on the basis of their sale-deed, made an application to the Subordinate Judge of Saharanpur under Order I, rule 3, to be brought on the record. The lower Court on the objection of the plaintiff rejected the application. In revision before us, it is argued that though the applicants may have no ground to be made defendants on the basis of the sale-deed in their favour, yet as the sale-deed was obtained in lieu of the consideration of the mortgage-deed which was executed prior to the institution of the suit, the applicants should be brought on the record as defendants in the case. We are unable to agree with the learned Advocate for the applicants. The rule as to array of parties is given in Order I, rule 3. It is to the effect that all persons may be joined as defendants against whom any right to relief in respect of, or arising out of, the same act or transaction or series of acts or transactions is alleged to exist, whether jointly, severally or in the alternative. In the present case, no relief is sought by Sikandar Khan against the applicants, nor is the case of Sikandar Khan the same against the applicants as against the defendants already on the record. We, therefore, think that the order of the learned

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Subordinate Judge was correct. The application fails and is dismissed with costs.

Rule discharged.

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL No. 877 OF 1910.

July 30, 1912.

Present:—Sir N. G. Chandavarkar, KT., Judge, and Mr. Justice Batchelor.

BABAJI AKOBA KASAR—APPELLANT

versus

DATTU LAXMAN KASAR—RESPONDENT.

Limitation Act (XV of 1877), Sch. II, Art. 127—Joint property—Suit for partition by one co-sharer—Decree ascertaining plaintiff's share—Co-parcenary between defendants not destroyed—Exclusion to knowledge of co-parcener—Possession—Adverse possession.

A., *B.* and *C.* were co-parceners in a joint Hindu family. *A.* was excluded to his knowledge from all enjoyment of the family property since 1890. The property was in possession of *B.* In 1895, *C.* sued *B.* and *A.* for his one-sixth share of the property and obtained a decree for this share in 1898. The decree decided that the family was a joint one, that the property in suit was joint family property and that *B.* was entitled to one-sixth share. In 1907, *A.* sued *B.* to recover his share by partition of the family property. *A.* contended that as against him, the possession of *B.* should only be considered adverse after 1898. Both the lower Courts held that the suit of *A.* was barred under Article 127 of the Limitation Act, as he had been excluded from all enjoyment of the property since 1890:

Held, that the suit was barred by time because,

Per *Chandavarkar, J.*—

(*a*) the co-parcenary between *A.* and *B.* was not destroyed by the decree of 1898;

(*b*) the judgment and the decree of 1898 did not disturb, as between *A.* and *B.*, the previous state of things and stop the limitation that had begun to run from 1890;

Per *Batchelor, J.*—

(*c*) the finding of fact that *B.* held adversely from 1890 was wholly independent of, and unaffected by the decree of 1898, which only decided that the family and the property were joint and the property was consequently partible; and

(*d*) though *A.* had a good title to possession in 1898, the possession was actually with *B.*, who was ousting *A.* to his knowledge and inspite of his title since 1890.

Per *Chandavarkar, J.*—For a judgment in a partition suit brought by one co-parcener for his share, to operate as a severance of interest not only as to him but also as between the other co-parceners sued, the judgment must contain a clear adjudication that each co-parcener either should have or is entitled to a share definitely fixed.

Chidambaram Chettiar v. *Gauri Nachiar*, 6 I. A. 177 at p. 180; 2 M. 83 (P. C.) and *Bala Bax Ladhuram* v. *Rukhambai*, 30 I. A. 130 at p. 137; 5 Bom. L. R. 462; 7 C. W. N. 642; 30 C. 729 (P. C.), relied upon.

Per *Batchelor, J.*—Possession is a mere matter of fact, and adverse possession means possession held by some person on his own behalf or on behalf of some person other than the true owner, the true owner having a right to immediate possession.

Second appeal from the decision of the District Judge of Ahmednagar, in Appeal No. 46 of 1899, confirming that passed by the first class Subordinate Judge at Ahmednagar, in Civil Suit No. 90 of 1907.

Mr. *L. A. Shah*, for the Appellant.

Mr. *G. S. Rao*, for Respondents Nos. 1 and 3.

Mr. *J. R. Dhurandhar*, for Respondent No. 4.

JUDGMENT.

CHANDAVARKAR, J.—The suit, which has led to this second appeal, was brought by the appellant for partition of property, alleged to be joint and ancestral, and the only question in appeal is whether the claim is barred under Article 127 of Schedule II to the Limitation Act.

It is found as a fact by both the Courts below that the appellant has been excluded to his knowledge by his co-parceners from enjoyment of the joint property since 1890, *i. e.*, for more than twelve years before the present suit instituted in 1907.

For the appellant, it is contended that the period of exclusion from 1890 to 1898 must be eliminated from the question of limitation, because of a decree for partition passed in 1898 in favour of one of the co-parceners. In the judgment on which that decree was passed, it was found that the property now in dispute was joint and partible. That finding, it is urged, was an adjudication in favour of each party to that suit that he was a co-parcener entitled to a share; and that the adjudication had in law the effect of arresting, in favour of the appellant and as against the respondents, the period of limitation which had begun to run against the appellant from 1890 under Article 127 of the Limitation Act and of giving him a fresh cause of action and starting point of limitation.

Whether that is so must depend on what was determined by, and was the effect of, the judgment and decree in the previous suit.

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That was a suit by Narayan Balaji, who was defendant No. 5 in the present suit and is respondent No. 4 in this appeal. On an issue raised in the previous suit, the Court found that the property now in dispute was joint and partible. To use the language of the Privy Council in *Chidambaram Chettiar* v. *Gauri Nachiar* (1), "by this judgment there was a clear adjudication that the property was partible." The judgment then proceeded to declare that Narayan Balaji, the plaintiff in the suit, was entitled to one-sixth share in the property and the decree framed in accordance with the judgment awarded that sixth share to him. This sixth share could indeed not have been determined by the Court without ascertaining incidentally the share of each of the co-parceners. But that implied ascertainment could not destroy the co-parcenary also between the co-parceners who were defendants in the suit and make them separate in estate *inter se* unless the judgment had fixed the shares which they were or would be entitled to. That is the principle of the law laid down by the Privy Council in *Bala Bax Lathuram* v. *Rukhambai* (2), where it is said:—"There is no presumption, when one co-parcener separates from the others, that the latter remain united. In many cases, it may be necessary in order to ascertain the share of the out-going member, to fix the shares which the other co-parceners are or would be entitled to, and in this sense, the separation of one is said to be a virtual separation of all." That is also in substance the principle of the decision of the Privy Council in *Chidambaram Chettiar* v. *Gauri Nachiar* (1). For a judgment in a partition suit brought by one co-parcener for his share, to operate as a severance in interest not only as to him but also as between the other co-parceners sued, the judgment must contain a clear adjudication that each either should have or is entitled to a share definitely fixed. Now in the present case, in the previous suit, the judgment did not fix the shares of the defendants therein. It gave a sixth share to the plaintiff in that suit and left the remaining five-sixth untouched. The determination of that sixth share might imply that each co-parcener had a sixth share but that was incidental and was a matter of mere arithmetical calculation, which did not become a binding decision, because it was not made the subject of clear adjudication by the Court in its judgment by fixing the share of every one of the other co-parceners so as to create a severance in interest as between them. The mutual relations of the defendants with reference to their five-sixths having been left to continue as before, the ancestral property in their hands remained joint. If that was so, the judgment and the decree did not disturb as between them the previous state of things and stop the limitation that had begun to run as against the appellant from 1890.

This conclusion derives support from the plaint and pleadings of the appellant himself. His case in the Courts below was not that the decree in the previous suit had extinguished the joint estate not only as to the plaintiff in that suit but also as between the defendants therein, of whom he was one and that thereafter the said defendants had by agreement continued united so as to constitute a new joint family. His case was substantially that the plaintiff in that suit had separated and that so far as the defendants therein were concerned, things had gone on as before. That meant that their previous relations with reference to everything pertaining to the joint family, including limitation, had been left undisturbed. And when the respondents pleaded limitation against him, the appellant relied upon Article 127 of the Limitation Act in answer to the contention of the respondents that either Article 142 or Article 144 governed the case.

The decree must, therefore, be confirmed with costs.

Separate sets of costs.

BATCHELOR, J.—The plaintiff sued to recover by partition his share, one-sixth, in certain joint family property. Having been defeated in both the Courts below, he now brings this second appeal here. Admittedly there is against him an absolutely clear finding of fact that since 1890, he has, to his knowledge, been excluded from all enjoyment of the family property; and admittedly he cannot succeed in this appeal unless he can displace this finding of fact.

In the first place, a second appeal is hardly a stage of the litigation where one would

(1) 6 I. A. 177 at p. 180; 2 M. 83 (P. C.).
(2) 30 I. A. 130 at p. 137; 5 Bom. L. R. 462; 7 C. W. N. 642; 30 C. 729 (P. C.)

expect to find it possible to overturn a finding of fact, for such an appeal is expressly limited to questions of law, such questions being decided on the facts as found by the District Court.

This difficulty the plaintiff seeks to overcome by calling in aid a decision of the Civil Court in 1898, determining a suit filed in 1895. That suit was brought by the present 5th defendant, and the other present defendants were parties to it. The decree decided that the family was a joint family; that the property in suit was joint property; and that the then plaintiff was entitled to a one-sixth share. The decree was in favour of the present 5th defendant, and there was no decree in favour of the present plaintiff. It is urged for the plaintiff that, by virtue of this decree, whatever adverse possession may, as a fact, have been running against him prior to the date of the decree, must be considered to have determined at the date of the decree, with the result that the presently material period of adverse possession cannot be pushed back beyond 1898; and in that case, the present suit would admittedly be in time.

The argument is one which I have great difficulty in following, but, so far as I understand it, it is altogether untenable. In my view of the case, the present finding of fact against the plaintiff is wholly independent of, and unaffected by, the decree of 1898. That decree neither decided, nor could decide, anything inconsistent with the present finding of fact, for the nature of the defendant's holding between 1890 and 1902 could not have been determined in a suit instituted in 1895. All that the decree decided was that the family and the property were joint and that the property was consequently partible. It was not even decided that the present plaintiff was at that time entitled to a one-sixth share, though I will concede that the decree proceeded on that reckoning. Still I cannot see how the plaintiff is now to be benefited, or to be saved from the finding of fact against him. In 1898 it was held that he was a member of a joint family. But it was not decided that he was in possession of any part of the family property either directly or constructively; and at a given moment, a Hindu may be a member of a joint family entitled on partition to his share and may still be in process of being excluded to his knowledge. That is what has happened here. Possession is a mere matter of fact, and adverse possession, as I understand it, means possession held by some person on his own behalf or on behalf of some person other than the true owner, the true owner having a right to immediate possession. To say, therefore, that in 1898, the plaintiff has a good title to possession is perfectly consistent with saying that in fact possession was with the defendants, who were ousting the plaintiff to his knowledge and in spite of his title.

As to the case of *Amrita Ravji* v. *Shridhar Narayan* (3), it is, I think, distinguishable on its facts, for there was an actual decree awarding possession in 1886 to that party who was objecting that the joint judgment-debtor's adverse possession prior to 1886 could not be tacked on to his subsequent possession so as to fill out the complete period of limitation. Moreover, I do not find that in that case the Bench enunciated any proposition of law which is in conflict with the views I have expressed in this appeal.

Decree confirmed.

(3) 33 B. 317; 11 Bom. L. R. 51; 1 Ind. Cas. 322.

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL No. 65 OF 1900.

November 17, 1902.

Present:—Sir John Stanley, KT., Chief Justice, and Mr. Justice Banerji.

NAWAL KUNWAR—PLAINTIFF—APPELLANT

versus

BAKHTAWAR SINGH AND OTHERS—DEFENDANTS—RESPONDENTS.

Evidence Act (I of 1872), *ss.* 18, 21—*Recital in mortgage deed--Admissible in evidence against representative of mortgagor—Probative value of recital.*

A recital in a mortgage-deed is admissible in evidence as against the mortgagor as well as against those who derive their title from him. Sections 18 and 21 of the Evidence Act make the recital admissible against them even as an admission. The probative value of such recital, however, is a different question.

First appeal from a decree of the Subordinate Judge of Saharanpur.

The Hon'ble Mr. *Motilal Nehru* (with him Mr. *Harendra Krishna Mukerji*), for the Appellant.

NAWAL KUNWAR *v.* BAHKTAWAR SINGH.

The Hon'ble Dr. *Sundar Lal* (with him Mr. *Gokal Prasad*), for the Respondents.

JUDGMENT.—This appeal arises in a suit brought by the appellant for sale upon a mortgage, dated the 10th January 1889, executed by the first defendant, Bakhtawar Singh, and his father, Partap Singh, for self and as guardian of his son, Risal Singh, the defendant No. 2, who was at that time a minor. The amount secured by the mortgage is Rs. 10,000, but the plaintiff alleges that she has paid only Rs. 8,337-9-0, which she seeks to recover with interest by sale of the mortgaged property. There was a prior mortgage in respect of the same property in favour of Munna Lal, the father of the third and fourth defendants. The plaintiff alleges that this mortgage has been discharged by her. Those defendants have purchased the mortgaged property from the first two defendants under a sale-deed, dated the 18th of July 1896, and have, therefore, been made parties to the suit. The fifth defendant, Banarsi Das, is the grandson of one Shibban Lal, who also held a prior mortgage in respect of the property mortgaged to the plaintiff. The plaintiff alleges that she paid a part of the mortgage-money due to Shibban Lal and seeks to redeem that mortgage by payment of the balance. The sixth defendant, Dalip Singh, is the purchaser of a portion of the mortgaged property from the defendants Nos. 3 and 4. The defendants Nos. 1 and 2 urge in answer to the claim that Rs. 1,000, only out of the consideration for the plaintiff's bond was paid and that the said amount has been realized by the plaintiff from the usufruct of the mortgaged property. The defendants Nos. 3 and 4, the only defendants who have seriously contested the claim, plead that the plaintiff's mortgage is fictitious and nominal and that it was executed in her favour by Partap Singh with a view to protect his property. This contention of the defendants has been accepted by the lower Court which has dismissed the plaintiff's claim. The plaintiff has preferred this appeal.

The principal question to be determined in the appeal is whether the mortgage in favour of the plaintiff was a fictitious transaction.

[After considering the evidence their Lordships proceeded as follows :—]

For the above reasons, we are of opinion that the conclusion at which the learned Subordinate Judge arrived as to the nature of the transaction is not warranted by the evidence, and that the mortgage in the plaintiff's favour was a genuine mortgage.

We have now to consider what payments have been actually made by the plaintiff. It was stated in the mortgage deed that out of the amount of the consideration for the mortgage, the plaintiff was to withhold Rs. 8,293 for payment to prior creditors. Out of this sum, Rs. 3,250 was, as we have already stated, due to Munna Lal and was set off against the amount of the sub-mortgage executed by the plaintiff in his favour, so that this sum of Rs. 3,250 has been paid by the plaintiff. It has also been proved that she paid to Bhawani Prasad on account of Shibban Lal's mortgage Rs. 1,500 on the 11th January 1889, and Rs. 1,365-9-0 on the 13th March 1889, in all Rs. 2,865-9-0. It has also been proved by the evidence of Kishan Sahai that he was paid Rs. 500 in discharge of a promissory-note held by him. The payment of Rs. 15 out of the sum of Rs. 515, mentioned in the plaint as paid to Kishan Sahai, has not been established. It is recited in the mortgage-deed that the plaintiff took credit for a sum of Rs. 549 due to her on account of a note of hand, dated the 14th March 1888. It was contended before us that no evidence existed on the record as to Partap Singh having executed any promissory-note in favour of the plaintiff for which Rs. 549 was due by him. Th learned Advocate for the respondents contended that the recital contained in the mortgage-deed in regard to that promissory-note was not admissible in evidence against the respondents, defendants Nos. 3 and 4, purchasers from the mortgagors. We are unable to agree with this contention. There can be no question that the recital is admissible in evidence as against the mortgagors themselves, and as the defendants Nos. 3 and 4 derive their interest in the subject-matter of the suit from the mortgagors, sections 18 and 21 of the Evidence Act make the recital admissible in evidence against them also as admission. What the probative value of that admission may be is a different question, but we are clearly of opinion that the statement

may be used as evidence against defendants Nos. 3 and 4.

[After considering the evidence their Lordships proceeded as follows :—]

For the above reasons we have come to the conclusion that the plaintiff has advanced under her mortgage-deed a sum of Rs. 8,322-9-0.

* * * * * * *

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL No. 792 OF 1910.

September 3, 1912.

Present:—Sir Lawrence Jenkins, KT., Chief Justice, and Mr. Justice N. Chatterjea.

BHUKHI KOERI—DEFENDANT No. 1—APPELLANT

versus

RAM KHELWAN PROSAD AND OTHERS—PLAINTIFFS—RESPONDENTS.

Rent, suit for, based on specific settlement—No alternative claim for rent—Plaintiff's title proved but settlement not proved—Whether decree for use and occupation should be given—Amendment of plaint, whether should be allowed.

In a suit for rent where no alternative claim is made for use and occupation, no sum can be decreed on that footing.

Lukhee Kanto Dass Chowdhury v. *Sumeeruddi Lusker*, 13 B. L. R. 243 (F.B.); 21 W. R. 208, followed.

Therefore, where rent was claimed under an alleged settlement with the defendant, which the plaintiff failed to prove, a decree for use and occupation ought not to have been given when there was no such claim and the defendant had no notice of such a claim.

A plaint may be allowed to be amended only when a claim has been omitted by mistake or inadvertence or for similar reasons, and not deliberately.

Therefore, where the plaintiff has sued for rent upon a specific case of settlement with the defendant, which has been found to be false, it is not a case where he should be allowed to amend the plaint by claiming a relief for the defendant's use and occupation, not consistent with the claim originally laid.

Appeal from the decree of the Additional Sub-Judge of Mozafferpur, dated December 3rd, 1909, modifying that of the Munsif of Hajipur, dated July 28th, 1909.

Babu *Soroshi Charan Mitra*, for the Appellant.

Babu *Bipin Bihari Ghose*, for the Respondents.

JUDGMENT.

N. CHATTERJEA, J.—This appeal arises out of a suit for recovery of rent brought by the plaintiff, on the allegation that the lands, for which the rent was claimed, had been settled with the defendant No. 1. The latter denied the relation of landlord and tenant with the plaintiff and set up one Jagadambi as his landlord. The Court of first instance held that the relation of landlord and tenant existed between the plaintiff and the defendant and gave a decree to the plaintiff. On appeal, the learned Subordinate Judge disbelieved the story of the settlement of the land by the plaintiff with the defendant No. 1, as also the alleged settlement by Jagadambi set up by the defendant, and held that the position of the defendant No. 1 was no better than that of a trespasser, but that plaintiff's title was proved and that he was entitled to recover rent for use and occupation from the defendant No. 1.

The defendant No. 1 has appealed to this Court and the question raised in this appeal is whether the plaintiff is entitled to compensation for use and occupation in the suit as framed.

In the plaint, there is no alternative claim for rent for use and occupation; the defendant No. 1, therefore, had no notice that the plaintiff, if he failed to prove the settlement set up in the plaint, would claim rent for occupation of the land, and he is apparently not willing to be treated as tenant of the plaintiff. In a suit for rent, where no alternative claim is made for use and occupation, no rent can be decreed on that footing. This was decided by the Full Bench in the case of *Lukhee Kanto Dass Chowdhry* v. *Sumeeruddin Lusker* (1), and we are bound by that decision. No doubt, in the cases referred to in the judgment of the Court below, it was held that tenancy in this country is created not only by contract but also by occupation of land so far as agricultural lands are concerned, and rent for use and occupation was decreed. But the question is not whether rent for use and occupation can be decreed in a suit for rent, but whether a decree on that footing can be made where there is no alternative claim for use and occupation. As pointed out by the Privy Council in the case of *Eshan Chunder Singh* v. *Shama Churn Bhutto* (2), "the determination in a cause should be

(1) 13 B. L. R. 243; 21 W. R. 208.
(2) 11 M. I. A. 7 at p. 20; 6 W. R. (P. C.) 57.

founded upon a case either to be found in the pleadings or involved in or consistent with the case thereby made".

In the case of *Surnomoyee* v. *Dino Nath Gir Sunnayasee* (3) and *Azim Sirdar* v. *Ram Lall Shaha*(4), the learned Judges treated the Full Bench case of *Lakhee Kanto Dass Chowdhry* v. *Sumeeruddin Lusker* (1) as laying down that the landlord is entitled to rent or compensation for the use of the land, where he is unable to prove the *kabulyat* under which rent is claimed, but the Full Bench distinctly held that the question whether the landlord is entitled to rent for use and occupation, depends upon the claim which is stated in the plaint and that where a claim for rent on account of such occupation is not made in the plaint, the landlord is not so entitled. This view has been accepted and followed in *Surendra Narain Singh* v. *Bhai Lal Thakur* (5), *Rachhea Singh* v. *Upendra Chandra Singh* (6) and *Gobinda Sundar Singh Chowdury* v. *Srikrishna Chakravarty* (7). In the present case, rent was claimed under an alleged settlement with the defendant. The plaintiff failed to prove it, and the defendant may well complain that a decree for use and occupation ought not to have been given when there was no such claim and he had no notice of such a claim.

Section 157 of the Bengal Tenancy Act, no doubt, provides that when a plaintiff instituted a suit for the ejectment of a trespasser, he may, if he thinks fit, claim an alternative relief that the defendant be declared liable to pay, for the land in his possession, a fair and equitable rent to be determined by the Court, and the Court may grant such relief accordingly. But the suit has not been framed according to the provisions of that section. The plaintiff does not claim that the defendant be declared liable to pay a fair and equitable rent to be determined by the Court; the suit is based upon a contract of tenancy which he has failed to prove.

Of course, the Court may allow the plaint to be amended but the amendment should be allowed only where the claim has been omitted by mistake or inadvertence or, for similar reasons, and not deliberately. Here the plaintiff sued for rent upon a specific case of settlement with the defendant which has been found to be false, and it is not a case where he should be allowed to amend the plaint by claiming a relief not consistent with the claim originally laid.

The decrees of the Courts below are accordingly set aside and the suit dismissed with costs.

JENKINS, C. J.—I agree.

Appeal allowed.

(3) 9 C. 908; 13 C. L. R. 69.
(4) 25 C. 324.
(5) 22 C. 752.
(6) 27 C. 239.
(7) 10 C. L. J. 538; 6 M. L. T. 255; 3 Ind. Cas. 346.

ALLAHABAD HIGH COURT.

CIVIL REVISION PETITION No. 63 OF 1912.

October 31, 1912.

Present:—Sir George Knox, KT., Judge, and Mr. Justice Rafique.

RADHA RAWAN—APPLICANT

versus

TULA RAM—OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908), O. XXIII, r. 1 —Application for leave to withdraw suit with liberty to bring fresh suit—Defective judgment—High Court's power to set aside order—Revision—Practice.

A Court allowed a person to withdraw his suit with liberty to bring a fresh suit; there was nothing in the judgment to show that the Court was satisfied that the suit must fail by reason of some formal defect or that there was any other sufficient cause for permitting the suit to be withdrawn:

Held, that the High Court could interfere in revision and set aside the order allowing the suit to be withdrawn.

Civil revision from an order of the first Additional Subordinate Judge of Agra.

FACTS.—In a suit pending before the Additional Subordinate Judge of Agra, an application was made for permission to withdraw the suit with liberty to bring a fresh suit. The Subordinate Judge granted the permission and recorded the following order:—

"I have heard the parties. I think there are sufficient reasons to allow the plaintiff to withdraw his suit with liberty to bring his suit again. The application is granted. Plaintiff's suit is dismissed with costs with liberty to bring another suit. Defendant will get his half costs from the plaintiff."

Defendant applied to the High Court in revision against the above order.

The Hon'ble Mr. *Moti Lal Nehru*(with him Dr. *Tej Bahadur Sapru*), for the Applicant.

VILLURI ADNIARAYANA v. POLIMERA RAMUDU.

Mr. *Wallach* (with him Dr. *Satish Chandra Banerji*), for the Opposite Party.

JUDGMENT.—There is nothing in the judgment of the Court below to show that that Court was satisfied that the suit must fail by reason of some formal defect. It was not shown to us that there was any formal defect or that there was any other sufficient cause. We have, therefore, no alternative but to set aside the order of the Court below and order that the case be returned to that Court with directions that it be restored to the file of pending suits and disposed of according to law. The costs of this application will be borne by the respondent.

Order set aside.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL NO. 931 OF 1911.

November 19, 1912.

Present:—Mr. Justice Sundara Aiyar and Mr. Justice Sadasiva Aiyar.

VILLURI ADINARAYANA—PLAINTIFF—APPELLANT

versus

POLIMERA RAMUDU *alias* RAMASWAMY AND OTHERS—DEFENDANTS—RESPONDENTS.

Water—Right to water in running stream—Surface water—Nature and rights of water explained.

Where water flowed through a definite channel across the lands of *A.*, up to *B.*'s lands and then spread itself all along the fields of *B.* and overflowed its *bunds* and joined another channel which irrigated *C.*'s land:

Held, that the water as it flowed from *B.*'s land could not be regarded as surface water and *C.*, was entitled to the customary flow of the channel water along *B.*'s lands and *A.* and *B.* had no right to obstruct the same.

Although no claim can be made either as a natural right or as an easement by prescription except to water flowing in a definite course and no claim can be maintained with regard to surface water or surface drainage, yet it does not follow that the right to the water of a stream ceases when it ceases to flow in a confined water-course.

Water flowing into a field from a known channel and passing along the field onwards into another field, though not over a confined tract in the former field but along its whole area, is not surface water.

In each case, the question whether or not particular water is surface water, is one of fact to be determined by the circumstances attending its origin and its continued existence. If the water is spread out and flows sluggishly over the surface, losing itself by percolation and evaporation, it is surface water although it has its source in springs.

But the mere fact that the water spreads out at some places and flows sluggishly without sufficient force to form a channel for itself, does not make it surface water if the flow has sufficient force to maintain itself and it is subsequently gathered together into a channel so as to form a water-course. The chief characteristic of surface water is its inability to maintain its identity and existence as a water body.

Well-defined existence arising from an ascertained course appears to be the real test in coming to a conclusion against any body of water being regarded as merely surface water.

Second appeal against the decree of the District Court of Vizagapatam, in Appeal Suit No. 20 of 1910, presented against that of the District Munsif of Vizagapatam, in O. S. No. 721 of 1908.

Mr. *B. Narasimhaswara Sarma*, for the Appellant.

Messrs. *K. V. L. Narasimham* and *V. Ramesam*, for the Respondents.

JUDGMENT.—In this case, the plaintiff asked for a declaration of his right to take water through a channel for the cultivation of certain land belonging to him and for an injunction restraining the defendants from obstructing the course of the channel. The lands both of the plaintiff, and defendants are situated in a proprietary estate. According to the plaintiff a river channel supplied the means of irrigation for the lands of the parties and other *ryots*, who had lands alongside the stream. A branch leading from the main channel passed through the lands of the defendants Nos. 1, 2 and 3 and then the 4th defendant's land and, according to the plaintiff, afterwards reached his own land. Defendants Nos. 1, 2 and 3 are alleged to have blocked up the channel at a point higher than the 4th defendant's land. They contended that the channel never irrigated the lands either of the 4th defendant or of the plaintiff, and that it stopped somewhere near their own lands. The 4th defendant did not contest the suit.

The facts found by the lower Appellate Court, as we understand the judgment of the District Judge, are:—that the channel in question continued, as a definite water-course, up to the 4th defendant's lands, and that the water of the channel flowed over

the *bunds* of the 4th defendant's fields and joined another channel which irrigated the plaintiff's lands.

The District Munsif held that the plaintiff was entitled to the flow of the channel water along the 4th defendant's lands to the channel which was the direct source of irrigation for his land, and that the contesting defendants were not entitled to interfere with the flow. On appeal, the District Judge held that, as the water of the stream did not flow direct to the plaintiff's land in any defined course, it must be taken that it was not intended to supply water to the plaintiff's land. He regarded the water as it flowed from the 4th defendant's land over his *bunds* as mere surface drainage and was of opinion that the plaintiff could not claim any legal right to it. He, consequently, dismissed the plaintiff's suit.

The question argued in second appeal is, whether the plaintiff is not entitled to the customary flow of the water of the stream A-I along the 4th defendant's field until it joined the channel which supplied water to his own field. There was, according to the finding of the Appellate Court, no definite water-course across the 4th defendant's field, the water-course ceasing to have any definite bed and banks after it reached the 4th defendant's field. We must also take it, on the findings, that the water in the stream was not always sufficient to irrigate the lands of the 4th defendant or to supply a flow to the plaintiff's channel. But this we regard as immaterial; such is the case with many streams and channels in this country. It is also immaterial that the water of the stream flowing through the 4th defendant's land did not reach the plaintiff's land direct but joined another channel out of which the plaintiff got his water. If the water of the stream supplied a means of irrigation to the plaintiff, it is immaterial whether it did so by directly reaching the plaintiff's land or indirectly by flowing into another channel.

The substantial question for decision is whether the fact that there was no defined channel across the 4th defendant's field but that the stream spread itself all along the field and overflowed the *bunds* to reach the plaintiff's channel, puts the plaintiff out of Court. The question is one of considerable importance in this country. It was stated by the learned Vakil for the appellant, and we believe with good reason, that irrigation channels do not always go direct to every field irrigated by them and that the water often flows from one field to another, either through cuts made in the *bund* of the field or by over-flowing the *bund*. And he submitted that it would be disastrous if it should be held that the owners of fields on the further side of channels could not support their right to the waters of the channels in the absence of a confined passage along each field irrigated by them.

The respondents' Pleader contended, on the other hand, that no claim can be made by any one to a flow of water except to water flowing in a definite channel, and that all water, which disperses itself over a field without a definite water-course, must be regarded as drainage and surface water, which the owner of the field over which it passes is entitled to appropriate or divert as he pleases.

After full consideration, we are of opinion that the respondents' contention should not be sustained. It is, no doubt, true that no claim can be made, either as a natural right or as an easement by prescription, except to water flowing in a definite course and that no such claim could be maintained with regard to what should be regarded as surface water or surface drainage in the proper acceptation of those expressions. But if this principle be understood correctly, it cannot, in our opinion, be held that the right to the water of a stream ceases when it ceases to flow in a confined water-course. If the stream has exhausted itself as a stream and merely soaks into a field, then, no doubt, no right to the water so soaking can be sustained in the same manner, as no right can be recognized to water falling on a field from the sky overhead or oozing from the soil underneath. Water of any of these descriptions cannot be the subject of any right until it again begins to flow in a definite course. The reason why no right to such water can be recognised is explained in various decided cases. In *Acton* v. *Blundell* (1), the question arose with regard to water flowing

(1) 12 M. & W. 324; 13 L. J. Ex. 289; 67 R. R. 361.

in a subterraneous course and supplying a valley, which was drained away by a landowner, who carried on mining operations in his own land in the usual manner. Tindal, C. J., explaining the ground and origin of the law which is held to govern running streams, observed as follows:—

"The ground and origin of the law which governs streams running in their natural course would seem to be this, that the right enjoyed by the several proprietors of the lands over which they flow is, and always has been, public and notorious: that the enjoyment has been long continued—in ordinary cases, indeed, time out of mind —and uninterrupted; each man knowing what he receives and what has always been received from the higher lands, and what he transmits and what has always been transmitted to the lower." The right to use such water the learned Judge regards, as stated by Mr. Justice Story in *Tyler* v. *Wilkinson* (2), to be 'an incident to the land.' He continues:—"But in the case of a well sunk by a proprietor in his own land, the water which feeds it from a neighbouring soil does not flow openly in the sight of the neighbouring proprietor, but through the hidden veins of the earth beneath its surface: no man can tell what changes these underground sources have undergone in the progress of time: it may well be, that it is only yesterday's date, that they first took the course and direction which enabled them to supply the well: again, no proprietor knows what portion of water is taken from beneath his own soil: how much he gives orginally, or how much he transmits only, or how much he receives: on the contrary, until the well is sunk, and the water collected by draining into it, there cannot properly be said, with reference to the well, to be any flow of water at all." In addition to the uncertainty and changes in the supply, his Lordship refers to two other reasons why no right to any such water should be recognized, namely, that every man, by virtue of his ownership, is entitled to abstract everything he can from his own land, and *secondly*, he is entitled to make the best use of his land for his own benefit. He observes:—"In the case of the running stream, the owner of the soil merely transmits the water over its surface: he receives as much from his higher neighbour as he sends down to his neighbour below: he is, neither better nor worse; the level of the water remains the same. But if the man who sinks the well in his own land, can acquire by that act an absolute and indefeasible right to the water that collects in it, he has the power of preventing his neighbour from making any use of the spring in his own soil which shall interfere with the enjoyment of the well. He has the power, still further, of debarring the owner of the land in which the spring is first found, or through which it is transmitted, from draining his land for the proper cultivation of the soil: and thus, by an act which is voluntary on his part, and which may be entirely unsuspected by his neighbour, he may impose on such neighbour the necessity of bearing a heavy expense, if the latter has erected machinery for the purposes of mining, and discovers, when too late, that the appropriation of the water has already been made."

In *Rawstron* v. *Taylor* (3), the reasons why no right could be obtained over surface water were pointed out. The judgments of the Court throw light also on what should really be regarded as surface water. Parke, B., said:—"This is the case of common surface water rising out of springy or boggy ground, and flowing in no definite channel, although contributing to the supply of the plaintiff's mill. This water, having no defined course and its supply being merely casual, the defendant is entitled to get rid of it in any way he pleases." Martin, B., emphasised the right of every landowner to enjoy his land as he chooses. He said:—"The proprietor of the soil has *prima facie* the right to drain his land. He is at liberty to get rid of the surface water in any manner that may appear most convenient to him; and I think no one has a right to interfere with him, and that the object he may have in so doing is quite immaterial." Platt, B., observed:—"The plaintiff could not insist upon the defendant maintaining his fields as a mere water-table." In *Broadbent* v. *Ramsbotham* (4), which also related to surface water, the grounds of decision were the same. The plaintiff claimed four sources of water which he said supplied the Longwood Brook on which his

(2) 4 Mason's (American) Reports 401.

(3) 11 Exch. 369; 25 L. J. Ex. 33; 105 R. R. 567.

(4) 11 Ex. 602; 25 L. J. Ex. 115; 4 W. R. 290; 26 L. T. (o. s.) 244; 105 R. R. 673.

mill was situated. One of the sources was a swamp of 16 perches. Alderson, B., observed that it was merely like a sponge fixed (so to speak) on the side of the hill and full of water. "If this overflows, it creates a sort of marshy margin adjoining; and there is apparently no course of water, either into or out of it, on the surface of the land. As to the subterranean courses communicating with this swamp, which must, no doubt, exist, it is sufficient to say that they are not traceable, so as to show that the water passing along them ever reaches Longwood Brook." It will be observed that the learned Judge considered it material that there was no course of water into the swamp. The judgment of Lord Hatherley, L. C., in *Grand Junction Canal Company* v. *Shugar* (5), is also important as throwing light on the nature of surface water. He observed referring to *Chasemore* v. *Richards*(6):—"Mr. Justice Wightman there laid down the law very plainly in giving the opinion of the Judges upon the subject, and the distinction was there drawn—and, I should have thought, firmly established—between water which comes no one knows exactly whence, and flows no one knows exactly how, either underground or on the surface, unconfined in any channel, either as rainfall or from springs of the earth, which may vary from day to day, or spring up from beneath the surface in a direction which no one knows—between that species of water and water once confined in a regular channel." His Lordship's description is quite inapplicable to water flowing into a field from a known channel and passing along the field onwards into another field, though not over a confined tract in the former field but along its whole area. We may refer also to the observations of Lord Watson in *McNab* v. *Robertson* (7) "Water, whether falling from the sky or escaping from a spring, which does not flow onward with any continuity of parts, but becomes dissipated in the earth's strata, and simply percolates through or along those strata, until it issues from them at a lower level, through dislocation of the strata or otherwise, cannot with any propriety be described as a stream." It is impossible to apply this description to the water of a stream flowing into it and afterwards passing out of it after irrigating it, though without making a cutting for itself, over any particular portion of the field. The true test of the existence of a common right is explained in Angell on "Watercourses," section 108 (*o*), page 137. The learned author says:—"It is to be observed that it is only when the flow of water on one person's land is identified with that on his neighbour's, by being traceable to it along a distinct and defined course, that the two proprietors can have natural relations with each other in respect of it, considered as the subject of separate existence. If the waters on the two lands do not possess this unity of character, they are in the same category as fish and birds, etc., and are only incident to, and form part of, the produce of their respective soils, while actually resting upon them; no proprietor can make claim to water in such condition before it arrives within his own borders. Nor can any proprietor claim that another shall receive it within his borders or that he shall not take appropriate measures upon his own land and in the reasonable use thereof, to prevent its collecting upon his soil." The next section illustrates the real character of surface water. "Thus water rising naturally, making land spongy and wet, and squaddering itself over the surface, has no public character whatever, although it ultimately finds its way to and feeds a stream; and, therefore, before it arrives at any defined natural channel, it belongs solely to the owner of the land which it covers, and he may deal with it exactly as he thinks fit, while he is making a reasonable use of his own land. Such, also, is the case with water which percolates through the porous basin of a pond or overflows the edge of a well, or which passes or runs off the surface of the soil, before, in either instance, it makes itself some natural channel. And, clearly, water severed from all other water, as in a pond or tank, and resting solely on the proprietor's own ground must be in a similar plight." When the flow of water on one person's land can be identified with that on another, there is no reason why a right to such flow should not

(5) 6 Ch. Ap. 483; 24 L. T. 402; 19 W. R. 569.
(6) 7 H. L. C. 349; 29 L. J. Ex. 81; 5 Jur. (N. S.) 873; 7 W. R. 685; 115 R. R. 187.
(7) (1897) App. Cas. 129; 66 L. J. (P. C.) 27; 57 L. T. 666; 61 J. P. 468.

exist although the water may flow along an intervening piece of land. "A mere right of drainage over the general surface of land is very different from the right to the flow of a stream or brook across the premises of another." Farnham in his 'Law of Waters and Water-course' Vol. III, page 2556, observes:—"When water appears upon the surface in a diffused state, with no permanent source of supply or regular course, and then disappears by percolation or evaporation, its flow is valuable to no one, and it must be regarded as surface water, and dealt with as such. In *Crawford* v. *Rambo* (8), it is said that surface water is that which is diffused over the surface of the ground, derived from falling rains and melting snows, and continues to be such until it reaches some well-defined channel in which it is accustomed to, and does, flow with other waters, whether derived from the surface or springs; and then it becomes the running water of a stream, and ceases to be surface water. In each case, the question whether or not particular water is surface water is one of fact to be determined by the circumstances attending its origin and continued existence. If the water is spread out and flows sluggishly over the surface, losing itself by percolation and evaporation, it is surface water, although it has its source in springs. But the mere fact that the water spreads out at some places, and flows sluggishly without sufficient force to form a channel for itself, does not make it surface water if the flow has sufficient force to maintain itself, and it is subsequently gathered together into a channel so as to form a water-course. The chief characteristic of surface water is its inability to maintain its identity and existence as a water body. ... ... But marsh lands through which overflow water from a lake reaches a natural stream are not governed by the rules applicable to mere surface water". Well-defined existence arising from an ascertained course appears to be the real test in coming to a conclusion against any body of water being regarded as merely surface water. See Farnham page 2556. Angell refers to a case which throws light on what is really necessary to make a water-course. For 7 rods, the stream descended rapidly in a well-defined course to a piece of marshy ground where it spread, so that its flow was slight and not sufficient to break the turf but was generally sufficient to form a continuous sluggish current along the surface in a natural depression to a watering place within the plaintiff's land. This was adjudged to be a water-course within the meaning attached in law to that term. Domat states the rule of Civil law as follows: "If waters have their course regulated from one ground to another, whether it be by the nature of the place, or by some regulation, or by a title, or by an ancient possession, the proprietors of the said grounds cannot innovate anything as to the ancient course of the water. Thus, he who has the upper grounds cannot change the course of the waters, either by turning it some other way, or rendering it more rapid, or making any other change in it to the prejudice of the owner of the lower grounds."

It is quite clear that the water of the channel in dispute between the parties in the present case, when it entered the 4th defendant's land, could not be regarded as surface water. It came from the channel in dispute. Its origin is not on the 4th defendant's land nor did it come upon the surface of his land through the pores of the earth. The channel did not, according to the findings, 'lose itself,' and get mixed up with the earth of the 4th defendant's land but continued its course along his field. The identity of the stream was preserved when it passed out of the field. It may be that the 4th defendant could, if he chose, restrict the passage of the stream along his land by confining it to a channel, occupying only a small portion of his field. It was not, however, the 4th defendant that obstructed the course of the stream, but defendants Nos. 1, 2 and 3: and the obstruction was made at a place before the stream reached the 4th defendant's land. They had no right to do so. In *Dudden* v. *Guardians of Clutton Union* (9), "the water from a spring flowed in a gully or natural channel to a stream on which was a mill. The spring having been cut off at its source and the water received into a tank as it rose from the earth, by the license of the owner of the soil on which the spring rose", it was held that an action would lie against the obstructor by the owner of a mill who used to receive a supply of water for his mill.

The obstruction in this case, according to

(8) 44 Ohio. St. 287; 7 N. E. 429.

(9) 1 H. & N. 627; 26 L. J. Ex. 146; 103 R. R. 752.

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the finding, was at a place where the channel, undoubtedly, existed as a regular water-course. In our opinion, it did not cease to be such before it reached the channel which directly irrigated the plaintiff's land. It did not become surface water on reaching the 4th defendant's land.

We reverse the District Judge's decision and restore the decree of the District Munsif with costs both here and in the lower Appellate Court.

The plaintiff will also have the further relief of an injunction against defendants Nos. 1 to 3 from interfering with the plaintiff's rights declared and granted by the District Munsif who refused that relief of injunction on insufficient grounds and against which refusal, the plaintiff filed a memo. of objections in the District Court and has also complained in the second appeal memo. before us.

ALLAHABAD HIGH COURT.

CIVIL REVISION PETITION No. 101 OF 1912.

November 28, 1912.

Present:—Sir Henry Griffin, KT., Judge.

RAM LAL—DEFENDANT—APPLICANT

versus

AMAR CHAND—PLAINTIFF—RESPONDENT.

Agra Tenancy Act (II of 1901), ss. 77, 167, 193—Appeal to District Judge—Limitation—Limitation Act (IX of 1908), s. 29 (b), Sch. I, Art. 152.

The period of limitation for an appeal to the District Judge under Agra Tenancy Act, 1901, is thirty days.

Such an appeal is governed by the procedure prescribed by the Code of Civil Procedure and by the limitation prescribed under Article 152 of the Limitation Act.

Application for revision against an order of the District Judge of Jhansi, dated the 9th of April 1912.

Mr. *Hamilton*, for the Applicant.

Mr. *B. K. Mukerji*, for the Opposite Party.

JUDGMENT.—A second appeal in a revenue suit to the learned District Judge of Jaunpore was dismissed by him on a preliminary ground that the appeal had been filed beyond time and no sufficient cause had been shown for extending the time for the filing of the appeal. Two grounds have been taken in the application for revision to this Court. One ground is that on the merits, the applicant was entitled to the benefit of section 5 of the Limitation Act. From the facts set out in the judgment of the Court, I am satisfied that the decision of the Court below on that point was correct. The applicant had himself to thank for the delay in the filing of the appeal after the expiry of one month from the date of the decree. The second ground raises a question as to which no ruling has been quoted before me. Mr. Hamilton for the applicant contends that the Tenancy Act does not prescribe any period of limitation for appeals preferred to District Judges under the provisions of section 167 of that Act He points out that Schedule E of that Act prescribes periods of limitation for appeals to Collectors, Commissioners and the Board, whereas in the matter of appeals to District Judges, the Act is silent. He refers to section 29 (*b*) of the Limitation Act, which provides that nothing shall affect or alter any period of limitation prescribed for any suit, appeal or application by any special or local law now or hereafter in force in British India. As a matter of recognised practice, limitation for appeals to District Judges has always been taken to be one month from the date of the decree and it appears to me that the provision of section 193 of the Tenancy Act sufficiently covers the question now before me. That section provides that the provisions of the Code of Civil Procedure shall apply to procedure in all suits and other proceedings under the Tenancy Act so far as they are not inconsistent therewith subject to certain modifications. An appeal to the District Judge is, therefore, governed by the procedure prescribed by the Code of Civil Procedure. Under Article 152 of the Limitation Act, a period of thirty days is prescribed for appeals to District Judges. I see no reason to interfere. The application is dismissed with costs including fees on the higher scale.

Application dismissed.

NAGAR ALI JOARDAR *v.* KALA CHAND SARDAR.

CALCUTTA HIGH COURT.
SECOND CIVIL APPEAL No. 1993 OF 1910.
November 28, 1912.
Present:—Mr. Justice Holmwood and Mr. Justice Chapman.
NAGAR ALI JOARDAR—PRINCIPAL DEFENDANT—APPELLANT
versus
KALA CHAND SARDAR—PLAINTIFF—RESPONDENT.

Landlord and tenant—Transfer of entire holding without landlord's consent—Original tenant remaining on land as sub-tenant of purchaser—Liability of purchaser to ejectment—Abandonment—Forfeiture.

Where the defendant purchased the entire rights of the original tenants to certain *jote* lands without obtaining the consent of the landlord, the plaintiff, to the transfer, and the original tenants remained in possession as sub-tenants of the purchaser:

Held, that the principle laid down in *Kabil Sardar's* case, 20 C. 590, did not apply, and the landlord was entitled to a decree for ejectment against the purchaser.

Kallinath Chakravarti v. *Upendra Chunder Chowdhry*, 24 C. 212; 1 C. W. N. 163, followed.

Rai Kamaleswari Persad Singh Bahadur v. *Moharaj Harbullab Narain Singh Bahadur*, 2 C. L. J. 369; *Chandra Mohan Mookhopadhaya* v. *Bissesswar Chatterjee*, 1 C. W. N. 158, *Durga Prosad Sen* v. *Doula Gazee*, 1 C. W. N. 160 and *Sheikh Gazaffer Hossein* v. *E. Dablish*, 1 C. W. N. 162, distinguished.

Appeal from the decree of the District Judge of Nadia, dated March 22nd, 1910, modifying that of the Munsif of Meherpur, dated July 29th, 1909.

Babus *Hemendra Nath Sen* and *Bimal Chandra Das Gupta*, for the Appellant.

Babu *Karunamoy Bose* for Babu *Ram Chandra Majumdar* and Babu *Sachchidananda Gupta*, for the Respondent.

JUDGMENT.—This second appeal arises out of a suit brought by the plaintiff, a lady, *shebait* under her husband's Will, to eject the appellant, the principal defendant, from three *jamas* which had come into his possession under a sale certificate dated September 1905, which a third party had obtained against defendants Nos. 1 to 6.

It is extremely difficult to follow the judgment of either of the Courts inasmuch as the parties are wrongly described, the transferee being described as the principal defendant and not numbered and the transferors being Nos. 1 to 6. But this much is clear that by the sale certificate Exhibit B, the whole of these three *jamas* were transferred to the principal defendant. Subsequently, the plaintiff sued the six defendants for rent, but the defendants Nos. 3 to 5 were exonerated from the suit for what reason we know not; but it must have been because the Court held they had no interest in the holding, for we find that the whole of the arrears sued for were decreed against defendants Nos. 1, 2 and 6. These points have not been considered by the learned Judge at all, and the Munsif in his judgment, although he set out at page 14 to describe this litigation, unfortunately did not go far enough. But the question is a pure question of law, and we think that we can deal with it on the authorities and dispose of the suit.

The contention on behalf of the principal defendant, who is the appellant and transferee of the whole of this *jama*, is that inasmuch as the learned Judge has found that the defendants Nos. 3 to 5 are still in possession of a portion of the *jama*, no forfeiture could have been incurred on the authority of the rulings in *Kabil Sardar* v. *Chandra Nath Nag Chowdhry* (1); *Rai Kamaleswari Persad Sing Bahadur* v. *Maharaj Harbullab Narain Singh Bahadur* (2); *Chandra Mohun Mookhopadhaya* v. *Bissesswar Chatterjee* (3); *Durga Prosad Sen* v. *Doula Gazee* (4) and *Sheikh Gozaffer Hossein* v. *E. Dablish* (5).

Now we find that all these cases are distinguishable on the ground on which the case of *Kabil Sardar* v. *Chandra Nath Nag Chowdhry* (1) was distinguished by this Court in the case of *Kallinath Chakravarti* v. *Upendra Chunder Chowdhry* (6), where it was held that where the defendant had purchased the entire rights of the original tenants of certain *jote* lands without obtaining the consent of the landlord to the transfer of the tenures, and the original tenants had remained in possession as sub-tenants of the transferees, the principle laid down in *Kabil Sardar* v. *Chandra Nath Nag Chowdhry* (1) did not apply. Now in all these cases, which have been cited to us by the appellant and which we have just now noticed, the rule laid down is that the sale of a part of the holding is not a ground for forfeiture. The language in the

(1) 20 C. 590.
(2) 2 C. L. J. 369.
(3) 1 C. W. N. 158.
(4) 1 C. W. N. 160.
(5) 1 C. W. N. 162.
(6) 24 C. 212; 1 C. W. N. 163.

latter part of the judgment in the case of *Kabil Sardar* v. *Chandra Nath Nag Chowdhry* (1) is not very clear. After laying down that the Full Bench in *Nurendro Narayan Roy* v. *Ishen Chandra Sen* (7) had held that the reason why the *zemindar* is entitled to obtain *khas* possession of the lands of the holding which has been sold and of which possession had been given to the purchaser, is that the sale and transfer of possession to the purchaser conveys no title to him and as the *ryot* has left the holding and disclaims any interest in it, he must be deemed to have abandoned it and the land remains a piece of land within the *zemindari* to which the person in possession has no title and which has been abandoned by the owner, does not seem to be consistent with the subsequent finding in that case, that the sale or parting of possession of the whole or part of the holding is not made a ground for forfeiture by the Tenancy Act. But the facts in that case show that there was no question of parting with the whole of the holding, because the Judges say in the present case "so far from having abandoned the holding, the *ryot* and his sons since his death have paid rent of the whole in the Collectorate and they have themselves always cultivated a portion of it," so that the words in the *placitum* "or parting with the whole" are *obiter*; and it is perfectly clear from the other rulings that the rule is that the transfer by an occupancy *ryot* of a portion of his holding does not effect the forfeiture of his tenancy, if he continues to be in occupation of the remainder, and this is what is laid down in the cases in 1 Calcutta Weekly Notes. In every case, there was a transfer of only a portion of the holding. Now in the case of *Kallinath Chakravarti* v. *Upendra Chunder Chowdhry* (6), to which we have referred, the whole of the holding was transferred, and the fact that the original tenants came back again as sub-tenants or in any other way, was held not to get rid of the original abandonment.

After the argument was over, our attention was called to the ruling in *Dina Nath Roy* v. *Krishna Bejoy Saha* (8), where it was held that, the original tenants, having taken under-lease from their transferee, could not have been said to have abandoned the holding. But we find that this case is clearly distinguishable, because they were holders of the entire holding and they expressed their willingness to pay rent to the landlord and ignore the transfer.

We think that the present case is governed by the rule laid down in *Kallinath Chackerbutty* v. *Upendra Chandra Chowdhry* (6) and we are fortified in this opinion by the findings of the learned Munsif on the facts of the case which have not been properly dealt with by the lower Appellate Court. Had it been necessary to go into facts which the learned Judge has not properly gone into, we should have to remand this case because we are not satisfied that the learned Judge's *ipso dixit* in the decretal part of his judgment that defendants Nos. 3 to 5 are in part possession has any foundation, inasmuch as he gives no reason for it, and the previous part of his judgment makes it very difficult to understand when he is talking of defendants Nos. 1, 2 and 6 and when he is talking of defendants Nos. 3, 4 and 5. The defendants Nos. 3, 4 and 5 happen to be ladies and their contention is that they obtained small parcels of the property by partition for their sustenance. It does not appear that any evidence was ever given of any such partition and there is no finding in either ourt's judgment that any such partition ever took place. It would appear that these ladies were in the position of maintenance-holders and that when the entire *jamas* were sold under the money-decree by the sale certificate, Exhibit B., whatever rights they had, must have passed, inasmuch as the decree was against them and the sale certificate passed the whole of the *jama*. It is, therefore, perfectly clear to us that the sale under the certificate constituted a complete ouster of all the defendants from the *jamas* and that on the authority of the Full Bench, the plaintiff landlord is now entitled to re-enter.

The result is that the appeal of the principal defendant is dismissed and the cross-appeal of the plaintiff is decreed. There will be a decree in favour of the plaintiff for *khas* possession of the whole of the *jamas* but without mesne profits excepting in so far as they were allowed by the Munsif; in other words, the judgment and decree of the lower Appellate Court are set aside and the judgment and decree of the Munsif restored,

(7) 13 B. L. R. 274; 22 W. R. 22.
(8) 9 C. W. N. 379.

MUHAMMAD ISMAIL KHAN v. MITHU LAL.

The cross-appellant is entitled to his costs in this Court and in the lower Appellate Court.

Appeal dismissed; Cross-appeal allowed.

ALLAHABAD HIGH COURT.

LETTERS PATENT APPEAL NO. 48 OF 1912.

November 27, 1912.

Present:—Sir Henry Richards, Kt., Chief Justice, and Mr. Justice, Banerji.

HAJI MUHAMMAD ISMAIL KHAN—PLAINTIFF—APPELLANT

versus

MITHU LAL AND OTHERS—DEFENDANTS—RESPONDENTS.

Landlord and tenant—Grove planted with permission of zemindar *on payment of rent—Right to transfer such grove—Agra Tenancy Act (II of* 1901), *s.* 4.

A. planted a grove and constructed a *pacca* well with the permission of the *zemindar* and agreed to pay a yearly rent. Subsequently *A.* sold the grove and the well to the defendants:

Held, that the transfer was a valid transfer, the position of *A.* being that of a grove-holder.

Muhammad Yasin v. *Illahi Bakhsh*, 34 A. 545; 10 A. L. J. 73; 16 Ind. Cas. 455, followed.

Per Benerji, J. (*contra*)—A grove-holder is a tenant under section 4 of the Agra Tenancy Act and has no right to transfer the grove in the absence of a custom or contract to the contrary.

Letters Patent Appeal from the decision of the Hon'ble Sir George Knox, Kt., Judge, dated the 12th of March 1912, in Second Appeal No. 501 of 1911. See 14 Ind. Cas. 799.

Mr. *Abdul Raoof* (with him Mr. *Muhammad Ishaq Khan*), for the Appellant.

Mr. *Peare Lal Banerji*, for the Respondents.

JUDGMENT.

RICHARDS, C. J.—This appeal arises out of a suit in which the plaintiff sought a declaration of his title to a certain plot of land with the trees thereon and a *pucca* well. The defendants admitted the plaintiff's title as *zemindar* and it is quite clear that the issue between the parties was, whether or not the plaintiff was entitled to oust the defendants from the possession of the grove and well. The facts are very clearly stated by the learned Judge of this Court from whose judgment this Letters Patent Appeal has been preferred. I will nevertheless state them very shortly. The *zemindar* agreed with one Lekhraj that he should plant the plot in question with fruit trees and should pay a yearly rent which was subsequently slightly enhanced. Lekhraj, in pursuance of the agreement, planted the grove and made the *pucca* well in question. Subsequently, he sold the grove and well to the defendants and died without leaving heirs. The plaintiff claims that under these circumstances, the defendants have no rights and that he is entitled to take possession and enjoy the grove and well planted and made by Lekhraj.

It seems to me that this claim is not well founded. *Prima facie*, every one is entitled to transfer any property or right he may possess. I think that Lekhraj had rights as the result of his having planted the grove and made the well in pursuance of his agreement with the *zemindars*. Indeed it was admitted that Lekhraj could not himself have been dispossessed, nor could his heirs if he had left them. No doubt this *prima facie* right of transfer may be restricted by custom or by Act of the Legislature. As for example, tenants of certain class of holdings are prohibited by the Tenancy Act from transferring their holdings. There is, in my opinion, however, nothing in the Tenancy Act to prevent a person possessed of such rights as Lekhraj had from transferring such rights. Of course, if I thought that the rights of Lekhraj were those of an occupancy or non-occupancy tenant, or that such rights were appurtenant to an occupancy or non-occupancy holding, I would hold that he had no right to transfer. It was, however, never alleged in the plaint nor apparently contended in either of the lower Courts below or in the second appeal to this Court that Lekhraj was an occupancy or non-occupancy tenant of the grove and well, or that such rights as he possessed were appurtenant to such a tenancy. Furthermore, I do not consider that such a contention could have been successfully put forward. Assuming that Lekhraj was a tenant of the land, his right to use it was limited to growing and maintaining the trees. He could not use the land for ordinary purposes of agriculture. His position was in fact that of a "grove-holder"—a position well known and recognised.

I would dismiss the appeal and affirm the decision of the three Courts by which the case has been already decided.

MALKAPPA DOD CHANBASAPAGOWDA v. MUDKAPPA BASAPPA MUDIGAVDAR.

BANERJI, J.—I regret I am unable to take the same view as the learned Chief Justice as to the competency of a person who plants a grove with the permission of the landholder upon an agreement to pay him rent, to transfer the grove, so as to confer on the purchaser a right to continue in possession of the grove against the wishes of the landholder. In my opinion, such a person is a tenant as defined in the Agra Tenancy Act, section 4, being a person by whom rent is paid and 'rent' according to that Act means, among other things, payments made on account of a grove. As he is not a tenant of the classes of tenants whose interest is under the Act transferable (see section 20), he has no right, in the absence of a contract or custom to the contrary, to transfer the grove. However, I do not desire to pursue the matter further, as it seems to me the question was practically decided in *Muhammad Yasin* v. *Ilahi Buksh* (1), which was an appeal under the Letters Patent from one of my judgments. I am afraid I am bound by the ruling in that case. I, therefore, agree in dismissing this appeal.

BY THE COURT.—The order of the Court is that the appeal is dismissed with costs.

Appeal dismissed.

(1) 34 A. 545; 10 A. L. J. 73; 16 Ind. Cas. 455.

BOMBAY HIGH COURT

SECOND CIVIL APPEAL No. 63 OF 1912.

August 1, 1912.

Present:—Sir N. G. Chandavarkar, KT., Judge, and Mr. Justice Batchelor.

MALKAPPA DOD CHANBASAPA-GOWDA—APPELLANT

versus

MUDKAPPA BASAPPA MUDIGAVDAR —RESPONDENT.

Adverse possession—Co-sharers—Hindu Law—Joint family property—One co-sharer in possession for all—Alienation by co-sharer in possession—Continuance of alienor in possession—Knowledge of exclusion—Limitation Act (XV of 1877), Sch. II, Arts. 127, 144

A. and *B.* were members of a joint Hindu family. *A.* held possession on behalf of himself and his co-parcener till 1880, when *A.* sold the property to a stranger *C.* *A.*, however, continued in possession and passed a rent-note in favour of his vendee, *C.* There was nothing in the circumstances to put *B.* on notice that any change of possession had occurred or that his title was in any way imperilled.

In 1906, *B.* sued for possession of his share by partition:

Held, (1) that the suit was not barred by limitation;

(2) that before the alienation, the possession of *A.* was more or less of a fiduciary character and it was the possession of all the co-sharers; it could not begin to be adverse without intimation by the co-parcener in possession conveyed to the other co-parcener that he intended to exclude him.

Per *Chandavarkar, J.*—The question of adverse possession between co-parceners *inter se* is governed by Article 127 of the Limitation Act. Article 144 applies where the question is as between a co-parcener in a joint Hindu family and a stranger to it.

If a co-parcener has alienated property belonging to the family, so as to exclude other co-parceners from it, adverse possession in favour of the alienee begins to run from the date of alienation and the consequent exclusion of the co-parceners.

The law is that the Court is always too loth to hold adverse possession proved where the possession is equivocal in character.

Lallubhai Bapubhai v. *Mankubarbai*, 2 B. 388 at p. 417, followed.

Per *Batchelor, J.*—To constitute an adverse possession against the real owner, possession must be in some way or other ostensibly adverse.

Second appeal from the decision of the District Judge of Dharwar, in Appeal No. 26 of 1910, reversing that passed by the Subordinate Judge at Haveri, in Civil Suit No. 408 of 1906.

Mr. *M. V. Bhat*, for the Appellant.

Mr. *G. S. Mulgaonkar*, for the Respondent.

JUDGMENT.

CHANDAVARKAR, J.—The question which arises in this appeal is one of adverse possession under Article 144 of the Limitation Act. The facts shortly are: the lands in dispute belonged originally to the plaintiffs and defendant No. 1 as members of a joint Hindu family. Defendant No. 1 held possession of them on behalf of himself and his co-parceners till 1880 when he sold the property to defendant No. 2. But defendant No. 1 continued in possession and passed a rent-note in favour of the 2nd defendant, his vendee. The question is whether this suit for partition which was brought in the year 1906 is barred by reason of the adverse possession of defendant No. 2 from the date of his sale.

Now, it is true the question of adverse possession between co-parceners *inter se* is governed by Article 127 of the Limitation

MOHAN LAL *v.* *Musammat* JUMERAT.

Act. But Article 144 applies where the question is as between a co-parcener in a joint Hindu family and a stranger to it. If a co-parcener has alienated property belonging to the family, so as to exclude other co-parceners from it, adverse possession in favour of the alienee begins to run from the date of the alienation and the consequent exclusion of the co-parceners. In the present case, defendant No. 2, the alienee, did not go into possession but allowed defendant No. 1, his vendor, to continue in the character of tenant under him. It is argued that that constructive possession entitles the second defendant to reckon the period of adverse possession from the date of his sale. But the objection in law to that argument is this:—Before the alienation defendant, No. 1 had held possession for himself and his co-parceners. His possession was, therefore, more or less of a fiduciary character, and it was the possession of all. It could not begin to be adverse without intimation by the co-parcener in possession conveyed to the other co-parceners that he intended to exclude them. So long as defendant No. 1 was in possession, notwithstanding his sale to defendant No. 2, his co-parceners would have no reason to suppose that he held adversely and intended to change the original character of that possession. Defendant No. 1 could not hold for both his co-parceners and defendant No. 2. Therefore, for adverse possession to run from the date of the sale, it was necessary for either of the defendants to do something to change the character of defendant No. 1's possession, and that to the knowledge of the co-parceners excluded. Defendant No. 2's title was merely on paper, and he could not rely upon the possession of defendant No. 1, as that of his tenant, because side by side with that, there was the undisturbed possession of defendant No. 1 as the agent of his family. Therefore, the character of the possession of defendant No. 1 being of an equivocal character, there was nothing on which adverse possession could operate. The law is that the Court is always too loth to hold adverse possession proved where the possession is equivocal in character: *Lallubhai Bapubhai* v. *Mankubarbai* (1).

(1) 2 B. 388 at p. 417.

On these grounds, the decree of the Court below must be reversed and the case sent back for disposal on the merits.

Costs to be costs in the appeal.

BATCHELOR, J.—I am of the same opinion. It seems to me to be impossible to hold that the plaintiffs can be prejudiced by reason of the fact that a deed of sale was executed behind their back by their agent, the first defendant, in favour of a stranger, the second defendant. In spite of this deed of sale, there was no transfer of possession, but possession remained, as uptil then it had always been, with the first defendant who is the agent of the plaintiffs in that behalf. There was nothing in these circumstances to put the plaintiffs on notice that any change of possession had occurred, or that their title was in any way imperilled. As was said by Mr. Justice Batty in *Tarabai* v. *Venkat Rao* (2), to constitute an adverse possession against the real owner, possession must be in some way or other ostensibly adverse. In this case, the possession remained ostensibly that which it had always been, with the result that the purchaser's possession was not adverse to the plaintiffs.

Decree reversed.

(2) 27 B. 43 at p. 61; 4 Bom. L. R. 721.

ALLAHABAD HIGH COURT.

CIVIL REVISION PETITION No. 59 OF 1912.

November 2, 1912

Present:—Mr. Justice Rafique.

MOHAN LAL—DEFENDANT—APPLICANT

versus

Musammat JUMERAT—PLAINTIFF—OPPOSITE PARTY.

Limitation Act (IX of 1908), Sch. I., Arts. 7, 102—Wet-nurse—Domestic servant—Suit for wages—Limitation.

A wet-nurse does not come within the definition of a house-hold servant; hence a suit by her to recover her wages does not fall under Article 7 of the Limitation Act, but falls under Article 102 of the Act.

Civil revision against an order of the Judge, Small Cause Court, Jhansi.

Mr. *Sital Prasad Ghosh*, for the Applicant.

Mr. *Durga Charan Banerjee*, for the Opposite Party.

JUDGMENT.—This is an application in revision under section 25 of the Small

Cause Courts Act. The facts, which have led to the making of the present application, are as follows:—*Musammat* Jumerat, the opposite party, was employed by the applicant in December 1907, to suckle and nurse his infant girl. *Musammat* Jumerat served the applicant up to January 1910. In November 1910, she instituted a suit, in the Court of Small Causes at Jhansi, to recover Rs. 150 on the allegation that she had been employed by the applicant at Rs. 10 a month to suckle and nurse his child and served him for 26 months, for which she had not been paid anything. She gave up her claim for Rs. 110 and claimed only Rs 150. The defendant-applicant denied having employed *Musammat* Jumerat as a wet-nurse at Rs. 10 per month. He further pleaded that the claim was barred by limitation. The learned Judge disallowed the pleas in defence and decreed the claim for Rs. 150. It is urged on behalf of the applicant in this Court that the case falls under Article 7, Schedule I of the Limitation Act, 1908, as *Musammat* Jumerat was a house-hold servant. Her wages became due at the end of every month, and her cause of action accrued on the default in payment of her wages at the end of the month and hence the claim is clearly barred except for three months. For the opposite party, the contention is that *Musammat* Jumerat is not a house-hold servant and that her case is covered by Article 115 of the first Schedule of Act IX of 1908. No authority has been cited on either side to show whether a wet-nurse does or does not fall within the definition of a house-hold servant. I do not think that a wet-nurse can properly come under the definition of house-hold servant. The case of *Musammat* Jumerat does not, in my opinion, fall under Article 7 of the first Schedule of the Limitation Act. I think her case is covered by Article 102 of that Schedule and her claim is, therefore, within time. The application is, therefore, dismissed with costs.

Application dismissed.

BOMBAY HIGH COURT.

FIRST CIVIL APPEAL No. 152 OF 1910.

August 5, 1912.

Present:—Mr. Justice Batchelor and Mr. Justice Rao.

UMAR AMNAJI MIAJI—APPELLANT

versus

THE SECRETARY OF STATE FOR INDIA—RESPONDENT.

Bhagdari *tenure, nature of*—Bhagdari *village—Right of* bhagdar *to village site—Land forming road-way —Bombay Land Revenue Code (Bom. Act V of* 1879), s. 37.

Land forming road-ways through the village site of a *bhagdari* village is the property of the Government.

All the land forming the village site of a *bhagdari* village is not the property of the *bhagdars*.

The *bhagdari* tenure is nothing more than a particular system of collecting the revenues for the Government.

A *bhagdar* is entitled only to those village fields which are assigned to him, and to that portion of the village site which is assigned to him for residence.

A *bhagdar* has no higher title to his assigned land in the village site than he has to his assigned land in the village fields. He cannot make any claim to the proprietorship of such lands, as he is liable to pay rent or assessment to the Government for these lands.

First appeal from the decision of the District Judge of Broach, in Suit No. 11 of 1908.

Mr. *D. A. Khare*, for the Appellant.

Mr. *L. A. Shah*, Acting Government Pleader, for the Respondent.

JUDGMENT.—In the suit out of which this appeal arises, the plaintiff, who is a *bhagdari* resident of the *bhagdari* village of Kantharia in Broach, sued for a declaration that the defendant had no title or interest in a certain piece of land in the village site, on which land the plaintiff had fixed pegs for the tethering of his cattle. He sought also a permanent injunction restraining defendant from interfering with his tethering his cattle on the piece of land in suit which was situated just outside his house. The learned District Judge dismissed the suit, being of opinion, that the *bhagdars* were not, as the plaintiff contended that they were, owners of the village site; that the land in suit was part of a public way used by certain inhabitants of the village, and, consequently, under section 37 of the Land Revenue Code, was the property of Government.

In appealing from this decree, the plaintiff, through his Pleader, has taken as his main

ground the proposition that land in the village sites of *bhagdari* villages is the property of the *bhagdars* and not of the Government. It seems to us that that proposition is not established. On the contrary, we agree with the learned Judge in thinking that in such villages the land forming the road-ways through the village site is the property of the Government. The particular strip of land, here in suit, is part of a *gully* or lane which leads directly from the main public road to the collection of houses situate round about the plaintiff's house. It appears from the map, and it is proved by the village Talati, who upon this point was not cross-examined, that this strip of land in suit is part of a way or lane open to the villagers, and used by them freely upon all occasions. We are of opinion, therefore, that it is established that the somewhat indefinite parcel of land in dispute is a portion of a public road-way.

That being so, upon what ground can the plaintiff claim that he is entitled to the relief which he here seeks? We were referred to the report made by Mr. Peddar in 1862, on the subject of this *narwa* and *bhagdari* tenure. And certain passages in that report were quoted as authority for the view that all the land forming the village site in a *bhagdari* village was the property of the *bhagdars*. It appears to us, however, that no part of the report authorizes any such proposition. Indeed, the report itself seems to us to show that the *bhagdari* tenure is nothing more than a particular system of collecting the revenues for the Government. In paragraph 28 of the report, Mr. Peddar, says:—"I have shown, I hope, that the *narwadars* and *bhagdars* are merely the old proprietary cultivators, and the system only a mode of sharing the Government demands." A similar view of the meaning of the system was expressed by Lieut.-Colonel Monier Williams in his "Memoir on the Zilla of Baroochi," and also in Baden Powell's "Land Systems of British India." The result of these historical references is, we think, to show that the tenure is merely one mode of collecting the revenue demands of the Government. But we find no authority for the view that the legal position of Government is altered in reference to the demands of any particular *bhagdar*. The *bhagdar*, it seems to us, is entitled only to those village fields which are assigned to him, and to that portion of the village site which is assigned to him for residence. Those two portions taken together form his *bhag*, which he is not entitled to alienate otherwise than as a whole. What part of the village site is assigned to particular *bhagdars* is shown by the Gabhan-patrak, which in this case is Exhibit 75, a document prepared in 1866, or within a few years of the passing of the Bhagdari Act. This record shows that the particular piece of land, now in dispute, forms no part either of the plot assigned to the plaintiff's *bhag* or of the plot assigned to any other resident of the village. The inference derivable from this circumstance is strengthened by reference to the Vahivat-patra, Exhibit 64, paragraph 14 of which recites that: "in this village, public roads having been made on *bhag* land, such land has been included in Government land." The meaning of that seems to be clear, namely, that public road-ways even when made through lands, which would otherwise be *bhag* land, are included in Government land.

It appears to us, moreover, that so far as the *bhagdhari* tenure is concerned, it cannot give the plaintiff any higher title to his assigned land in the village site than he has to his assigned land in the village fields. And in regard to these latter lands, he is indisputably liable to pay rent or assessment to the Government. He cannot, therefore, make any claim to the proprietorship of such lands.

In this case, apart from the general considerations to which we have alluded, there is particular evidence strongly in favour of the respondent. The oral evidence, which comes largely from parties interested on the other side, favours the defendant's case rather than the plaintiff's. And the record contains two distinct admissions, and one implied admission, made by the present plaintiff and wholly irreconcilable with the case which he now puts forward in this suit.

Upon the whole, therefore, we agree with the learned District Judge in thinking that the plaintiff has failed to make out the case for which he was contending and that this appeal should be dismissed with costs.

Appeal dismissed.

ALLAHABAD HIGH COURT.

CIVIL REVISION PETITION No. 90 OF 1912.

November 4, 1912.

Present:—Sir Henry Griffin, Kt., Judge.

HAR NARAIN—PLAINTIFF—APPLICANT

versus

UMRAI—DEFENDANT—OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908), O. XLVII, r. 7—Order granting review—Appeal—Dismissal in default—Restoration on review.

A suit was dismissed for default. An application for restoration was also dismissed. The plaintiff then applied for review of judgment. The Court of first instance allowed the application for review and restored the suit to its original number. On appeal, the District Judge reversed the order of the first Court granting the application for review, on the ground that no review could be granted when an application for restoration had been dismissed:

Held, that this was not a ground upon which an appeal could be allowed under the provisions of Order XLVII, rule 7.

Application for revision against the judgment of the District Judge of Farrukhabad.

Mr. *Gulzari Lal*, for the Applicant.

Mr. *A. P. Dube*, for the Opposite Party.

JUDGMENT.—A suit was dismissed under the provisions of Order IX, rule 8, of the Code of Civil Procedure. An application under Order IX, rule 9, to have the order of dismissal set aside was also dismissed. The plaintiff again applied under Order XLVII, rule 1, for review of judgment. The Court of first instance allowed that application and setting aside its former orders directed that the suit be restored to its original number. The defendant appealed and the learned District Judge has reversed the order of the Court of first instance and directed that the application for review be dismissed. The plaintiff comes here in revision, and it is contended on his behalf that the Court below had no jurisdiction to hear the appeal from the Court of first instance except on the grounds set out in Order XLVII, rule 7. That rule provides that an order rejecting an application for review of judgment shall not be appealable, but an order granting review shall be appealed against on grounds specified in clauses (*a*), (*b*) or (*c*) following. None of the reasons given by the Court below for allowing the appeal comes under clauses (*a*), (*b*) or (*c*) of rule 7. The provision of rule 2 of Order XLVII does not apply. Rule 4 is also not applicable under the circumstances. The Court below gave as its reason for allowing the appeal that as the application for restoration had been dismissed, the plaintiff cannot come again and ask for a review of judgment. This is not one of the grounds upon which an appeal could be allowed under the provisions of Order XLVII, rule 7. I allow this application, set aside the order of the Court below and restore the order of the Court of first instance. The costs of this application will be the costs in the case.

Application allowed.

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL No 714 OF 1911.

August 12, 1912.

Present:—Mr. Justice Batchelor and Mr. Justice Rao.

DWARKANATH AMRIT DESHPANDE—DEFENDANT—APPELLANT

versus

MAHADEV BALKRISHNA DESHPANDE—RESPONDENT.

Pensions Act (XXIII of 1871), s. 4—Jurisdiction—Civil suit—Deshpande Kulkarni Vatan—*Suit for declaration of share in cash allowance—Collector's certificate.*

A suit to obtain a declaration that the plaintiffs are owners of an eight-anna share in the *Deshpande Kulkarni Vatan*, consisting of a cash allowance paid annually from the treasury whether coupled with a prayer to recover the actual cash received or not, falls within the class of suits defined by section 4 of the Pensions Act, and is, consequently, not maintainable in a Civil Court without a Collector's certificate.

Govind Sitaram v. *Bapuj Mahadeo*, 18 B. 516, distinguished.

Babaji Hari v. *Rajaram Ballal*, 1 B. 75, followed.

Second appeal from the decision of the first class Subordinate Judge, at Thana, in Appeal No. 84 of 1909, varying that passed by the Subordinate Judge at Pen, in Civil Suit No. 483 of 1907.

Mr. *D. A. Khare*, for the Appellant.

Mr. *N. M. Samarth*, for the Respondent.

JUDGMENT.—The point raised for the appellants defendants in this appeal is that under sections 4 and 6 of the Pensions Act XXIII of 1871, this suit does not lie without a certificate from the Collector. Admittedly, such a certificate was refused on the plaintiffs'

application. The only question, therefore, now before us is whether section 4 of the Pensions Act debars the Civil Court from entertaining the suit without such a certificate. It appears to us that if regard is had to nothing but the words of section 4 of the Statute and to the pleadings and the nature of this suit, there can be no reasonable doubt but that Civil Court is ousted of its jurisdiction. Section 4 lays down that:—"No Civil Court shall entertain any suit relating to any pension or grant of money or land-revenue conferred or made by the British or any former Government, whatever may have been the consideration for any such pension or grant, and whatever may have been the nature of the payment, claim, or right for which such pension or grant may have been substituted." And the present suit is explicitly and in terms a suit to obtain a declaration that the plaintiffs are the owners of an eight-annas share in the *Deshpande Kulkarni Vatan*, which now consists of a cash allowance of Rs. 122, paid annually from the treasury at Pen. The plaintiffs seek also for a declaration of their right to receive the amount of their share from the first defendant, the registered *Vatan*-holder. On its face, therefore, the suit is clearly a suit relating to a pension or grant of money conferred by the British Government. It is pointed out by Mr. Samarth, for the respondents-plaintiffs, that they withdrew their prayer to recover the actual cash received, and restricted their suit to a claim for a declaration that they were entitled to an eight-annas share in this cash allowance in respect of the *Deshpande Kulkarni Vatan*. Even upon this footing, however, it seems to us that the suit is nonetheless barred, for it seems to us not possible reasonably to maintain that the suit falls outside the class of suits defined by section 4 of the Pensions Act.

Reliance was placed for the respondents on this Court's decision in *Govind Sitaram* v. *Bapuji Mahadeo* (1), a decision which does, no doubt, at first sight afford some countenance to the respondent's case. But upon the best consideration which we can give to Sargent, C. J.'s judgment in that case, we must read it as based upon the view that the suit then under notice was capable of being regarded, and was by the Court regarded, as being substantially a mere suit for a declaration of the then plaintiffs' status as *Vatandars*. No such view can be taken of the present plaint, with its specific claim for a share in the cash allowances of the *Vatan*, and it follows that there is nothing in *Sitaram's* case (1), which is inconsistent with the application of section 4 of the Pensions Act to the present suit.

There is, however, a decision of this Court which is of direct authority on the facts now before us and which supports the opinion we have formed: we refer to *Babaji Hari* v. *Rajaram Ballal* (2), where Mr. Justice West, after allowing all possible weight to what he describes as the anterior improbability of the Legislature's having intended to shut out such suits from the jurisdiction of the Courts, comes to the conclusion that the plain grammatical meaning of section 4 must prevail, and that such a suit as this must be ousted. In that case, the plaintiff had sued to have his right declared to a ninth share in certain *Vatans* of some villages in Satara, and Mr. Justice West, for the reasons which are set out in the judgment, held that section 4 imposed a complete bar to the Courts' jurisdiction in so far as the suit had reference to the cash allowance payable by the Government. The learned Judge said: "As it stands, the section extends to all suits relating to any grant of money made by Government; and the plaintiff, who seeks a share in such a grant from his alleged co-sharers, must, we think, be said to bring a suit relating to the grant." It is, in our opinion, impossible to draw any distinction of substance between the plaint which was then under consideration and that which is before us now.

We are of opinion, on these grounds, that the suit falls within the bar of section 4 of the Pensions Act, and must be dismissed with costs. We, therefore, allow this appeal, reverse the decree and dismiss the suit with costs throughout.

Decree reversed.

(1) 18 B. 516.

(2) 1 B. 75.

BANK OF BOMBAY v. NANDLAL THACKERSEYDAS.

PRIVY COUNCIL.

APPEAL FROM THE BOMBAY HIGH COURT.

October 31, 1912.

Present:—Lord Macnaghten, Lord Atkinson, and Lord Shaw.

BANK OF BOMBAY—DEFENDANT—APPELLANT

versus

NANDLAL THACKERSEYDAS—PLAINTIFF—RESPONDENT.

Pledge—Bailment--Bailee working as warehouseman and merchant—Pledge of deposited goods—Pledgee having no knowledge of bailor's claim—Return of goods to pledgor—Notice—Presumption of dishonesty—Suit for conversion of goods and marshalling securities—Pleadings.

A. entrusted certain bales of cotton to *B.* as a *muccadum* or warehouseman. Besides working as a *muccadum* or a warehouseman, *B* carried on business as a cotton merchant on an extensive scale. *B.* was financed by *C.*, with whom *B.* used to pledge cotton to secure his account for cash advances and cash credits.

B. pledged *A.*'s bales to *C.*, who had no notice or reason to suspect that the cotton belonged to any one but *B.* or that any one but *B.* had any right or title thereto or interest *therein*. As a matter of fact, the cotton was subsequently returned by *C.* to *B.* or parted with to *B.*'s order.

A. sued *C.* claiming recovery of cotton bales entrusted to *B.*; in the alternative, *A.* claimed payment of the value of the bales and finally claimed that his rights should be ascertained and declared on the basis that the securities deposited by *B* with *C.* should be marshalled in his favour:

Held, (1) that having regard to the claim to marshal securities, *C.* was entitled to prove the fact that the cotton was returned to *B.* or parted with to his order;

(2) that the fact that *C.* parted with the cotton deposited with him to or to the order of the depositor, *B.*, without notice of any claim by any other person, afforded a complete defence to the suit.

No one is bound to suspect dishonesty in a person of good credit and reputation with whom he is dealing, merely because that person occupies a position which would enable him to act dishonestly if he were a rogue.

Appeal from a judgment and decree of the High Court at Bombay, dated the 20th of January 1910*, reversing a judgment and decree of the High Court (Original Side) dated the 8th of March 1909.†

FACTS.—The facts which gave rise to the litigation were as follows :—The plaintiff-respondent, Nandlal, was carrying on business in Bombay as a merchant, commission agent, money-lender and banker in 1903. The defendant No. 2, Lakhmidas, was a cotton merchant and a *muccadum* or warehouseman. The plaintiff alleged that he had entrusted to the care of the said Lakhmidas 399 bales of cotton to be warehoused for which *amanat* or deposit receipt was given. In August 1903, he was informed that Lakhmidas purported to pledge the said bales to the Bank of Bombay in whose godowns two of his bales were found. The custody of the bales did not clothe Lakhmidas with legal possession of the said goods and, therefore, he could not pledge and the Bank acquired no title by the pledge. Further, the Bank did not act in good faith and took the goods in pledge under very suspicious circumstances. The Head of Shroff Department of the said Bank was a partner with Lakhmidas in certain cotton speculations and that he was well aware of all his business transactions. The Bank had failed to deliver up the bales of cotton. The Bank stated that it was not aware of the fact that the alleged bales of cotton belonged to the plaintiff and that certain bales of cotton were pledged with it to secure advances from time to time. It was not known to the Bank that any improper dealings were taking place and that it took in pledge the bales in good faith from a merchant who was doing business in cotton on a very large scale on his own account. Later in the proceedings, the Bank applied that pleadings be amended by the addition of the allegation that whatever bales of cotton were pledged with them were removed and sold by the pledger, Lakhmidas, before the Bank received any intimation from the plaintiff. The High Court (Original Side) decided in favour of the Bank and delivered judgment on March 8, 1909. Against this decision, an appeal was lodged and the judgment of the High Court(Appellate Side) was given on January 20, 1910, reversing the judgment of the lower Court

Sir *A. Cripps, K. C.*, and Mr. *McCardie*, on behalf of the Appellant, contended that the High Court wrongly construed section 178 of the Indian Contract Act, 1872, and read into it words of limitation which were not contained therein. The Bank was never guilty of conversion, nor of any actionable wrong either by keeping or restoring goods to the person who deposited them, though the depositor may not have any authority from the owner. The Bank had no notice whatever that the cotton belonged to the plaintiff.

M. *Atkins, K. C.*, and Mr. *Lowndes*, for the Respondent, contended that the plaintiff was

* 5 Ind. Cas. 457.

† 4 Ind. Cas. 652.

the owner of the bales of cotton in question, which being pledged by Lakhmidas with the Bank, were converted. The pledge was invalid as Lakhmidas was a *muccadum* and had no power to pledge, that the Bank took the pledge under circumstances which were such as to raise a reasonable presumption that Lakhmidas was acting improperly. The Bank ought not to have been allowed to adduce evidence to show that any of the bales had been returned and that there was no sufficient evidence to show that any of the bales had in fact been so returned. Even the return of the bales of cotton to Lakhmidas and subsequent sale thereof by him in fraud of the plaintiff would not exonerate the Bank from liability. In any case, the plaintiff should be allowed to stand in the shoes of Lakhmidas to claim from the Bank the marshalling of securities held by the Bank from the said Lakhmidas.

Sir *A. Cripps*, heard in reply.

JUDGMENT.

LORD MACNAGHTEN.—This is an appeal from an order and decree of the High Court of Bombay in its appellate jurisdiction, reversing the order and decree of Beaman, J., who tried the case originally. The trial Judge dismissed the suit without costs as against the first defendants, the Bank of Bombay, who are the present appellants. The Court of appeal, consisting of Scott, C. J., and Batchelor, J., made a decree in favour of the plaintiff with costs.

The plaintiff, a merchant in Bombay, by his plaint which was filed so far back as November 1904, claimed delivery of 399 bales of cotton which had been entrusted to the second defendant Lakhmidas as *muccadum* or warehouseman and, as the plaintiff alleged, improperly pledged by him to the Bank. In the alternative, the plaintiff claimed payment of the value of the bales in question, and in the event of it being held that he was not entitled to any such relief as aforesaid, then he asked that his rights should be ascertained and declared suggesting that the securities deposited by Lakhmidas with the Bank should be marshalled in his favour.

The case was not brought to a hearing until January 1909. For this delay, both parties seem to have been equally to blame. Various irrelevant issues were raised and various irrelevant defences were set up, and there were interlocutory applications protracted and all apparently futile. Both parties seem to have been in the dark as to the real facts of the case which were not elucidated until the suit was at hearing, though apparently the plaintiff might have discovered the facts from Lakhmidas' books which were accessible to him, and the Bank ought to have been able to produce an accurate record of their dealings with their customers.

There were 21 issues originally settled. In the course of the hearing, an additional issue was proposed by the learned Counsel for the Bank, and allowed without opposition on the part of the plaintiff. It was in the following terms: "Whether the Bank has been guilty of any conversion in respect of the goods in suit?" Upon that issue, the case ultimately turned.

The material facts, as ascertained during the trial, may be stated shortly.

Lakhmidas, though now insolvent and under sentence of imprisonment for criminal breach of trust, was in good credit in the early part of 1903 and then carrying on business in Bombay both as a cotton merchant on an extensive scale and also as a *muccadum* or warehouseman. He was financed by the Bank, and in the habit of pledging cotton with the Bank to secure his account for cash advances and cash credits, and in the habit of withdrawing parcels of cotton so pledged when and as he disposed of them in the course of his business, leaving, of course, an amount sufficient to cover his liability to the Bank or else substituting other cotton for the cotton so withdrawn.

At that time, the Managers of the Bank had no reason to suppose that Lakhmidas was carrying on any business but that of a cotton merchant. They were assured that he had given up the business of a *muccadum*, which at one time was carried on by his firm, though, undoubtedly, a man in their employ, whose duty it was to obtain information for the Bank with regard to their customers, was aware that Lakhmidas was carrying on the business of a warehouseman as well as that of a cotton merchant. This man seems to have been in partnership with Lakhmidas or in collusion with him.

In February 1903, the plaintiff, as purchaser of the bales in question in this suit, or in some other manner interested therein,

took delivery of them and entrusted them to Lakhmidas as warehouseman. Lakhmidas immediately pledged them with the Bank. For a time they were deposited in the open air Jettha at Colaba, which is said to have been leased by him in the name and on behalf of the Bank.

About the end of April or early in May 1903, on the approach of the monsoon, all the cotton in the possession of Lakhmidas at Colaba was removed by him into godowns leased by the Bank and placed there in the Bank's custody.

In June and July 1903, all the bales of cotton in suit, with the exception of two (as to which there is no question now), having been sold by Lakhmidas were withdrawn from the Bank's godowns and passed out to Lakhmidas or to his order.

No claim to this cotton was made by the plaintiff against the Bank before it passed out of the hands of the Bank. The Bank had no notice or reason to suspect that it belonged to any one but Lakhmidas, or that anyone but Lakhmidas had any right or title thereto or any interest therein.

The fact that the cotton was returned to Lakhmidas, or parted with to his order, was established during the cross-examination of Lakhmidas, called as a witness by the plaintiff, and proved by inspection of his books.

The plaintiff strongly objected to any evidence being given as to this fact, inasmuch as it had not been pleaded by the Bank as a defence to the suit. But the learned Judge held, and, in the opinion of their Lordships, held rightly, that the fact could not be excluded having regard to the claim to marshal securities set up by the plaintiff.

If the evidence on this head was properly admitted, it seems to their Lordships that it must be admissible for all purposes.

Their Lordships think that the fact that the Bank parted with the cotton deposited with them to or to the order of the person by whom it was deposited without notice of any claim by any other person affords a complete defence to the suit.

Their Lordships agree in the finding of the learned trial Judge that the Bank acted throughout in good faith—a finding which does not seem to have been questioned on the appeal to the High Court. Nor indeed do they think that there would have been any imputation on the conduct of the Bank if the Managers of the Bank had known that Lakhmidas was a *muccadum* as well as a cotton merchant, though, of course, for their own protection they would have been careful in dealing with him if they dealt with him at all had they known that he carried on both businesses. No one is bound to suspect dishonesty in a person of good credit and reputation with whom he is dealing merely because that person occupies a position which would enable him to act dishonestly if he were a rogue.

Taking the view which their Lordships do of this case, it is unnecessary for them to express any opinion on the construction of Section 178 of the Indian Contract Act, 1872.

Having regard to the loose manner in which the business of the Bank was conducted, and the way in which the suit was defended, their Lordships are of opinion that the appellants are not entitled to any costs.

Their Lordships will, therefore, humbly advise His Majesty that the order appealed from should be discharged without costs—any costs already paid being re-paid, and the order of Beaman, J., should be restored.

There will be no costs of the appeal.

Solicitors for the Appellant: Messrs. *Cameron, Kemm & Co.*

Solicitors for the Respondent: Messrs. *T. L. Wilson & Co.*

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL No. 492 OF 1911.

August 14, 1912.

Present:—Mr. Justice Batchelor and Mr. Justice Rao.

MALHAR BHAGVANT KULKARNI—APPELLANT

versus

NARSINH KRISHNA MAJLI—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 92—Public religious trust—Suit by trustees for recovery of trust property from outsiders—Outsiders heirs of late manager.

A suit by the trustees of a public religious trust for the recovery of property, which has gone wrongfully into the possession of persons who are strangers to the trust, is not governed by the

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provisions of section 92 of the Civil Procedure Code, 1908. The mere fact that these persons in possession are heirs of the late manager of the trust property is immaterial.

Second appeal from the decision of the first class Subordinate Judge, at Beglaum, in Appeal No. 299 of 1910, confirming that passed by the Subordinate Judge at Chikodi, in Civil Suit No. 565 of 1909.

Mr. *Nilkanth Atmaram*, for the Appellant.

Mr. *C. A. Rele*, for the Respondent.

JUDGMENT.—We are of opinion that in this case the lower Courts were wrong in thinking that this was a suit governed by the provisions of section 92 of the Civil Procedure Code. The suit was brought by the plaintiffs as trustees of a public religious trust. They were appointed trustees on the 26th April 1903. The defendants' father had been manager of the trust property from 1883 up to his death in 1905. After his death, his accounts were examined by the plaintiffs-trustees who discovered, as they allege, that a large balance due to the temple was with him. They, therefore, as trustees, now sue to recover property belonging to the trust which has gone wrongfully into the possession of defendants who are strangers to the trust. To such a suit as this, section 92 has no application: it is a suit, not by persons interested in the trust against defaulting trustees, but by the trustees against outsiders alleged to be in wrongful possession of the trust property. The extent and meaning of this section are well explained in *Lakshmandas Parashram* v. *Ganpatrav Krishna* (1); *Strinivasa Ayyangar* v. *Strinivasa Swami* (2) and *Budree Das Mukim* v. *Chooni Lall Johurry* (3). And these decisions show that the present suit is outside the scope of section 92.

It is faintly suggested by Mr. Rele in this second appeal that his clients themselves should be regarded as occupying the position of trustees, but, we think, there is no substance in this argument. No such admission was made in the plaint, and no such assertion was made in the written statement. The defendants are only heirs of the late manager and can have no claim to be regarded as trustees.

We must, therefore, allow this appeal, reverse the decree of the lower Appllate Court and remand the suit for trial on its merits.

The appellants must have their costs in this Court and in the lower Appellate Court from the respondents. Costs in the first Court will abide the result.

Decree reversed.

(1) 8 B. 365.
(2) 16 M. 31.
(3) 33 C. 789; 10 C. W. N. 581.

PIRVY COUNCIL.

APPEAL FROM THE CHIEF COURT OF THE PUNJAB.

November 13, 1912.

Present:—Lord Macnaghten, Lord Moulton, Sir John Edge and Mr. Ameer Ali.

Sardar KIRPAL SINGH—DEFENDANT—APPELLANT

versus

Sardar BALWANT SINGH AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Custom—Alienation by father of ancestral property —Necessity—Burden of proof—"Just debt"—Privy Council Appeal—Concurrent findings—Practice.

In the case of an alienation by a father, governed by Customary Law, the *onus* of proving necessity for the consideration rests upon the vendee.

An agriculturist male proprietor of lands may alienate ancestral lands as against the reversioners for valid necessity such as a "just debt". A "just debt" means a debt which is actually due and is not immoral, illegal, or opposed to public policy, and has not been contracted as an act of reckless extravagance, or of wanton waste, or with the intention of destroying the interests of the reversioners.

A concurrent finding of fact is conclusive on the point.

Devi Ditta v. *Saudagar Singh*, 65 P. R. 1900 (F. B); P. L. R. 1900, p. 322, approved.

An appeal by the defendant from a judgment and decree of the Chief Court, dated the 16th day of January 1908, varying a judgment and decree of the District Judge of Gujranwala, dated the 31st day of July 1907.

FACTS.—For facts see 4 Ind. Cas. 632, where the judgment of the Chief Court is reported.

Against the judgment and decree of the Chief Court, the defendant appealed to the Judicial Committee.

Mr. *DeGruyther*, *K. C.*, (with him Mr. *Dube*), contended on behalf of the Appellant (defendant) that fair value was paid, that

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there was no undue influence exercised by the appellant, that the *onus* to prove that debts were not incurred for necessity, was on the respondents and that if it was a just debt, it was binding on the sons. There was no difference between Hindu Law and Customary Law on this point.

Bhagbut Persad Singh v. *Girija Koer* (1), *Jagan Nath* v. *Tulsi Das* (2), *Bahadar Singh* v. *Des Raj* (3), *Sardari Mal* v. *Khan Bahadur Khan* (4); *Sobha Singh* v. *Thoba Singh* (5), Rattigan's Digest, p. 97, were referred to.

Sir *E. Richards, K. C.*, for the Respondents, contended that the arguments urged were based upon the principles of Hindu Law which were never applied in any Court. There was material difference between the Hindu Law and the Customary Law, as in Hindu Law the question of pious duty on the part of the son to pay off his father's debt very greatly affected the law. According to the Punjab Customary Law, the point was the restriction of the power of alienation. [SIR JOHN EDGE: The case was not fought out on the merits of Hindu Law.] It was the duty of the vendee to inquire into the necessity of the debt incurred.

Dr. *Majid* following argued that the Punjab Customary Law was like the Common Law in England. If it was proved that the case was to be determined by Customary Law, then it had to be decided according to certain fixed principles which prevail all over the Punjab amongst the agriculturists. The Punjab Alienation Act operated in the same way. In case of the agriculturists (and in the present case plaintiffs were *Jats*), the presumption was that general custom of the Punjab applied and the party which asserted to the contrary had to prove his assertion by way of special custom. The Punjab Laws Act also laid down that in this Province custom was the primary rule of decision.

[LORD MOULTON: You put it even higher than your leader.]

[SIR JOHN EDGE: How do you draw the analogy between the English Common Law and the Punjab Customary Law?]

(1) 15 I. A. 99 at p. 103; 15 C. 717.
(2) 72 P. R. 1898.
(3) 53 P. R. 1901.
(4) 11 P. R. 1899.
(5) 14 P. R. 1899.

[LORD MOULTON: The question is also what the custom is?]

The custom applicable to this case was the general custom of the Punjab which laid down that a father could not alienate his ancestral property without necessity. What the necessity was had to be proved with reference to the particular part of the Province. In this case, the plaintiffs were *Jats* and no question of special custom arose. Unlike Hindu Law, a vendee was bound to inquire into the necessity. If there was any analogy between the Hindu Law and the Customary Law, it was in alienation by a widow governed by the *Mitakshara* and by a father of his ancestral land under Customary Law. The father of the plaintiffs had incurred debts to the knowledge of the defendant, which were not for necessity.

Rattigan's Digest, pages 93, 110, Articles 61, 95, Remark 2, page 96, Remark 7, page 115, *Suraj Bansi Koer* v. *Sheo Prashad* (6); *Minakshi* v. *Immadi* (7); *Damodhar* v *Birjo* (8); also *Jugdil Narain Suhaye* v. *Lalla Ram Prokash* (9); *Bahadur Singh* v. *Des Raj* (3); *Piran Ditta* v. *Moti* (10); *Ram Rakha Mal* v. *Balwant Singh* (11); *Sobha Singh* v. *Kishore Chand* (12); *Habib* v. *Fattu* (13) and *Devi Ditta* v. *Saudagar Singh* (14), were referred to.

Mr. *DeGruyther*, heard in reply.

JUDGMENT.

SIR JOHN EDGE.—This is an appeal by the defendant in the suit from a decree, dated the 16th January 1909, of the Chief Court of the Punjab, which varied a decree, dated the 31st July 1907, of the District Judge of Gujranwala.

The plaintiffs, who are Sikh *Jats*, and the sons of Sardar Gurbakhsh Singh, deceased, brought their suit in the Court of the District Judge of Gujranwala, to obtain possession of ancestral lands which had been conveyed in their life-time by their father to the defendant by a deed dated the 26th August 1892.

(6) 6 I. A. 88 at p. 106; 4 C. L. R. 226; 5 C. 148.
(7) 16 I. A. 1; 12 M. 142.
(8) S. D. of 1858 p. 802.
(9) 2 W. R. 292.
(10) 97 P. R. 1901.
(11) 58 P. R. 1905; 59 P. L. R. 1905.
(12) 65 P. R. 1907.
(13) 69 P. R. 1908; 125 P. L. R. 1908.
(14) 65 P. R. 1900 (F. B.); P. L. R. 1900 p. 322.

They alleged in their plaint that, according to the custom of the agriculturists of the Punjab, their father was not competent to sell the ancestral lands without necessity, and that their father was a debauchee and an extravagant person, and there was no necessity for the sale, and they prayed for a decree cancelling the sale-deed and for possession on condition that they should pay to the defendant the money, if any, which might be proved to have been paid by the defendant to their father for valid necessity. The defendant, so far as is now material, alleged in his written statement that he purchased the land in good faith on payment of lawful consideration without knowledge that the plaintiffs' father was a debauchee and an extravagant person, that no debt was contracted by their father without necessity, and that the debt which their father contracted with him was spent for valid necessities. The defendant did not, in his written statement, deny that the plaintiffs and their father were agriculturists to whom the custom alleged by the plaintiffs would apply.

According to the sale-deed of the 26th August 1892, the consideration was Rs. 18,000, the details of which stated in that deed were—

	Rs.
Left with the vendee for payment to Din Muhammad Beg, Muhammad Amin Beg, Bodh Raj and Jagan Nath, the previous mortgagees ...	9,500
Credited to the vendee on account of previous debt, principal and interest due to him under a bond, dated the 13th February 1891 ...	4,650
Credited to the vendee, on account of the previous debt, principal, and interest due to him under *bahi* account entered on leaf No. 115 ...	3,350
Now received in cash before the Sub-Registrar ...	500

As it must be taken as admitted on the pleadings that the custom alleged by the plaintiffs applied, the *onus* of proving the validity as against the plaintiffs of the consideration was upon the defendant, the vendee. On that basis, the case was fought in the Courts below.

It was found as a fact by the District Judge, and on appeal by the Chief Court, that the plaintiffs' father, the late Sardar Gurbakhsh Singh, was recklessly extravagant, and that he did not know how to manage his affairs properly. That concurrent finding has an important bearing on the question of necessity, as the payment of a just debt by the male proprietor of lands to which the custom applies is a necessity for which he can validly as against the reversioners alienate ancestral lands. It was held in this connection by a Full Bench of the Chief Court of the Punjab, and as their Lordships consider correctly, in *Devi Ditta* v. *Saudagur Singh* (14), that a "just debt" means a debt which is actually due and is not immoral, illegal, or opposed to public policy, and has not been contracted as an act of reckless extravagance, or of wanton waste, or with the intention of destroying the interests of the reversioners.

The District Judge and on appeal the Chief Court dealt with the items composing the Rs. 18,000 as set out in detail in the sale-deed of the 26th August 1892. It appears that the lands or some of them, which were included in the sale-deed of the 26th August 1892, had been previously mortgaged to Din Muhammad Beg and others by the plaintiffs' father on the 10th October 1891 for Rs. 6,100 for a period of 20 years with liberty to those mortgagees to make improvements, the cost of which, with interest thereon, the mortgagor undertook to pay at the time of redemption. The District Judge found that the Rs. 6,100 part of the item of Rs. 9,500 was a just antecedent debt, the payment of which was a necessity and that it was not proved to his satisfaction that the balance of the first item, namely Rs. 3,400, was due from Gurbakhsh Singh to Din Muhammad and the other mortgagees or constituted a just debt for the payment of which to Din Muhammad Beg and those other mortgagees of 1891, there was a necessity within the meaning of the custom. With those findings of the District Judge, the Chief Court on appeal concurred. Their Lordships consider that these concurrent findings should be accepted as conclusive so far as the sums of Rs. 6,100 and Rs. 3,400 are concerned.

As to the second item Rs. 4,650 of the detail of consideration, the District Judge, although he was not satisfied that there had been any necessity for the borrowing

by Gurbakhsh Singh of some of the amounts which are included in that item and as to others assumed from the recitals in some of the bonds which were produced by the defendant and without further proof that there had been necessity, allowed the whole item of Rs. 4,650 as a charge which the plaintiff should pay to the defendant. The Chief Court, on a careful consideration of the evidence, disallowed the whole of the item Rs. 4,650.

The Judges of the Chief Court considered that the District Judge had not rightly appreciated the rule as to the *onus* of proof, and they were unable to find that any necessity had been established for the incurring by Gurbakhsh Singh of any of the debts which composed the item of Rs. 4,650. From that conclusion of the Chief Court, their Lordships see no reason to dissent.

The District Judge disallowed Rs. 1,000 of the item of Rs. 3,350 of the detailed consideration, and the whole of the item of Rs. 500, finding that the Rs. 1,000 and the Rs. 500 were debts which Gurbakhsh Singh had incurred as acts of reckless extravagance. The Chief Court found that the District Judge had rightly disallowed the Rs. 1,000 and the Rs. 500, and, pointing out that no mention of the Rs. 3,350 account was made in a consolidating bond which Gurbakhsh Singh executed on 13th February 1891, found that no necessity had been proved for any portion of the item Rs. 3,350. With that conclusion of the Chief Court their Lordships agree.

The result is, that their Lordships will humbly advise His Majesty that the appeal should be dismissed and the decree of the Chief Court be affirmed. The appellant must pay the costs of this appeal.

Appeal dismissed.

Solicitors for the Appellant: Messrs. *Barraw, Rogers & Nevill.*

Solicitors for the Respondents: Mr. *E. Dalgado.*

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 573 OF 1911.

May 21, 1912.

Present:—Mr. Justice Chamier.

RAM JAR SINGH—PLAINTIFF—APPELLANT

versus

BHAGALU SINGH AND OTHERS—DEFENDANTS—RESPONDENTS.

Evidence—Execution of mortgage-deed by father—Suit for sale against son—Circumstances under which it was executed—Oral evidence, admissibility of.

A suit for sale on the basis of a mortgage-deed, executed by a Hindu father, was brought against the mortgagor's son. The deed was executed in lieu of a prior mortgage-deed, which was not produced:

Held, that oral evidence was admissible to prove the circumstances under which the mortgage-deed was executed in order to show that the mortgage was executed for a family necessity.

Second appeal from the decision of the District Judge of Benares.

Mr. *D. R. Sawhney*, for the Appellant.

Dr. *Tej Bahadur Sapru*, for the Respondents.

JUDGMENT.—In my opinion, the decision of the Munsif in this case was correct and should not have been disturbed. The suit is based upon a mortgage-deed, executed by Mahadeo Singh, father of the defendants-respondents, in favour of the plaintiff-appellant. The consideration for the mortgage is stated in the deed to be a sum of Rs. 115 due on a previous mortgage executed by Mahadeo Singh and his cousins, Bahadur Singh and Sahadeo Singh. According to the decision in *Chandra Deosing* v. *Mata Prasad* (1), the appellant had to prove that the mortgage in suit was made either for family necessity or to secure payment of an antecedent debt. The appellant produced Bahadur Singh (already mentioned) who said that the deed of August the 9th, 1892, was executed on the occasion of a partition between two branches of the family and that the deed in suit was executed on the occasion of a later partition between the members of one of those branches of the family. He says that he and his brother, Sahadeo Singh, were liable to Ram Jar Singh under the deed of 1892, and that on the occasion of the later partition, Mahadeo Singh undertook to pay the amount due to Ram Jar Singh. The Munsif believed the evidence of Bahadur Singh and it is perfectly clear that if that evidence is true and is admissible, the deed in suit was executed

(1) 31 A. 176; 6 A. L. J. 263; 1 Ind. Cas. 479.

in respect of an antecedent debt. On appeal, the District Judge did not say that he disbelieved the evidence of Bahadur Singh, but he said that the whole of it was inadmissible on account of the non-production of the deed of August 9th, 1892, and of the deed by which the later partition was effected. It appears to me that Bahadur Singh did not give the contents of documents. He merely stated the circumstances in which documents were executed. It may possibly be wrong to admit his statement that the execution of the earlier or the later mortgage-deed was one of the terms of the partition. But I can see no reason why he should not prove that the deed in suit was executed on a certain occasion and in consideration of a sum for which Mahadeo Singh and two others were already liable. The learned Judge says that the recitals in the mortgage in suit are not evidence against the defendants. It may be that they are not evidence of the truth of the facts stated in them. But they are surely admissible to rebut the suggestion that Bahadur Singh's evidence has been fabricated for the purpose of this suit. The Distrtict Judge does not say that he disbelieves the evidence of Bahadur Singh. The Munsif said that he believed it. I might remand the case to the District Judge for a fresh finding. But it is open to me under the present Code to decide the question myself. I have no hesitation in accepting the evidence of Bahadur Singh, and I find that the mortgage in suit was executed in consideration of an antecedent debt. I allow the appeal, set aside the decree of the lower Appellate Court and restore that of the Court of first instance with costs in all Courts.

Appeal allowed.

BOMBAY HIGH COURT.

FIRST CIVIL APPEAL NO. 154 OF 1911.

August 16, 1912.

Present:—Mr. Justice Batchelor and Mr. Justice Rao.

MANOHAR RAMCHANDRA HINGE—APPELLANT

versus

THE COLLECTOR OF NASIK—RESPONDENT.

Dekkhan Agriculturists' Relief Act (XVII of 1879), s. 2—Agriculturist—Court of Wards—Suit on behalf of ward—Status of ward—Maintenance allowance, effect of—Rich agriculturist—Bombay Court of Wards Act (I of 1905), ss. 2, 4, 25, 32.

A suit brought by the Court of Wards on behalf of a ward, who is an agriculturist, is governed by the provisions of the Dekkhan Agriculturists' Relief Act.

In such a suit, the real plaintiff is the ward and it is his status which has to be considered.

A temporary allowance made to a ward for the purposes of maintenance is not conclusive of the ward's status. To ascertain what that status is, regard must be had to the character of the ward's property from which this allowance is derived.

The Dekkhan Agriculturists' Relief Act makes no distinction based on the comparative riches or poverty of the person whose status is being investigated A rich agriculturist is just as much the agriculturist under the Act as a petty agriculturist.

First appeal from the decision of the first class Subordinate Judge of Nasik, in Suit No. 1 of 1911.

Mr. *K. H. Kelkar*, for the Appellants.

Mr. *L. A. Shah*, Acting Government Pleader, for the Respondent.

JUDGMENT.—The only question involved in this appeal is whether the Court below was right in its view that the suit was governed by the Dekkhan Agriculturists' Relief Act on the footing that the plaintiff is an agriculturist. Upon the title of the suit itself, it is brought by "The Collector of Nasik District representing the Court of Wards for the estate of Gopalrao Shivdevrao Rajebahadur."

Mr. Kelkar's first argument is that the real plaintiff is the Court of Wards, and it is that Court's status which should be regarded, and not the status of Gopalrao Shivdevrao. It is, says the learned Pleader, the same case as if a person being himself an agriculturist assigned his property to a non-agriculturist stranger. The assignee could not claim the benefit of the special Act. It appears to us, however, that the Court of Wards bears no resemblance to the assignee in the case put. As appears quite clear from the Court of Wards Act (Bom. Act I of 1905) *passim*, and especially from sections 2, 4 and 32 thereof, the property remains the property of the ward, and the only manner in which the Court of Wards intervenes is to assume the superintendence of it.

The reason why this suit is brought in the name of the Court of Wards is explained by section 32 of the Act which lays down that in such a case as this, "the Court of Wards,

having the superintendence of the Government ward's property, shall be named as the next friend, or guardian for the suit." In other words the ward being temporarily disabled from suing on his own behalf, sues through the Court of Wards. But the plaintiff is nonetheless the ward Gopalrao Shivdevrao, and it is his status, therefore, which alone has to be considered.

A further argument upon this point was endeavoured to be extracted from section 25 of the Act. Mr. Kelkar relying on that section has contended that even assuming that the real plaintiff is the ward Gopalrao, he cannot be considered an agriculturist for the purpose of the Dekkhan Agriculturists' Relief Act, because his only means of livelihood is the allowance made to him by the Court of Wards under section 25. We think, however, that this temporary allowance made for the purposes of maintenance is not conclusive of the ward's status, but that to ascertain what that status is, regard must be had to the character of the ward's property from which this allowance is derived.

The question, therefore, still remains whether Gopalrao, the plaintiff, is an agriculturist within the meaning of the Dekkhan Agriculturists' Relief Act. In that Act, the term 'agriculturist' is defined as "a person who by himself or by his servants or by his tenants earns his livelihood wholly or principally by agriculture". It will be seen that the Act countenances no distinction based upon the comparative riches or poverty of the person whose status is being investigated. In other words, the rich agriculturist is just as much an agriculturist under this Act as the petty agriculturist. If that is so, it would certainly be a surprising result if we were to find that the plaintiff in this case who is a landholder, and nothing else, should not be regarded as an agriculturist, within the definition of the Act. We think, however, that the learned Judge below was right in his view that the plaintiff fell within the definition.

It may be, as Mr. Kelkar has argued, that the Judge was wrong in allowing the Rs. 1,100, received by the ward's mortgagees, and not by the ward himself, to be counted as if that sum formed part of the ward's agricultural income. We say that it may be so, without deciding definitely, because in the view we take of this case, it is not necessary for us to pronounce a decision.

Assuming that Mr. Kelkar's argument on this point is correct, it is, however, nonetheless established in our view that the plaintiff is an agriculturist. On the admitted figures, the yearly income accruing to the plaintiff from the lands paid by his occupancy tenants is Rs. 3,793. The total assessment on all the lands involved comes to Rs. 2,382. From this sum of Rs. 2,382, a certain deduction must be made. What that deduction should be was a point of some argument. We agree with Mr. Shah's contention that the deduction should be the total assessment on all the mortgaged property, that is, the sum of Rs. 885, and we cannot accept the counter-contention that the deduction should be limited only to that part of the assessment which is leviable on the lands exempted. If, therefore, we make this deduction of Rs. 885 from the total assessment of Rs. 2,382, we get as the result Rs. 1,497, which figure will represent the assessment on the non-mortgaged property. This sum of Rs. 1,497 must now be deducted from the sum of Rs. 3,793 to which we have already referred. That leaves us with Rs. 2,296 as the income derivable from the agricultural sources. As against that, the most that we can set on the other side of the account would be a sum of Rs. 1,255 *plus* something under Rs. 400 as a cash allowance. These two sums would yield only Rs. 1,655 as against Rs. 2,296 derived from agricultural sources. This is the reckoning which, in our opinion, is most favourable to the case for the defendant. And even on this reckoning, it is plain that the plaintiff is entitled to be regarded as an agriculturist under the Dekkhan Agriculturists' Relief Act.

We are of opinion, therefore, that the learned Judge below was right, and we must dismiss this appeal with costs.

As to the scale on which the costs should be allowed, the parties should go first to the Taxing Officer.

Appeal dismissed.

S. N. DAR, B. A. LL. B.,
Vakil High Court,
SRINAGAR (Kashmir)

HIRDEY NARAIN *v.* POWELL.

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL No. 351 OF 1910.

October 30, 1912.

Present:—Sir Henry Griffin, KT., Judge, and Mr. Justice Chamier.

HIRDEY NARAIN AND ANOTHER—APPELLANTS

versus

M. J. POWELL AND ANOTHER—RESPONDENTS.

Land Acquisition Act (I of 1894)—Compensation—Different interest in land acquired—How to apportion compensation.

When different persons hold different interests in the land acquired under the Land Acquisition Act, the Court should ascertain the value of the respective interests and apportion the compensation in proportion to such interests.

First appeal from the decision of the District Judge of Saharanpur.

For the order of remand, *see* 13 Ind. Cas. 420.

Dr. *Tej Bahadur Sapru*, for the Appellants.

Mr. *A. E. Ryves*, (with him Mr. *Nehal Chand*,) for the Respondents.

JUDGMENT.—This case was remitted to the District Judge in order that he might ascertain the respective values of the interests of the appellant and Mrs. Powell in the land in question for which the Superintendent of Dehra Dun has awarded, under the Land Acquisition Act, a sum of Rs. 7,768-8-0. The learned Judge rightly, as we think, set himself to ascertain what were the respective rights of the appellants and Mrs. Powell in the land. He came to the conclusion that Mrs. Powell was what he calls an *abadi* tenant, having a right to build on the land and to transfer it, that the interest of the appellant in the land was worth no more than Rs. 1,060, and that the balance of the sum awarded by the Superintendent of Dehra Dun, namely, Rs. 6,708-8 0, should be given to Mrs. Powell. But in case this Court did not agree with the view that Mrs. Powell was an *abadi* tenant, he went on to ascertain the values of the respective rights of the parties in the case on the assumption that Mrs. Powell was an occupancy-tenant of the land. He found that the annual value of Mrs. Powell's interest as an occupancy-tenant was Rs. 22, and the annual value of the appellant's interests as landlords was Rs. 11. He then suggested that Mrs. Powell should be given a sum of Rs. 352, that is, sixteen years' purchase of the annual value of her interests and that the balance should be given to the appellants. We are unable to accept either of these conclusions in their entirety, Mrs. Powell, or rather the person through whom she claims, is recorded as an occupancy-tenant of the land. There is really no evidence as to the circumstances in which or even as to the time when Mrs. Powell's predecessors first obtained the land. Both sides have indulged in much speculation as to what their respective rights must be. One fact stands out clearly, namely, that for the last fifty or sixty years, the land has been used for agricultural purposes, and in the absence of definite evidence as to the respective rights of the parties in the land, we think that the sum awarded should be divided between them in proportion to the values of the interests hitherto enjoyed by them, after making due allowance for the possibility of the rent being enhanced. We accept the finding of the District Judge that the annual value of Mrs. Powell's interest in the land is Rs. 22, and that the annual value of the appellant's interests is Rs. 11. But it seems to us that the whole sum awarded by the Superintendent should be divided amongst them in proportion to the value of their interests, and that there is no justification for what the learned Judge has done, namely, give Mrs. Powell sixteen times the value of her interest and give the appellants the whole of the balance. It would be as wrong, in our opinion, to give the appellants sixteen times the value of their interests in the land and to give Mrs. Powell the whole of the balance. The result is that we hold that the sum in question should be divided in the proportions of $\frac{1}{3}$rd and 2/3rds, $\frac{1}{3}$rd going to the appellants and 2/3rds to Mrs. Powell, that is to say, Rs. 2,590, to the appellants and Rs. 5,178-8-0, to Mrs. Powell. The decree of the Court below is modified accordingly.

Decree modified.

DHONDU DAGDU PATIL *v.* SECRETARY OF STATE.

BOMBAY HIGH COURT.

FIRST CIVIL APPEAL No. 7 OF 1912.

August 19, 1912.

Present:—Mr. Justice Batchelor and Mr. Justice Rao.

DHONDU DAGDU PATIL—APPELLANT

versus

SECRETARY OF STATE FOR INDIA—RESPONDENT.

Bombay Abkari Act (V of 1878), ss. 32, 67—License to sell liquor—Collector's order cancelling license—Collector honestly believing licensee guilty of bribing officials—Suit against Government—Limitation—Protection in statutory duties.*

If any public or private body charged with the execution of a statute honestly intends to put the law in motion and really and not unreasonably believes in the existence of facts, which, if existent, would justify his acting and acts accordingly, his conduct will be in pursuance of the statute and will be protected.

Where a license for sale of liquor granted to a person was revoked by the Collector under the *bona fide* belief that the licensee had bribed the Collector's Head Clerk though there was no actual conviction of the licensee:

Held, (1) that the act of the Collector must be regarded as done in pursuance of the statute;

(2) that a suit brought against the Government in respect of the act would be barred if brought after the expiry of four months from the date of the act, even though the licensee unsuccessfully appealed to the Commissioner and the Local Government against the Collector's order of revocation.

First appeal from the decision of the District Judge of Nasik, in Civil Suit No. 2 of 1911.

Mr. *Coyaji* (with him Mr. *R. R. Desai*), for the Appellant.

Mr. *L. A. Shah*, Acting Government Pleader, for the Respondent.

JUDGMENT.—The appellant before us, who was the plaintiff in the Court below, had, during the years 1908 to 1910, a license for the sale of country liquor in the town of Nasik. As his work during that period was found to be satisfactory, the Collector of the District gave him notice intimating that that Officer was willing to re-new his license for the year beginning with the 1st of April 1910. On the 14th of March 1910, the plaintiff expressed his willingness to accept the license, and, under section 31 of the Abkari Act (Bom. Act V of 1878), executed the agreement therein referred to. On the 31st March 1910, the Collector informed the plaintiff that his license was suspended, and on the 6th of April following, the Collector further intimated to the plaintiff that he had cancelled the plaintiff's license on the ground that he had come to learn that the plaintiff had given secret bribes to the Collector's Head Clerk. Aggrieved by this decision, the plaintiff appealed from the Collector's revocation of the license to the Commissioner and to Government, but in each case was unsuccessful. Therefore, after notice given, he, on the 30th March 1911, filed this suit.

It has been dismissed by the learned Judge of the lower Court on two grounds, both of them having reference to section 67 of the Bombay Abkari Act. In the *first* place, the learned District Judge has

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* The sections run as follows:

Section 32. The Collector may summarily re-call or cancel any license permit or pass granted under this Act—

(*a*) if any fee or duty payable by the holder thereof be not duly paid, or

(*b*) in the event of any breach by the holder of such license, permit or pass, or by his servants, or by any one acting with his express or implied permission on his behalf, of any of the terms or conditions of such license, permit or pass, or

(*c*) if the holder thereof is convicted of any offence against this Act or, any other law for the time being in force relating to Abkari-revenue or of any criminal offence.

Section 67. No action shall lie against Government or against any Abkari officer for damages in any Civil Court for any act *bona fide* done or ordered to be done by them in pursuance of this Act, or of any law at the time in force relating to Abkari-revenue;

and all prosecutions of any Abkari officer, and all actions which may be lawfully brought against Government or against any Abkari officer, in respect of anything done, or alleged to have been done, in pursuance of this Act, shall be instituted within four months from the date of the act complained of, and not afterwards;

and any such action shall be dismissed

(*a*) if the plaintiff does not prove that, previously to bringing such action, he has presented all such appeals allowed by this Act, or by any other law for the time being in force, as within the aforesaid period of four months it was possible to present; or,

(*b*) in the case of an action for damages, if tender of sufficient amends shall have been made before the action was brought, or if after the institution of the action a sufficient sum of money is paid into Court with costs, by or on behalf of the defendant:

Provided that nothing in this section shall be deemed to affect the power or jurisdiction of Her Majesty's High Court of Judicature or of the Court of Small Causes at Bombay,

held that the defendant is protected by reason of the provision that "no action shall lie against Government for any act *bona fide* done by them in pursuance of the Act;" and, *secondly*, he has held that the suit is time-barred by reason of the provision requiring that "all actions which may be lawfully brought against Government, in respect of anything done in pursuance of the act, shall be instituted within four months from the date of the act complained of and not afterwards."

Upon both grounds, it appears to us to be clear that the learned Judge below is right. Admittedly, the act complained of was the act of revoking the plaintiff's license, which was done by the Collector on the 31st March 1910, and admittedly the plaintiff's suit was instituted very much more than four months after that act. It is sought by the learned Counsel for the appellant to save the suit on the footing that the Collector's act was not an act *bona fide* done in pursuance of the statute, so that section 67 would have no application.

The only question, therefore, involved is whether in the circumstances of this case the Collector's act was *bona fide* done in pursuance of the statute. That it was an act *bona fide* done there can, we think, be no doubt. The lower Court writes that "there can be no question that he honestly believed he was justified in doing what he did." And nothing has been said before us to countenance the view that when the Collector formed the opinion that the plaintiff had bribed his Head Clerk, he formed that opinion perversely or unreasonably. So far, therefore, as the record of this case goes, we must accept the finding that the Collector's opinion was formed in good faith, and upon materials which seemed to him sufficient to justify that opinion. It is true that when at a much later date the prosecution was instituted against the plaintiff and the Collector's Head Clerk, that prosecution was not successful, but this circumstance seems to us not to negative the view which we have expressed.

If then the Collector's act was done in good faith, was it an act done in pursuance of the Act? We think it was. Under section 32 of the statute, the Collector had power summarily to re-call or cancel any license if the holder thereof were convicted of any criminal offence. Now the bribing of the Collector's Head Clerk would be a criminal offence. Consequently, the appeal must be decided on the footing that at the time the Collector revoked the plaintiff's license the Collector in good faith believed that the plaintiff had committed an offence, for which, on conviction, his license would be revocable. It is quite true that the Collector's action is not strictly in conformity with the section which authorizes the revocation only on the actual conviction of the licensee. But the circumstances under which the Collector acted are so near the circumstances legally entitling him to act as he did that we feel bound to say the act was done in pursuance of the statute. The law upon this point may be found stated in many cases, of which we may notice *Herman* v. *Seneschal* (1). In strictness, anything not authorized by a statute cannot be said to be in pursuance of it, while if it is authorized by the statute, clearly it would need no other protection. But if effect were given to such a construction, it would altogether do away with the protection intended to be given; accordingly, the general principle is that if any public or private body charged with the execution of a statute honestly intends to put the law in motion and really and not unreasonably believes in the existence of facts, which, if existent, would justify his acting, and acts accordingly, his conduct will be in pursuance of the statute and will be protected. Reference may also be made to the case of *Spooner* v. *Juddow* (2), which was cited by the District Judge, and in which Lord Campbell said:—"There can be no rule more firmly established, than that if parties *bona fide* and not absurdly believe that they are acting in pursuance of statutes, and according to law, they are entitled to the special protection which the Legislature intended for them, although they have done an illegal act." The rule, no doubt, has its limits, but we cannot doubt that it applies to such a case as this, where the belief that the statute could

(1) (1862) 32 L. J. C. P. 43; 13 C. B. (N. S.) 392; 6 L. T. 646; 11 W. R. 184.

(2) 4 M. I. A. 353 at p. 379.

properly be enforced was honestly entertained and the facts thus believed differed but little from the facts which, if they had existed, would have invested the Collector with complete authority under the statute to do the act complained of.

It appears to us, therefore, that on the facts as we have them here, there is no room to doubt that the Collector's act was done in good faith and in pursuance of the statute. That being so, the defendant is entitled to the protection afforded by section 67 of the Act, and the suit is also beyond time.

On these grounds, we affirm the decree and dismiss the appeal with costs.

Decree confirmed.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 469 OF 1912.

November 14, 1912.

Present:—Mr. Justice Chamier.

SHEOPHER SINGH AND OTHERS—DEFENDANTS—APPELLANTS

versus

DEO NARAIN SINGH AND OTHERS—PLAINTIFFS—RESPONDENTS.

Limitation—Wrong entry in Settlement Record—Subsequent correction of entry—Declaration of right—Cause of action.

Plaintiffs were in proprietary possession of a certain land and were recorded as such in the revenue papers. At the Settlement of 1901, however, they came to be recorded as proprietors of a smaller area than what they were in possession of. They, however, remained in undisturbed possession of what they were entitled to. In 1909, the Collector ordered that the Settlement entries of 1901 should be corrected and plaintiffs' share recorded as before that date. The Commissioner, on appeal, set aside the order of the Collector. The plaintiffs then brought a suit for declaration of their rights to the land:

Held, that the Commissioner's order of 1909 gave them a fresh cause of action for the declaration of their right, notwithstanding that it was passed on appeal from the Collector's order, and the suit, having been brought within six years from that date, was within time.

Legge v. *Ramharan Singh*, 20 A. 35, *Akbar Khan* v. *Turaban*, 5 A. L. J. 637; A. W. N. (1908) 252; 4 M. L. T. 444; 1 Ind. Cas. 557: 31 A. 9, referred to.

Second appeal from the decision of the District Judge of Azamgarh.

Mr. *Uma Shanker Bajpai*, for the Appellants.

Mr. *Surendra Nath Sen*, for the Respondents.

JUDGMENT.—In this case, the Courts below have agreed in holding that the plaintiffs are entitled to a declaration of their rights in certain land. The defendants have appealed to this Court contending that according to the rulings of this Court, the plaintiffs' claim to a declaration is barred by limitation. The other grounds of appeal have been abandoned before me.

The facts found are that the plaintiffs have all along been in possession of the land in question and were recorded as the proprietors thereof at the fifth Settlement. At the sixth Settlement, owing, it would seem, to the introduction of a new method of recording shares, the Settlement Authorities made an entry in respect of this land which showed that the plaintiffs were entitled to a smaller area. They objected to the entry but their objection was thrown out in November 1901. They nevertheless remained in undisturbed possession of all the land to which they were entitled. In April 1909, the Collector ordered that the entries should be corrected and the plaintiffs' rights recorded as at the fifth Settlement. But the Commissioner on appeal set aside the Collector's order in August 1909. In their plaint, the plaintiffs say that the defendants began to interfere with them in 1910, on the strength of Commissioner's order of 1909. But according to the finding, there can have been no real disturbance of the plaintiffs' possession.

The questions for decision are whether time began to run against the plaintiffs in 1901 and, if so, whether a fresh cause of action accrued to them in August 1909. It is common ground that the period of limitation applicable to the claim for a declaration is six years.

The first question must be answered in the affirmative according to the decisions in *Legge* v. *Ram Barn Singh* (1) and *Akbar Khan* v. *Turaban* (2), but in the negative according to the decision in *Parshotam* v. *Parmanand*, Miscellaneous No. 279 of 1908, decided by Stanley, C. J., and Banerji, J., on December 18th, 1908. On looking into the record of the last mentioned case, I find it difficult to reconcile the decision in it with the decisions in the two other cases mentioned. In that

(1) 20 A. 35.

(2) 5 A. L. J. 637; A. W. N. (1908) 252; 4 M. L. T. 444; 1 Ind. Cas. 557; 31 A. 9.

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case, Stanley, C. J., and Banerji, J., held that an adverse entry in the records, of which the plaintiff was found to have been well aware, did not set time running against him and that it was only when an actual claim to the land was made upon the strength of that entry that time began to run against the plaintiff. That decision receives some support from the decision of Knox and Aikman, JJ., in *Skinner* v. *Shanker Lal* (3). In that case an entry had been made in the records adverse to the plaintiff in May 1899. The defendant brought a suit on the strength of it in 1903. A declaratory suit brought in July 1905, was held to be within time because, although the plaintiff might have sued in 1903, he was not bound to do so and the suit of 1905 furnished him with a distinct cause of action.

But whether or not it should be held that a cause of action accrued to the plaintiffs in the present case in 1901, it seems to me that an entirely fresh cause of action accrued to them in August 1909.

The blot on their title was the erroneous entry of 1901. That was removed by the Collector in April 1909, and if his order had stood, the plaintiffs could not have maintained a suit for a declaration. The Commissioner's order of August 1909, was a fresh attack upon the plaintiff's title and, in my opinion, gave them a fresh cause of action notwithstanding that it was passed upon appeal from the Collector's order. As the Collector's order gave the plaintiffs all that they wanted, it cleared their title even if (as has been suggested) the order was not carried out before the Commissioner's order was passed.

I hold that the suit was brought within time. I, therefore, dismiss this appeal with costs.

Appeal dismissed.

(3) 31 A. 10 (*note*): 1 Ind. Cas. 556.

BOMBAY HIGH COURT.

CIVIL APPLICATION No. 70 OF 1912.

August 30, 1912.

Present:—Sir Basil Scott, Kt., Chief Justice, and Sir N. G. Chandavarkar, Kt., Judge.

PURSHOTTAM JANARDAN CHAPHEKAR—APPLICANT

versus

MAHADU PANDU TURMALKAR—OPPONENT.

Revision—High Court—Power to interfere with Collector's order reversing mamlatdar's *decision—Collector a Subordinate Court—Civil Procedure Code (Act V of* 1908), *ss.* 3, 115—*Mamlatdars' Courts Act (II of* 1906), *s.* 28.

The Mamlatdar's Courts Act expressly constitutes the Collector, taking proceedings under that Act, a Court. Therefore, the Collector, when exercising judicial functions under the Act, is subject to the superintendence and control of the High Court.

The Collector of Thana v. *Bhaskar Mahadev Sheth*, 8 B. 264, followed.

Section 115 of the Civil Procedure Code authorizes the High Court to interfere on revision with the order of a Collector under section 28 of the Mamlatdar's Courts Act. The Collector has no authority under the latter section to reverse a decision come to by the *Mamlatdar* on evidence.

The enumeration of subordinate Courts in section 3, Civil Procedure Code, 1908, is not exhaustive and does not exclude all other Courts from the category of Courts subordinate to the High Court.

Mr. *P. B. Shingne*, for the Applicant.

Mr. *D. W. Pilgaonkar*, for the Opponent.

JUDGMENT.—This is an application under the extraordinary jurisdiction of this Court to set right an order by the Collector by which, upon the mere statement of the defendant before him, he took upon himself to reverse the decree of the *Mamlatdar*.

It has been objected on behalf of the opponent that this Court has no power under its extraordinary jurisdiction to interfere with the order of the Collector so made.

The Mamlatdar's Courts Act, however, expressly constitutes the Collector (taking proceedings under that Act) a Court, and it has been ruled in *Collector of Thana* v. *Bhaskar Mahadev Sheth* (1) that the Collector, when exercising judicial functions, is subject to the superintendence and control of the High Court.

Section 115 of the Civil Procedure Code authorizes the High Court to call for the

(1) 8 B, 264 at pp. 267, 268.

record of any case which has been decided by any Court subordinate to such High Court and there can, we think, be no doubt that the Collector as a Court, under the Mamlatdar's Courts Act, is subordinate to the High Court.

Reference has been made to section 3 of the Civil Procedure Code in which certain Courts are stated to be subordinate to the High Court, but that does not exclude all other Courts from the category of Courts subordinate to the High Court.

We think that the Collector had no authority to reverse the decision come to by the *Mamlatdar* upon the evidence. We set aside his order and restore that of the *Mamlatdar* with costs.

Order set aside.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL NO. 752 OF 1909.

November 19, 1912.

Present:—Mr. Justice Kensington and Mr. Justice Shah Din.

AULIA KHAN AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

KANSHI RAM AND OTHERS—DEFENDANTS—RESPONDENTS.

Mortgage—Construction of deed—Zar-i-marhuna—Hamrah—*Personal remedy of mortgagee as to interest—Redemption—Interest.*

The operative part of a mortgage-deed ran as follows:

'*Rihn bashrait-i-zail karte hain ke qabza kasht wa muamala Sarkar zimme murtahinan hoga. Zar-i-marhuna se chhih sau pachchas bila sud rahega. Iwaz sud zar-i-bala wa muamala Sarkar paidawar arazi murtahinan lenge. Baqi chhih sau pachchas ke* hamrah *sud bahisab ek rupia fisadi mahwari denge. Zar-i-sud salana ada hoga. Basurat adam adai sud salana sud dar sud bahisab bala denge. Kasht arazi bamarzi murtahinan muzhiran karenge ... ... Miad koi muqarrar nahin hai. Jab bad darau fasl bamah-i-Har khud kasht murtahinan talab karen* zar-i-marhuna *dekar zamin chhura lewenge.* Zar-i-marhuna *batafsil-i-zail ... ... wasul pai. Qabza diya gaya ... ... Nisbat zar-i-sud salana bala* hamrah *chhih sau pachchas rupia murtahinan ko ikhtiyar hoga ke sud dar sud lewen ya muzhiran se ba irja-i-nalish wasul karlewen.*'

Held, (1) that the words *zar-i-marhunah* in the redemption clause in the above extract meant the mortgage-money without any reference to the interest due on it; *Bhag Mal* v. *Talia*, 6 P. L. R. 1907; 44 P. W. R. 1907, referred to and approved.

(2) that the words *hamrah chhih sau pachchas rupia* in the last clause of the above extract meant calculated or due on Rs. 650 and in the light of the context were susceptible of no other meaning. The clause was one relating to interest and compound interest, and stood by itself, having nothing whatever to do with the redemption of the land. Under the clause, the interest or compound interest was agreed to be received or recovered from the mortgagors personally;

(3) that, under the terms of the mortgage-deed, as set forth in the above extract, the mortgagors were entitled to claim redemption on payment of the principal mortgage-money only, and the mortgagees had only a personal remedy against them in respect of their claim for interest or compound interest.

Second appeal from the order of the Divisional Judge, Rawalpindi, dated the 1st April 1909, reversing that of the District Judge, Attock District, at Campbellpur, dated the 25th November 1909, decreeing plaintiffs' claim.

Mr. *Fazal-i Elahi*, for the Appellants.

Rai Bahadur Lala *Sukh Dial*, for the Respondents.

JUDGMENT.—The facts of the case are briefly these. On the 20th March 1883, the plaintiffs executed a mortgage-deed in respect of 113 *ghumaons* 3 *kanals* and 13 *marlas* of land for a total consideration of Rs. 1,300 in favour of the predecessors-in-interest of the defendants. The mortgage-deed provided that the mortgagees were put in possession of the land and would be liable for payment of the land revenue. Of the mortgage-money, Rs. 650 was to carry no interest, the produce of the land being reckoned as equivalent to the interest on that amount together with the land revenue payable by the mortgagees; and on the balance Rs. 650, interest was to be paid by the mortgagors at the rate of 1 per cent. per mensem. The interest on Rs. 650 was to be paid annually; and in default, compound interest was to be charged at the same rate. The mortgagors were to remain in cultivating possession of the land as tenants under the mortgagees on payment of a produce-rent, but were liable to be ejected on failing to cultivate the land as agreed upon. No period was fixed for redemption, the mortgagors being at liberty to redeem the land in the month of *Har* on payment of *zar-i-marhuna*. As regards re-

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covery of the interest payable on Rs. 650, it was further stipulated that the mortgagees would have the option either to receive compound interest or to recover the same from the mortgagors by suit.

In 1885, the mortgagees brought a suit against the mortgagors for recovery of Rs. 156, due by way of interest for two years on Rs. 650 under the terms of the mortgage-deed. A compromise was arranged between the parties, the mortgagees agreeing to receive interest at the rate of 8 annas per cent. per mensem instead of at the rate of Re. 1 as stipulated in the deed of mortgage; and in accordance with the compromise, a decree for Rs. 78 was passed against the mortgagors.

The suit, out of which the present appeal has arisen, was brought by the mortgagors against the successors-in-interest of the original mortgagees for possession, by redemption, of the mortgaged land on payment of the principal mortgage-money, Rs. 1,300. The defendants pleaded that under the terms of the mortgage-deed of 1883, the plaintiffs could not redeem the mortgage except on payment of the principal mortgage-money Rs. 1,300, together with Rs. 10,848 8 due by way of interest and compound interest on Rs. 650 for 25 years and 4 months, the whole of which amount, according to the defendants, was a valid charge on the mortgaged land. The only material issue in the case was whether or not the plaintiffs were entitled to redeem the land from the defendants on payment of the principal money only, though a subsidiary issue was also drawn as to whether, if the plaintiffs were bound to pay before redemption the amount of interest and compound interest alleged to be due under the deed, the rate of Re. 1 per cent. per mensem specified therein could or could not be reduced.

The District Judge, upon a careful consideration of the terms of the mortgage deed, in the light of a decision of this Court, *Bhag Mal* v. *Talia* (1), came to the conclusion that the covenant between the parties as to the payment of interest and compound interest on half of the mortgage-money, Rs. 650, only created a personal liability against the mortgagors and that the mortgaged land was chargeable only with the payment of the principal amount, Rs. 1,300. He, therefore, gave the plaintiffs a decree for possession of land by redemption conditional on payment of Rs. 1,300. On appeal, the learned Divisional Judge differed from the District Judge's interpretation of the mortgage-deed and being of opinion that, upon the true construction of its terms, the mortgagees had the option to realise the interest and compound interest, either with the principal mortgage-money at the time of redemption by the mortgagors or personally from them by a separate suit, he held that the amount of interest and compound interest due on Rs. 650 during the currency of the mortgage was a proper charge upon the land. He further held that since in the litigation of 1885, the rate of interest entered in the mortgage-deed was reduced by agreement between the parties to 8 annas per cent. per mensem, the defendants were not entitled to charge interest and compound interest at a higher rate: and upon that basis, he decreed redemption in favour of the plaintiffs on payment of Rs. 1,300, *plus* Rs. 1,871-11-6, total Rs. 3,171-11-6.

A further appeal has been preferred to this Court by the plaintiffs, and we have heard the case fully argued on both sides. We agree with the Courts below that the question for decision in this case turns solely upon the interpretation of the mortgage-deed of 1883, and, in our opinion, the interpretation put upon it by the District Judge is correct. It seems to us that the Divisional Judge has missed the true signification of the words *hamrah* and *zar-i-marhuna*, used in the deed in question; and it is in consequence of this misapprehension that he has placed a wrong construction upon the language of the deed and held that the mortgagors were bound, at the time of redemption, to pay the amount of interest and compound interest due on Rs. 650, along with the principal mortgage-money, the whole of this amount being a valid charge upon the land. The operative part of the deed, which contains the clauses about the true construction of which the parties are at issue, runs as follows: —"*Rihn bashrait i-zail karte hain ke qabza kasht wa muamala Sarkar zimme murtahinan hoga. Zar-i marhuna se chhih sau pachchas bila sud rahega. Iwaz sud zar-i-bala wa*

(1) 6 P. L. R. 1907; 44 P. W. R. 1907.

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muamala Sarkar paidawar arazi murtahinan lenge. Baqi chhih sau pachchas ke hamrah *sud bahisab ek rupia fisadi mahwari denge. Zar-i-sud salana ada hoga. Basurat adam adai sud salana, sud dar sud bahisab bala denge. Kasht arazi bamarzi murtahinan muzhiran karenge.* *Miad koi muqarrar nahin hai. Jab bad darau fasl bamah-i-Har khud kasht murtahinan talab karen,* zar-i-marhuna *dekar zemin chhura lewenge.* Zar-i-marhuna *batafsil-i-zail* * * * * * * * * * * * *wasul pai. Qabza diya gaya.* * * * * * * * *Nisbat zar-i-sud salana bala* hamrah *chhih sau pachchas rupia murtahinan ko ikhtiyar hoga ki sud dar sud lewen ya muzhiran se bairja-i-nalish wasul kar lewen.*"

The two clauses in the deed which have given rise to most discussion in both the Courts below and also before us are:—

(1) *Miad koi muqarrar nahin hai. Jab bad darau fasl bamah-i-Har khud kasht murtahinan talab karen,* zar-i-marhuna *dekar zamin chhura lewenge.*"

(2.) *Nisbat zar-i-sud salana bala* hamrah *chhih sau pachchas murtahinan ko ikhtiyar hoga ki sud dar sud lewen ya muzhiran se bairja-i-nalish wasul kar lewen.*

With reference to the first clause, the plaintiff's Counsel has contended that it clearly permits redemption on payment of *zar-i-marhuna*, which means the principal mortgage-money only; and he has further urged, with reference to the second clause, that it has nothing whatever to do with redemption but that it is a separate covenant providing for the receipt or recovery by the mortgagees of interest and compound interest due in respect of half the mortgage-money, Rs. 650, regarding which inthe earlier part of the deed the parties have entered into a distinct stipulation. The words *hamrah chhih sau pachchas rupia* in the second clause, it has been contended, do not mean "together with Rs. 650," as the Divisional Judge has understood them to signify, but they mean "calculated or due on Rs. 650"; and this argument is supported by reference to the use of the word *hamrah* in the earlier part of the deed. "*Baqi chhih sau puchchas ke hamrah sud bahisab ek rupia fisadi mahwari denge.*" This contention is, in our opinion, perfectly sound; and it is a matter of some surprise that the Divisional Judge should have failed to understand the meaning of the word *hamrah* as used by the parties in the deed. In the light of the context, the word is not susceptible of any other meaning; and we must hold that the second clause, as set out above, is a clause relating to interest and compound interest and stands by itself, having nothing whatever to do with the redemption of the land, for which provision is made in the earlier redemption clause which has to be separately considered on its own merits. It is clear to our minds that under the last clause, the interest and compound interest was agreed to be received or recovered from the mortgagors personally, and for the purposes of the present suit, it is unnecessary to decide whether both interest and compound interest could be recovered by suit, or whether only interest could be so recovered, and in the event of the mortgagees not enforcing their remedy by suit, they were at liberty to charge compound interest as agreed upon. We are quite clear that the Divisional Judge is entirely wrong in his construction of the interest clauses when he says that "in the realization of interest, the mortgagees are given a choice either to take it with the principal money or to realise it personally from the mortgagors." The plain language of the clause is, in our opinion, utterly repugnant with this construction.

The most material clause to be considered is the redemption clause which has been set out above; and in that clause the words *zar-i-marhuna* clearly mean the mortgage-money and not, as held by the Divisional Judge, the mortgage-money together with interest due on half the mortgage-money Rs. 650. The expression *zar-i-marhuna* has been used in the deed in three places; and if the Divisional Judge had carefully considered the language of the whole deed, he whould have found it impossible to support the view which he has put forward as to the interpretation of the aforesaid expression. The deed says:

(1) zar-i-marhuna *se chhih sau pachchas bila sud rahega.*

"(2) zar-i-marhuna *de kar zamin chhura lewenge*",

and this followed immediately by

"(3) zar-i-marhuna *batafsil-i-zail* (then follows the detail of Rs. 1,300) *wasul pai.*"

In (1) and (3), the expression *zar-i-marhuna* undoubtedly means the principal mortgage-

money: and it is impossible to understand how in (2) it can mean anything more than the principal mortgage-money, especially when, as has been noted above, (2) is immediately followed by (3), where the details of *zar-i-marhuna* Rs. 1,300 are set out. In fact, *zar-i-marhuna* in the deed before us means the same thing as *zar-i-rihn* in the deed which was the subject of consideration in *Bhag Mal* v. *Talia* (1). We entirely agree in the construction placed in the case just cited upon the term *zar i rihn*, namely, that it means the principal mortgage-money without any reference to the interest due on it, and it follows that the view of the learned Divisional Judge in the present case that the amount of the interest and the compound interest due on Rs. 650, according to the terms of the mortgage-deed, is a charge upon the land in the hands of the mortgagees, is erroneous. The mortgagors are entitled to claim redemption on payment of the principal mortgage-money only, and the mortgagees have only a personal remedy against them in respect of their alleged claim for the interest and the compound interest due.

For the foregoing reasons, we accept this appeal, and reversing the decree of the Divisional Judge, we restore that of the District Judge with costs throughout. The decree will be drawn up in accordance with the provisions of Order XXXIV, rule 7, Civil Procedure Code.

Appeal allowed.

PUNJAB CHIEF COURT.

CIVIL REFERENCE No. 1 OF 1912.

November 25, 1912.

Present:—Mr. Justice Robertson and Mr. Justice Beadon.

ALI MARDAN—PLAINTIFF

versus

BAKAR KHAN—DEFENDANT.

Government Tenants Act (III of 1893)—Horse breeding peasant grant—Jhelum Canal Colony—Tenancy to devolve on one person and not to be alienated—Compromise for joint succession in Civil Court—Decree of Civil Court, effect of—Government as landlord not affected—Chief Court—Revision.

One *S.* held a horse breeding peasant grant in the Jhelum Canal Colony. After the death of *S.*, the grant, under the rules, could devolve upon a single person only as an impartible holding. It was also one of the conditions of grant that it should not be alienated without the previous sanction of the Financial Commissioner. *S.* died without a male issue but left three brothers *A.*, *B.* and *C.* The Colonization Officer mutated the whole grant in favour of *B.* only. On this, *A.* instituted a civil suit for possession of the land of the grant on the ground that he, as eldest son of his father, was entitled to succeed in preference to *B.* The two brothers entered into a compromise whereby they agreed to hold the land jointly in equal shares. Upon this, the Court passed a decree in terms of the compromise.

The Colonization Officer refused to effect mutation in accordance with the decree of the Civil Court, on the ground that the decree was illegal. The decree was accordingly referred to the Chief Court for revision:

Held, (1) that there was no good ground for interfering with the decree:

(2) that the decree in no way affected the rights of the Government as landlord, who could obtain ejectment or otherwise enforce the conditions of the tenancy;

(3) that the decree did not prevent the Government from enforcing any rights it might have in consequence of the infringement of the conditions of tenancy;

(4) that as between *A.* and *B.*, there was a valid compromise to which the Court was bound to give effect in a decree, which was valid and binding on the parties.

Case referred by the Divisional Judge, Shahpur Division, at Sargodha, with his No. 638-J, dated the 3rd November 1911, for orders of the Chief Court.

Mr. *Nand Lal*, for the Plaintiff.

Mr. *Rustomji*, for the Defendant.

ORDER.—This Reference relates to a Government tenancy to which the Government Tenants (Punjab) Act III of 1893 applies.

Under section 7 of the Act, the grantee holds the land as a tenant from Government on certain prescribed conditions—a copy of these conditions has not been submitted with the Reference and, consequently, we have not been able to refer to them. It is, however, admitted before us that under these conditions, the tenancy, on the decease of the tenant for the time being, shall in every case devolve upon a single person as an impartible holding.

Apart from these conditions, section 8 of the Act provides that the rights or interests vested in a tenant shall not be transferred by private contract without the previous consent in writing of the Financial Commissioner.

ALI MARDAN v. BAKAR KHAN.

In the present case, the land was granted to one Sahib Din who died in 1908 without male issue but leaving a widow, *Musammat* Nur Bhari, a minor daughter and three brothers, Madat Khan, Ali Mardan and Bakar Khan.

On the death of Sahib Din, the Colonization Officer sanctioned mutation in favour of Bakar Khan subject to the payment by him of Rs. 75 at each harvest to Sahib Din's widow. On this, Ali Mardan instituted a civil suit for possession of the land, on the ground that he, as eldest son of his father, was entitled to succeed. In this suit on the date fixed for hearing, Ali Mardan and Bakar Khan entered into a compromise by which these two brothers were to hold the land jointly in equal shares and were to be jointly liable for the sum of Rs. 75 payable at each harvest to the widow and thereupon the Court passed a decree in terms of the compromise.

The Colonization Officer refused to sanction mutation giving effect to the decree and wrote to the Deputy Commissioner as follows:—

"This order of the District Judge is quite illegal and against the conditions of the grant which is a horse-breeding peasant grant. Section 17 of the conditions absolutely forbids any alienation of any part of the grant without the previous sanction of the Financial Commissioner and it is an essential point with all horse-breeding grants that they should not be sub-divided.

"Will you please ask the District Judge to review his order if he can and not to entertain such suits in future. If he cannot review his order, the case should be at once reported to the Financial Commissioner for the Chief Court to be moved. I cannot sanction mutation on the District Judge's decree.

"Ali Mardan Khan's proper course was to appeal to the Commissioner against my mutation order".

The Court which passed the decree was the Court of the District Judge to whom a copy of the Colonization Officer's note was forwarded. On considering the matter, the District Judge rightly held that he had no power to review his judgment but, being of opinion that he had in error passed an illegal decree, he has referred the decree through the Divisional Judge to this Court for revision.

Before us there has been no appearance on behalf of Government but we have heard Counsel on behalf of Ali Mardan and Bakar Khan of whom the latter, on the technical grounds raised by the Colonization Officer, now seeks to avoid the compromise and the decree.

Under section 21A of the Punjab Alienation of Land Act, a special procedure has been provided by which the Deputy Commissioner can move for the revision of a decree which in any way contravenes the provision of that Act but, as far as we are aware, no similar special procedure has been provided by law in respect of tenancies to which Act III of 1893 applies, and we are unable to find any good ground on which we can interfere with the decree now in question.

The Colonization Officer appears to be mistaken in his view of the position of the Courts in the matter and to have overlooked the fact that the decree in no way affects the rights of the Government as landlord.

A transfer of a tenancy or a share of a tenancy can take place with the sanction of the Financial Commissioner as representative of the landlord and, as the landlord was not a party to the suit, the Court was not concerned with the question whether sanction had been given or not—as between the parties to the suit and apart from the interests of the landlord, who was not a party, there was a valid compromise to which the Court was bound to give effect in a decree—and the decree passed in accordance with the compromise is not against the landlord and in no way prevents the Government from enforcing any rights which it may have in consequence of infringement of the conditions of the tenancy.

It may be that the landlord, if so advised, may take steps to obtain ejectment or to otherwise enforce the conditions of the tenancy, but it is also possible that the landlord may not elect to do so. In either case, Bakar Khan cannot avoid the bargain and, as between him and Ali Mardan, who were parties to the suit, the compromise and the decree are valid and binding.

Under these circumstances, we are unable to revise the decree and we decline to interfere with it.

Each party in this Court will pay its own costs.

RAMONI MOHAN RAY *v.* KALIMUDDI.

CALCUTTA HIGH COURT.
SECOND CIVIL APPEAL No. 1619 OF 1909.
December 9, 1912.
Present:—Mr. Justice Holmwood and Mr. Justice Chapman.
RAMONI MOHAN ROY—PLAINTIFF—APPELLANT
versus
Sheikh KALIMUDDI AND ANOTHER—DEFENDANTS—RESPONDENTS.

Landlord and tenant—Surrender of portion of holding—Subsequent sale of same portion—Subsequent execution of kabulyat *by* raiyat *to landlord—Suit by landlord to eject purchaser*—Kabulyat, *whether in fraud of purchaser, or legal fiction validly resorted to by landlord—Unauthorized purchase of portion of holding, if incumbrance—Abandonment—Surrender—Bengal Tenancy Act (VIII of 1885), ss.* 86, 87, *sub-ss.* (6) *and* (7).

In December 1906, a *raiyat* surrendered a portion of his holding to his landlord, and sold this very portion to the defendant in February 1907. In December 1907, he executed a *kabulyat* in favour of the landlord in respect of the holding. Eleven days after that, a suit was brought by the landlord to eject the purchaser on the ground that the holding was not transferable by custom:

Held, that the execution of the *kabulyat* was not an act done by the tenant in fraud of the purchaser to which the landlord made himself a party by taking the *kabulyat*, but the contract was a legal fiction to which the landlord was entitled to resort to in order to recover from the purchaser who had no title as against him; that unless it was shown that the landlord acted fraudulently in excess of his rights for the purpose of defeating the rights of the purchaser, the *kabulyat* could not be inoperative; that the unauthorized purchase of a portion of the holding by the defendant could not create an incumbrance on the tenancy within the meaning of section 86, sub-sections (6) and (7), of the Bengal Tenancy Act; that the landlord in this case could accept the tenant's surrender of the whole or a portion of the holding under section 86, sub-section (7); that the effect of the *kabulyat* was to surrender the whole original holding and create a new holding altogether; that although the tenant might be answerable to the purchaser for damages and compensation for breach of contract, the landlord could not be bound to recognize any right in the transferee; and that the landlord was entitled to eject the purchaser.

Kabil Sardar v. *Chunder Nath Nag Chowdhry*, 20 C. 590, distinguished.

Badan Chandra Das v. *Rajeswari Debya*, 2 C. L. J. 570, relied upon.

Appeal from the decree of the Sub-Judge of Dacca, dated June 18th, 1909, confirming that of the Munsif of Manikgunge, dated July 31st, 1908.

Babus *Mohendra Nath Roy*, *Gunoda Charan Sen* and *Manmotha Nath Roy*, for the Appellant.

JUDGMENT.—This second appeal arises out of a suit brought by the plaintiffs *zemindars* to eject the defendant, a purchaser of a portion of their *ryot's* holding which is not transferable by custom. The plaintiffs alleged that in December 1906, the original tenant, Tarini Prosad Bhaumik, had surrendered the portion in question to the landlord and that he sold this very portion to the defendant in February 1907. The defendants alleged that the *zemindar* had fixed rates of *nazar* by notification which on the rulings of this Court constituted a valid custom of transfer.

Both these points have been found against them on the facts in the lower Court and we need not deal with the defendants' case of custom as that is the subject of appeals by defendants in other cases relating to the same *zemindari* but no cross-appeal has been filed in this suit.

The plaintiff falls back upon a *kabuliat*, executed in his favour by Tarini Prosad Bhaumik on the 10th December 1907, that is, eleven days before he filed this suit.

In this *kabuliat*, Tarini recites that he has sold his lands in Deora Kasunda and plaintiff has the right to take possession thereof and that the portion of his holding in Kasunda sold away by him is to be considered as given in *istifa*. The Munsif held that this showed that no previous *istifa* had been given and that the *kabuliat* was got up collusively between plaintiff and his tenant who was also his *tehsildar* for the purposes of this suit. The Subordinate Judge does not go so far as this but says that a mere paper transaction with the object of evading the provisions of the law cannot be considered a *bona fide* dealing with the lands and cannot get rid of the ordinary rule of law laid down by this Court that the transfer of a portion of a holding does not constitute an abandonment. The reason for the rule is given in the case of *Kabil Sardar* v. *Chandra Nath Nag Chowdhry*(1) and is that the sale and transfer of possession to the purchaser conveys no title to him, and as the *ryot* has left the holding and disclaims any interest in it, he must be held to have abandoned it and the land remains a piece of land within the *zemindari* to which the person in possession

(1) 20 C. 590.

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has no title. It is evident that it is essential to such a case that the owner of the land, *i.e.*, the *ryot*, must have abandoned it altogether, as, if he has not, he is the person entitled to possession of it, and it is, of course, not sufficient to enable him to succeed for the *zemindar* to prove that the person who is cultivating land has no title to it: he must show that the *ryot's* interest has ceased, or that he is entitled to eject the *ryot* for one of the reasons mentioned in the Bengal Tenancy Act. This rule has operated very harshly upon *zemindars* and a notable instance is found in *Pandub Nath* v. *Durga Churn Roy* (2), which was referred to in a reference made to a Full Bench by Trevelyan and Wilkins, JJ., in *Sir Maharaja Kissen Pertab Sahi* v. *J. R. Tripe* (3). It was argued before these learned Judges that where a tenant sells a defined portion of his holding, makes over the portion sold and declines to pay any more rent in respect of it, he in effect has abandoned that portion and the landlord should be entitled to eject the purchaser as a trespasser from the property sold just as much as in the case where the whole tenure is sold; otherwise a tenant might, by retaining a small portion of the tenure, be always able to avoid the provision of law, which in the absence of custom or usage prevents alienations without the consent of the landlord [*Sir Maharaja Kissen Pertab Sahi* v. *J. R. Tripe* (3)]. The Court was inclined to accede to this argument but as the decision of Rampini, J., in *Pandub Nath* v. *Durga Churan Roy* (2) upheld in Letters Patent Appeal [*Durga Charan Roy* v. *Pandab Nath* (4)] by Petheram, C.J., and Macpherson, J. dated 11th August 1893, appeared to be expressly in point and against this view, they referred the question to a Full Bench. The Full Bench, however, did not decide it as it was held that there being no evidence to prove that the tenant had refused to pay rent for the portion sold by him, it was not necessary to answer the question referred.

The case we have now to deal with is a more specialised case and raises a rather delicate and important question, *viz.*, what is the effect of the *kabuliat* which the tenant gave the landlord 10 months after the transfer? This raises the question, whether the contract was a legal fiction which the landlord was entitled to resort to in order to recover from the purchaser who had no title as against him, or was it an act done by the tenant of the landlord in fraud of the purchaser to which the landlord made himself a party by taking the *kabuliat*.

The Munsif appears to have taken the latter view; the Subordinate Judge held that it was merely a paper transaction or legal fiction with the object of evading the law and that such a transaction would not be a *bona fide* dealing with the land and could not be operative. Now, it seems to us that unless it is shown that the landlord acted fraudulently in excess of his rights for the purpose of defeating the rights of the purchaser, the *kabuliat* cannot be inoperative.

Section 86, clause 7, of the Bengal Tenancy Act, provides that save in the case of an incumbrance existing on the holding, nothing in the section shall affect any arrangement by which a *ryot* and his landlord may arrange for a surrender of a whole or a part of the holding.

The unauthorised purchase of a portion of the holding by the defendant cannot, in our opinion, create an incumbrance on the tenancy since it is in no way binding on the landlord and the tenant has parted with his interest outright, though he may not have got rid of his obligation to pay the full rent to the landlord.

In order to succeed in ejectment against the defendant, the *zemindar* has to show that the *ryot's* interest has ceased, and as he has no duty or obligation in relation to the unauthorised purchaser, he cannot be said to be a party to any fraud on the purchaser by the tenant. He is in no way bound to recognise the purchaser and he can accept the tenant's surrender of the whole or a portion of the holding under section 86 (7). But we may go further and hold that the effect of the *kabuliat* was to surrender the whole original holding and create a new holding altogether. The case of *Badan Chandra* v. *Rajeswari Debya* (5), though not precisely on all fours with this case appears to clearly establish the principle which we think applies in this case.

(2) 2 C. W. N. CLV.
(3) 2 C. W. N. CLIV
(4) 2 C. W. N. CLV.

(5) 2 C. L. J. 570.

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We are of opinion that in this view of the matter, the cases on the point that have decided that the landlord is not entitled to maintain an action in ejectment either against the transferor or the transferee, can be distinguished from the present case.

Those cases will be found summed up in the judgment of Mookerjee, J., in the case of *Rai Kamaleswari Prosad Singh Bahadur* v. *Maharaja Harbullab Narain Singh Bahadur* (6).

The general rule is that the landlord cannot eject the transferee as long as the original tenancy subsists but we know of no authority for holding that the landlord cannot get rid of the original tenancy by a valid contract legally made with his tenant determining the tenancy and creating a new one, and although the tenant may be answerable to the purchaser for damages and compensation for breach of contract, the landlord cannot be in any way bound to protect or recognise any right in the transferee and cannot, therefore, be said to be a party to any fraud on the purchaser. To hold otherwise would be to hold that the landlord, by taking this *kabuliat* from the tenant had parted with all his interest in the land transferred, since he cannot after accepting the *kabuliat* demand any further rent from the original tenant nor can he get rent from the transferee unless the latter choose to attorn to him.

We are of opinion that the plaintiff has discovered a legal means of getting rid of the unavoidable hardships which the strict application of the law, as interpreted in former decisions, has involved. It does not appear to matter that the means used is in the nature of a legal fiction.

Many unintentional hardships, which were never contemplated when the law was enacted and which arise from inferences, perhaps necessary, from the wording of the law, have been before now got over in this way, and as long as a man, acts in a perfectly legal manner and within his rights, we cannot see why he should be debarred from the remedy he has succeeded in re-opening for his own relief from an undoubted hardship, merely because it involves an evasion of another rule of law which no longer applies to his case.

(6) 2 C. L. J. 369.

It has always been recognised that if a man can keep outside the four walls of the law, he is not bound by it in a case to which, *ex hypothesi*, the law has no application. This may be a thing to be deprecated in many cases, but in a case where an undoubted hardship has been unintentionally imposed on a person by a provision of law which the Legislature cannot have contemplated would have such an effect, we think the remedy by way of what is a strictly legal device is a salutary one.

The result is that the judgment and decree of the lower Appellate Court must be set aside and the plaintiff's suit decreed with costs in all Courts.

Appeal allowed.

PUNJAB CHIEF COURT.

FIRST CIVIL APPEAL NO. 749 OF 1909.

December 4, 1912

Present:—Mr. Justice Robertson and Mr. Justice Beadon.

AMOLAK SHAH AND OTHERS—DEFENDANTS—APPELLANTS

versus

CHARAN DAS AND OTHERS—PLAINTIFFS—RESPONDENTS.

Land Acquisition Act (1 of 1894), s. 30—Exclusive jurisdiction to determine right to, and apportionment of, compensation—Civil Procedure Code (Act XIV of 1882), ss. 521, 522—Separable parts of award—Void and valid portions—Court discovering before decree its incompetency to try suit—Dismissal of suit—Amount of compensation—Apportionment—Estoppel.

A. died about 1902. He left two pieces of land, (1) at X and (2) at Y. Mutation in respect of this property took place in favour of *A.*'s three sons, *B.*, *C.* and *D.* The land at X. was acquired by Government, and the Collector's award was delivered in August 1903. Objections were put in and referred to the Court, which gave its final decision in August 1907, to the effect that *D.* was not separated from the family, and was entitled to ⅓rd share of the compensation awarded. This decision formed the subject of an appeal to the Chief Court.

After the reference by the Collector to the Court, *B.* and *C.*, on the 4th January 1905, instituted a suit in the Court of the Subordinate Judge in respect of both pieces of land to have it declared that on the death of *A.*, their father, they were exclusive owners of the land and that *D.* was not entitled to a share of the land, or to a share of the compensation awarded by the Collector in respect of the X land. The suit was referred to arbitration by the parties and the

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umpire's award, delivered on 22nd June 1906, declared *B.* and *C.* to be exclusive owners of the land and alone entitled to receive the compensation. Objections were put in under section 521 of the old Code of Civil Procedure and in addition a plea was raised that as the point in dispute was exclusively within the jurisdiction of the Land Acquisition Court, the Court of the Subordinate Judge had no jurisdiction to entertain the suit. On this plea alone, the suit was dismissed without any inquiry into the objections under section 521 and any adjudication on the award. On appeal, the Divisional Judge upheld the Subordinate Judge's decision in regard to the X land, but finding that the Court of the Subordinate Judge had jurisdiction in regard to the Y land, enforced the award of arbitration and allowed the claim of *B.* and *C.* in respect of that piece of land. This decree of the Divisional Judge formed the subject of two cross-appeals by the parties concerned.

The first appeal under the Land Acquisition Act and the two cross-appeals mentioned above were heard together by the Chief Court:

Held, (1) that as regards the Y land, the decree of the Subordinate Judge not being in accordance with the arbitration award, the Divisional Judge had jurisdiction to entertain an appeal which was not barred by section 522 of the old Civil Procedure Code; on the other hand, the decree of the Divisional Judge in respect of that piece of land being in accordance with, and not in excess of, the award, an appeal from it was barred by section 522;

(2) that there was no reason for interference on revision in respect of Y land, the grounds urged being unsustainable, because (*a*) the award relating to the Y land was separable from the award relating to the X land, and (*b*) *D.* had by his silence abandoned his objections to the award in the Divisional Court;

Partab Singh v. *Devi Singh*, 5 P.R. 1883, distinguished.

(3) that the Subordinate Judge had no jurisdiction to try the claim in respect of X land;

(4) that the Subordinate Judge having discovered, before passing a decree, that he had no jurisdiction to entertain the suit as regards the X land, or to pass a decree which would be binding on the Land Acquisition Court, he had no option under the circumstances but to dismiss the suit in regard to that land;

(5) that *D.*, by his agreement to the reference to arbitration, was not, under the circumstances of the case, estopped from questioning the Court's jurisdiction or from defending his rights in the Land Acquisition Court;

(6) that the Land Acquisition Court was competent to go into the question of apportionment, as the objections referred to the Court included one by *B.* and *C.* that they alone were entitled to the portion of the compensation awarded by the Collector to their brother, *D.*

A decision of the Chief Court in the previous appeal on the question of the amount of compensation does not bar the Land Acquisition Court from disposing of the point of apportionment which, in its first decision on the matter of compensation, it had expressly left for future decision.

In a claim disposed of by the Collector in the course of Land Acquisition proceedings under the special procedure prescribed by Act I of 1894, the Collector's order or adjudication of the rights of the owners or claimants to the property for which compensation was assessed and awarded, cannot be questioned otherwise than by a reference to Court under the provisions of the Act, and the Civil Courts are not competent to re-open and determine matters disposed of in accordance with the Act in a separate suit.

Sher Khan v. *Shamsher Khan*, 37 P. R. 1905; 35 P.L. R. 1905, followed.

First appeal from the order of the Additional Divisional Judge, Lahore, dated the 16th March 1909, awarding Rs. 5,111-11-4.

Rai Bahadur Bakhshi *Sohan Lal*, for the Appellants.

Rai Sahib Pandit *Sheo Narain*, and Lala *Moti Lal*, for the Respondents.

JUDGMENT.—This is a first appeal in a case under the Land Acquisition Act regarding the apportionment of the compensation awarded by the Collector for land acquired by Government under the Act. The objectors to that part of the apportionment which is now in dispute are Amolak Shah and Ragnath Das, and Charan Das and Ganda Mal sons of Gokal Chand deceased are the opposite party.

The two connected further appeals Nos. 418 and 633 of 1909 are cross-appeals and relate to a suit in which Amolak Shah and Ragnath Das are plaintiffs and Charan Das and Ganda Mal are defendants.

Manak Shah deceased was the father of Gokal Chand, Amolak Shah and Ragnath Das and the property to which these three appeals relate formed part of Manak Shah's estate, and consists of two pieces of land, *i.e.*, (1) at Lahore and (2) at Ichhra.

Manak Shah died about 1902 and it appears that mutation in respect of this land took place in favour of his three sons in equal shares in spite of objection on the part of Amolak Shah and Ragnath Das. It also appears that Gokal Chand applied for partition and on objection by his brothers, they were referred to the Civil Courts.

In the meantime, the land at Lahore was acquired by Government and the Collector's award was delivered on the 3rd August 1903, fixing the compensation and determining the portion to be paid to a mortgagee, and the portion to be paid to the three brothers,

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Objections to this award were referred to the Court on 19th September 1903, those by Amolak Shah and Ragnath Das being dated 14th August 1903. At first, by order dated 24th June 1904, the Court declined jurisdiction on technical grounds but on 1st May 1906, this order was reversed on appeal and the case was remanded for decision on the merits. Then on 19th January 1907, the Court decided the dispute as regards the amount of the compensation only and by its order it expressly left the question of apportionment for subsequent decision.

After the decision of an appeal on 7th August 1907 regarding its order relating to the amount of compensation, the Court then began the second part of the case relating to the apportionment of compensation and, as regards that part of the compensation which is not due to the mortgagee, it has decided that Gokal Chand was not separated from the family and that his sons are entitled to ⅓rd share. This decision is the subject of the present Appeal No. 749 of 1909.

After the reference of the objections by the Collector to the Court for decision, Amolak Shah and Ragnath Das, on the 4th January 1905, instituted a suit in the Court of the Subordinate Judge in respect of both pieces of land to have it declared that, on the death of Manak Shah, their father, they were exclusive owners of the land and that Gokal Chand was not entitled to a share of the land or to a share of the compensation awarded in respect of the Lahore land.

In the course of the suit, by agreement of the parties, the whole case was referred to arbitration and the final award by the umpire was delivered on 22nd June 1906. This award was in favour of Amolak Shah and Ragnath Das, who by the award were held to be exclusive owners of the land and alone entitled to receive the compensation.

After the award had been delivered, objections were put in under section 521 of the old Civil Procedure Code which was then in force and in addition to these objections, a plea was raised to the effect that, as the point in dispute was exclusively within the jurisdiction of the Land Acquisition Court, the Court of the Subordinate Judge had no jurisdiction to entertain the suit. On this plea the Subordinate Judge decided that he had no jurisdiction in the matter and by his judgment, dated 21st July 1908, he dismissed the suit without considering the objections under section 521, Civil Procedure Code, and without adjudicating on the award.

On appeal, the Divisional Judge upheld the Subordinate Judge's decision in regard to the Lahore land but, finding that the Court of the Subordinate Judge had jurisdiction in regard to the Ichhra land, he remanded the case under section 562, Civil Procedure Code, for re decision on the merits in respect of that portion of the claim. In further appeal to the Chief Court, however, it was held on 23rd April 1907 that a remand under section 562 was not permissible and that, if the Divisional Judge was of opinion that a remand was necessary, he should take action under section 566 or section 568, Civil Procedure Code, and the case was remanded to the Divisional Judge with the direction that he should pass one decree disposing of the whole appeal. By the decree which the Divisional Judge has now passed, the award by arbitration has been enforced as regards the Ichhra land and the claim by Amolak Shah and Ragnath Das in respect of that land has been allowed but the first Court's decision, dismissing the suit on the ground of want of jurisdiction, has been maintained in respect of the Lahore land. This decree is the subject of the Cross-Appeals Nos. 418 and 683 of 1909.

As regards the Ichhra land, the decree of the Subordinate Judge dismissing the suit was not in accordance with the award and the Divisional Judge had jurisdiction to entertain an appeal which was not barred by section 522, (old) Civil Procedure Code. On the other hand, the Divisional Judge, having seen no cause to remit the award to the arbitrators for further consideration and having refused the application to set aside the award under section 521, has passed a decree in respect of the Ichhra land which is in accordance with the award and is not in excess of it. Consequently, the appeal from the Divisional Judge's decree in respect of the Ichhra land is barred by section 522, old Civil Procedure Code, or section 16, Schedule II of the present Code of Civil Procedure, and, as an appeal, the present appeal by Gokal Chand's sons (No. 683 of 1909) must

fail on the ground that the appeal does not lie.

It has, however, been urged that, if the Appeal No. 683 of 1909 does not lie as an appeal, the decree in regard to the Ichhra land should be set aside on revision on the following grounds:—

(*a*) that the award relating to the Ichhra land was inseparable from the rest of the award of the arbitrators and ,consequently, the whole award is void and could not have been acted on by the Divisional Court and (*b*) that the objections, on which the application to set aside the award under section 521 were based, were not inquired into and properly decided.

As regards (*a*), *Partab Singh* v. *Devi Singh* (1), which is relied on, had reference to the filing of an agreement in respect of a suit not pending in Court and it was held that such an agreement dealing with matters beyond the jurisdiction of the Court, could not be filed under section 523, Civil Procedure Code. In such cases, the agreement must either be one capable of being filed as a whole, or it must be rejected as a whole. *Fateh Singh Karm Chand* v. (2) followed *Partab Singh* v. v. *Devi Singh* (1) and deals with the same point and these authorities are distinguishable from the present case.

In the present case, the suit had been instituted before the agreement to refer to arbitration had been entered into and, whether or not there had been a reference to arbitration, the Court was bound to adjudicate on that portion of the suit which was within its jurisdiction.

It cannot be held that the award relating to the Ichhra land is inseparable from the award relating to the Lahore land. The two pieces of land are distinct and separate and the adjudication in the award applies to them severally without ambiguity. Subject, of course, to any order which might be passed under section 521 in respect of the objections to the award, the award, for the purposes of the suit, is valid and binding on the parties to the suit, and, whether or not the Court had jurisdiction to pass a decree on the award in respect of the Lahore land, it is clear that the Court had jurisdiction to pass a decree in accordance with the award in respect of the Ichhra land.

As regards (*b*), it is true that the objections were not inquired into by the first Court and that the Divisional Judge did not cause inquiry to be made by remand either under section 556 or section 568, (old) Civil Procedure Code, but (see page 5, line 14 of the paper-book of Appeal No. 683 of 1909), the sons of Gokal Chand might have had these objections inquired into if they had so desired. When the case went back from the Chief Court for fresh decision, they did not ask for a remand on this point and it is clear that they abandoned these objections in the Divisional Court.

For these reasons, there is no good ground for interference or revision with the decree in respect of the Ichhra land.

Coming now to Appeals Nos. 418 and 749 of 1909, the first point for consideration has reference to the question of the jurisdiction of the Court of the Subordinate Judge in respect of the Lahore land.

There is no doubt that ordinarily the Court of the Subordinate Judge would have had jurisdiction to entertain the suit but in *Sher Khan* v. *Shamsher Khan* (3), it was held by a Division Bench of this Court that in a claim disposed of by the Collector in the course of land acquisition proceedings under the special procedure prescribed by Act I of 1894, the Collector's order or adjudication of the rights of the owners or claimants to the property for which compensation was assessed and awarded, cannot be questioned otherwise than by a reference to Court under the provisions of the Act and that the Civil Courts are not competent to re-open and determine matters disposed of in accordance with the Act in a separate suit.

This authority is exactly in point in the present case and supports the contention that the Court of the Subordinate Judge had no jurisdiction to entertain the suit, or to pass a decree, in respect of the Lahore land. It is true that this question of jurisdiction did not come to the notice of the Subordinate Judge till after the award of the arbitrators had been delivered but this makes no material difference. Before passing a decree,

(1) 5 P. R. 1883.
(2) 56 P. R. 1886.
(3) 37 P. R. 1905; 35 P. L. R. 1905.

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the Subordinate Judge discovered that he had no jurisdiction to entertain the suit as regards the Lahore land or to pass a decree which would be binding on the Land Acquisition Court, and under these circumstances, he had no option but to dismiss the suit in regard to that land.

It is, however, contended that, having agreed to refer to arbitration and having allowed an award to be delivered by the arbitrators, Gokal Chand's sons are estopped from claiming a share of the compensation and, consequently, the Land Acquisition Court was bound to give effect to the award.

In this connection and in connection with the question of the jurisdiction of the Subordinate Judge, reliance is placed on *Pitchuvier* v. *Perumal Ronan* (4), in which in proceedings in the Land Acquisition Court, which had exclusive jurisdiction in the matter, the Court itself passed an order by consent of parties for payment of the compensation money to one of them after four months, if in the meantime the other party did not institute a suit to establish his right to the money. The agreement had reference to the proceedings in the Land Acquisition Court, which by this agreement passed a final order which was not impeached and, in respect of the suit which was instituted in the Munsif's Court, it was held that the order of the Land Acquisition Court which was passed by consent could not be attacked collaterally and, consequently, the parties were estopped from questioning the Munsif's jurisdiction.

The circumstances of the present case are quite different. There was no agreement with reference to the proceedings in the Land Acquisition Court which terminated those proceedings or provided for the settlement of the dispute elsewhere. On the contrary, while the proceedings were pending in the Court having exclusive jurisdiction, one party, without the consent of the other party, brought a suit, in aCourt having no jurisdiction. It is true that in this suit, the parties agreed to refer the dispute to arbitration but at the time of this agreement they were under a misapprehension as regards the jurisdiction of the Court and, especially as the defect of jurisdiction came to notice before a decree was passed and before the award had become final by the disposal of objections under section 521, Civil Procedure Code, it cannot be held that the sons of Gokal Chand were estopped from questioning the Sub-Judge jurisdiction or from defending their rights in the Land Acquisition Court.

It is also contended that the Land Acquisition Court had no jurisdiction to go into the question of apportionment (*a*) because of an alleged defect in the order of reference and (*b*) after the Chief Court had decided the case on appeal on the question of the amount of compensation to be paid.

These contentions do not appear to have much force. By the Collector's award, the three brothers were given a specified portion of the compensation jointly.

The objections referred to the Court for decision included one by Amolak Shah and Ragnath Das that they alone were entitled to this portion of the compensation and thus this point was duly referred to the Court for decision. The case consisted of two parts, *i. e.*, one relating to the amount of compensation to be paid by Government and the other relating to the apportionment of the money.

The Court took up these two parts separately and in the order disposing of the first part it was expressly stated that the second part still remained for decision.

The second part of the case was not before the Chief Court in the previous appeal.

The last point for consideration is whether or not, apart from the arbitrator's award, there was a partition in Nanak Shah's lifetime by which Gokal Chand was separated from the rest of the family.

There was apparently some dispute about money obtained in respect of some contract and, according to the witnesses, Mr. Barber and Lala Narinjan Das, this led to the separation of Gokal Chand but this evidence is not conclusive and, especially if the partition was the result of a quarrel, it is strange that no deed was drawn up and executed at the time of the alleged partition.

There is, no doubt, a letter (page 20 of the paper-book of Appeal No. 749), purporting to have been written by Gokal Chand on the 28th November 1902 but it is denied that this letter is genuine and, though Lala Narinjan

(4) 13 Ind. Cas. 651; 11 M. L. T. 160; (1912) 1 M. W. N. 163.

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Das and Jas Mal (now servant of Amolak Shah) profess to identify Gokal Chand's signature, the letter appears to be most suspicious. The alleged date of the letter is long after the alleged separation and it is a significant fact that it is subsequent to the date of the Tahsildar's first report of 15th August 1902 in connection with the acquisition of the land. If the letter had been in existence at the mutation proceedings on 22nd February 1903, it would have been relied on in those proceedings when Amolak Shah and Raghnath Das, instead of relying on the letter, took their stand on an alleged oral Will. The letter was not made use of until proceedings for the acquisition of the land were in progress and an attempt was then made to get it registered but registration was refused.

We agree with the lower Court that on the evidence available, it is impossible to hold that the alleged separation is proved.

The result is, that all the three appeals fail and we dismiss this one (No. 749 of 1909) with costs.

Appeal dismissed.

BOMBAY HIGH COURT.

ORIGINAL CIVIL APPEAL No. 41 OF 1911.

SUIT No. 813 OF 1910.

August 8, 1912.

Present:—Sir Basil Scott, KT., Chief Justice, and Sir N. G. Chandavarkar, KT., Judge.

MAHOMED IBRAHIM HAJI GULAM SAHIB LONDAY—APPELLANT

versus

ABDUL LATIF HAJI MAHOMED IBRAHIM JITAYKER—RESPONDENT.

Wakf—*Trust—Perpetuity, rule against—Dedication to charity illusory—Perpetual family settlement—Muhammadan Law*—Shaffei—*Life-estate—Limitation Act (IX of* 1908), *s.* 10, *scope of—Resulting trust—Specific purpose—Estoppel—Possession of* mutwalli *also entitled to contingent beneficial remainder—Life-tenant obtaining possession from trustee—Evidence Act (I of* 1872), *ss.* 115, 116.

It is doubtful whether the rule of the Muhammadan Law, that a life-estate is bad and would resolve itself into an absolute estate, can be sustained in the case of *shaffeis.*

A person, claiming under a resulting trust, may be barred by limitation unless the resulting trust is of such a kind as to fall within the scope of section 10 of the Limitation Act.

A trust for a specific purpose is a trust for a *specified* purpose.

A resulting trust in favour of the heirs of a testator, upon failure through invalidity of one of the trusts declared in the Will, is not a trust for a specific purpose within the meaning of section 10.

Kherodemoney Dossee v. *Doorgamoney Dossee*, 4 C. 455; 2 C. L. R. 112; 3 C. L. R. 315; *Wundravandas* v. *Cursondas*, 21 B. 646, followed.

The opinion of Beaman, J., in *Casamally Jairajbhoy* v. *Sir Currimbhoy Ebrahim*, 36 B. 214; 13 Bom. L. R. 717; 12 Ind. Cas. 225, that for the purposes of limitation there is no distinction to be drawn between resulting trusts and trusts for specific purposes, and that the only case in which limitation can run in favour of a trustee, whether by express words or by operation of law, is where he is in as a trespasser and not as a valid transferee, dissented from.

A trust for the grand-daughter of the settlor for life and thereafter on her descendants from generation to generation, and in default thereof on the settlor's husband's relatives from generation to generation in perpetuity and in default with an ultimate trust for the education and instruction of Muhammadan youths, is void as being an attempt to create a perpetuity in the nature of a family settlement under the guise of a *wakf.*

Where there are passages in a *wakfnama*, justifying the trustee in handing over to the successive life-tenants, the possession of the trust properties, so long as he does not abdicate the position of the *mutwalli* assigned to him, and the life-tenants obtain possession of the properties with the consent of the *mutwalli* on the footing of their title as life-tenants under the *wakfnama*, the life-tenants cannot be permitted to deny that the person from whom the possession was claimed had a title to such possession when it was handed over to them.

The estoppel so created binds all those who claim under or through the life-tenants so obtaining possession. This is specially so where the person from whom possession is claimed is not a bare trustee but is also entitled to a contingent beneficial remainder on failure of certain limitations.

When a *wakfnama* must be treated as valid between certain parties owing to estoppel, the *mutwalli*, when his beneficial remainder has taken effect, is entitled to the possession of the property under the terms of the *wakfnama* both as trustee and as beneficiary.

When the claim of settlor's heirs under a resulting trust has long been barred by the law of limitation, the person who is in possession of the trust property at the time of the institution of the suit, can successfully defend his possession against those heirs.

Appeal from a judgment and decree of Beaman, J.

The facts are given in the judgment of the Appeal Court. After giving his findings on the preliminary issues, Beaman, J., dismissed the suit by the following

ORDER.—The conclusion of the whole matter has now been reached to find upon the last contested issue, namely, whether the plaintiff has made out adverse possession against all the world, in virtue of which he

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can now claim to recover this property from the hands of the trustee of the *wakf* into which it appears to have gone under the decree of Mr. Justice Macleod. The decision of this issue was deferred because I was given to understand that evidence had to be led upon it. The only evidence laid before the Court has been the evidence which was given before Mr. Justice Macleod, and this has been put in by consent. The course of the proceedings has certainly been peculiar and the result has been to bring about what I cannot help thinking to be a very singular position. Before Mr. Justice Macleod, the then plaintiffs succeeded in having the *wakfnama*, under which alone they appear to have been entitled to such rights as those on which they were then in enjoyment, set aside with the somewhat unexpected result that the trustee was declared to be no longer trustee of the then plaintiffs, there being resultant trust back to the heirs of the settlor if they could be found. Mr. Justice Macleod, when he had gone so far, was, of course, under the impression that the plaintiffs were among the heirs of the original settlor. On reference to the Commissioner, however, it was found they were not, and although in answer to advertisements in the newspapers, a certain number of people came in claiming to be heirs of the original settlor, the learned Judge naturally refused to have anything to do with them in that suit; so that the end of the matter was that the trust settlement was set aside at the instance of the parties who were found to have no further interest in the settled property. From the plaintiffs' point of view, that was a most unfortunate decision, for apparently if the plaintiffs before Mr. Justice Macleod and the plaintiff in this suit had left the *wakfnama* alone, they might have remained in quiet enjoyment of the rents and profits of this property as contemplated by the settlor. But here again the plaintiff impugns the *wakfnama* and insists upon a declaration that it is bad in law. As I began by saying, it is clearly so on the face of it; but if this suit had come before me first in this form and there had been no proceedings in 1906, I should then have contented myself to simply dismissing the suit leaving the plaintiff and defendant No. 4 as trustee under the *wakfnama* to settle their differences as best they could. Now, however, the position has been materially changed by what occurred as the result of the former suit, for the trust property having been sold to the City Improvement Trust, the proceeds thereof were available for disposal, but Macleod, J, thought that it was necessary to make an order dealing with that fund, and accordingly directed that it was to be given over to the trustee of the *wakfnama*, the intended trusts of which had all failed to be held by him as trustee for the resultant *cestui que trustent* the heirs of the settlor whenever found, and now the plaintiff has come in to make a claim to the trust fund in the hands of the defendant No. 4 under the consent-decree in the suit tried by Mr. Justice Macleod upon the ground that he had had adverse possession of the settled property against all the world. I think it would have been exceedingly difficult for the plaintiff to make good any claim of that kind; but although evidence has been led and a good deal of argument has been spent upon it on both sides, there is really nothing to be argued about; for the learned Counsel for the plaintiff admitted and reiterated over and over again in the course of the concluding argument *that he did not even allege adverse possession to the trustee*, and he appeared to think that having possession as beneficiary, taking under the trustee, who held the legal estate under such settlement, when the settlement was found to have failed so far as these trusts were intended, that possession of his would in some way, not clearly explained, give him a title against both the trustee and the real *cestui que trust* when found. If my view of the law be correct, it follows necessarily upon the admission of the plaintiff that he does not allege adverse possession to the trustee, then his whole case upon this issue completely fails.

The legal position is, in my opinion, too clear to admit of doubt or argument. When there is a trust settlement under which a trustee obtains a legal estate to be applied to certain uses and those uses are, after the lapse of many or few years it matters nothing, found to be bad in law, there is a resultant trust back of the whole of the settled property which had formerly been applied to the satisfaction of those uses, to the settlor, his heirs and legal representatives; and it follows from this that the possession of the trustee, which was until the trusts

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were discovered and declared to be bad for certain supposed *cestui que trust*, becomes converted into possession for and on behalf of the resultant *cestui que trustent*. As in this case, the possession of the defendant No. 4 having been found, as the result of the suit tried by Macleod, J., to be not for and on behalf of the plaintiff and other defendants in this suit but only, as soon as that decree was passed, possession for and on behalf of the resultant *cestui que trustent*, the heirs of the settlor. So that if the plaintiff and the other defendants do not and cannot allege adverse possession to the trustee, it is perfectly clear that no question of adverse possession arises at all in this case. It is hard to conceive of a case indeed in which persons admittedly enjoying the uses of the trusts, which were afterwards declared to be bad and to have failed, could maintain that their enjoyment of such uses, even accompanied as it sometimes is by physical possession of the real estate supplying them, could be adverse to the trustee in whom at law that legal estate is vested. A case of that kind might possibly arise but it must be very rare. Had this case been fought out upon that ground, it might have been necessary to go very deeply into the evidence and search further afield for authorities upon this somewhat difficult point; but once the plaintiff has admitted that he does not even allege adverse possession to the trustee, there was a final end of this case on this issue.

I must, therefore, hold against the plaintiff upon this point, and the effect of that, taken with the other findings already recorded, is that his suit must be dismissed against the defendant No. 4.

Considering the very unusual nature of this litigation, the best order to make as to costs will be to make the same order as Mr. Justice Macleod made that the defendant No. 4 obtain costs out of the estate and the plaintiff bear his own costs.

The defendant No. 6, the Kazi of Bombay, voluntarily offers to pay his own costs.

As between the plaintiff and the other defendants, it is only too clear that they all have been present with a formidable array of Counsel on the odd chance that if the plaintiff succeeded, they might obtain pickings from the estate. The plaintiff was not seeking any relief from them, and there was no need for them to appear until in case of his success against the defendant No. 4, the plaintiff had called them in to complete the administration of the estate. Their interest was virtually the same as that of the plaintiff in several instances, and as I say they were here watching to see what they may make should the plaintiff be successful against the defendant No. 4. Under these circumstances, each should bear his own costs.

The plaintiff preferred an appeal.

On the hearing in appeal, the Administrator-General of Bombay, as representing the estate of Fatehbibi, was added as a party respondent, in pursuance of the Court's order dated the 4th March 1912.

Messrs. *Kanga* and *Mulla*, for the Appellant.

Messrs. *Bhandarkar* and *B. J. Walia*, for Respondent No. 1.

Messrs. *Robertson* and *Talyarkhan*, for Respondent No. 4.

Messrs. *Colah* and *Dastur*, for Respondent No. 5.

Messrs. *Mirza* and *Khan*, for Respondent No. 6.

Messrs. *Chitre* and *Captain*, for Respondents Nos. 7 and 8.

JUDGMENT.—The facts of this case, which it is necessary to state for our decision, are to a great extent set out by Mr. Justice Macleod very concisely in his judgment of the 1st of July in Suit No. 338 of 1906 as follows:—On the 16th June 1851, one Fatehbibi executed a deed in the nature of a *wakf* whereby she settled two properties: (1) a house in Kazi Street, (2) a Chawl at Duncan Cross Lane in trust for her grand-daughter, Mariambibi, for life and thereafter on her descendants from generation to generation and in default thereof on the settlor's husband's relatives and their descendants from generation to generation in perpetuity and in default with an ultimate trust for the education and instruction of Muhammadan youths. The settlor's husband was appointed first trustee or *mutawalli* and provision was made in the deed for a due succession of *mutawallis*. Mariambibi received the rents and profits till she died in 1857. The first *mutawalli*, the settlor's husband, died in 1854 and his executors acted as *mutawallis* during

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the minority of his eldest son, Shaik Ahmed. They continued paying the rents to Mariambibi and, after her death, to Mahomed Hoosein and Aminabibi, the son and daughter of Mariambibi, in equal shares. Shaik Ahmed, on attaining his majority in 1867, took over charge as *mutawalli* and, in or about 1873, handed over charge of the property to the beneficiaries retaining possession of the trust-deed. In October 1875, Mahomed Hoosein and Aminabibi executed an agreement Exhibit F under which they agreed to divide the rents equally according to the trust-deed. Mahomed Hoosein died in 1892, leaving one son Mahomedally who in his turn shared the rents with Aminabibi until her death in 1901, when he took the whole until he died in 1905 leaving him surviving his mother and two widows, the plaintiffs in the suit of 1906. In 1903, the Improvement Trust were taking proceedings for the acquisition of the Chawl in Duncan Cross Lane and Mahomedally went to the first defendant Mahomed Hoosein, the son of Shaik Ahmed, and the then *mutawalli* under the trust-deed, to ask his advice and got the deed for the purpose of prosecuting his claim for compensation before the Special Collector. Ultimately, he got the deed on signing Exhibit I, a document recognising the trust-deed, and Mr. Pavri was instructed jointly by Mahomedally and the first defendant to proceed with the claim. The amount of the compensation money was deposited by the Collector with the Tribunal of Appeal appointed by the City of Bombay Improvement Trust Act and remains with the Tribunal invested in Government Paper. The plaintiffs in Suit No. 338 of 1906, at the date of that suit, were in possession of the house in Kazi Street and they asserted that the trust-deed was void and prayed for a declaration that they and the 2nd, 3rd, 4th, 5th and 6th defendants were entitled to the properties and that their respective shares might be ascertained. Mr. Justice Macleod was of opinion that the trust-deed was invalid on the grounds that the ultimate gift for charitable purposes was illusory and the effect and intention of the deed was to create a perpetuity in favour of the settlor's descendants, and he came to the conclusion that the persons entitled to the property would be the heirs of Fatehbibi under the resulting trust of which the *mutawalli* had been the trustee. He expressed this opinion as to the rights of the heirs of Fatehbibi under the mistaken impression that they were before him as parties to that suit, but he referred it to the Commissioner to ascertain which were the heirs of Fatehbibi. The Commissioner, mistaking the reference, advertised for claims to the property by heirs of Fatehbibi and this advertisement brought in the claims by members of the Haindaday family, who claimed to be heirs of Fatehbibi, and the Commissioner reported that their claim was good. The report was excepted to and the learned Judge then explained that he had not intended that the Commissioner should admit claims by persons who were not parties to the suit and that the result of the Commissioner's report must be that the parties to the suit did not comprise the heirs of Fatehbibi. The result was a deadlock, because Makba was the only person who could show any title at all to the property, and his title was, in the opinion of the Court, only that of a trustee. He was not one of the heirs of Fatehbibi. The Court ordered that the property should be handed over to him as *mutawalli*.

There was an appeal from that decision, the Haindadays, the claimants before the Commissioner, still not being parties, and before the case had been argued out, a consent-decree was arrived at between Makba on the one hand and the plaintiffs and the other persons, claiming through Mahomedally and Mariambibi on the other, by which it was agreed that the property should be divided in equal shares, subject to the provision of a sum sufficient to produce Rs. 5 a month to protect a certain charity mentioned in the *wakfnama* in which the Advocate General was interested. That consent decree, however, by no means terminated the proceedings, for it turned out that one of the parties to the appeal was insane; and, he, subsequently, having recovered sanity, filed this suit to set aside the consent-decree claiming also the same relief as had been claimed by the plaintiffs in Suit No. 338 of 1906 and upon the same ground, *viz.*, that Mariambibi was entitled absolutely to the settled properties. His suit was dismissed by Mr. Justice Beaman and he has now appealed.

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When the case first came up in the Appeal Court, it became apparent that no final decision as to the rights of all possible parties in the property could be arrived at without the representation of the heirs of Fatehbibi. Accordingly, the case was adjourned in order that the heirs of Fatehbibi might be represented provided they could be bound by the proceedings in the suit up to date. Eventually they were brought on the record under cover of the Administrator-General, who took out Letters of Administration to the estate of Fatehbibi, and consents to be bound by all proceedings and submits himself in all respects to the orders of the Court. All the respondents, except Makba, support the plaintiff's claim and no longer desire to take the benefit of the consent-decree. During the proceedings in appeal, they have between themselves attempted to arrange a compromise with the Administrator of Fatehbibi's estate, so that they may secure the property in any event.

Now, it is apparent from the arguments on behalf of the various parties, who have presented their cases to the Court, that no one supports the *wakfnama*, and all are prepared to accept the findings of Mr. Justice Macleod in Suit No. 338 and Mr. Justice Beaman in the present suit that the *wakfnama* is void as being an attempt to create a perpetuity in the nature of a family settlement under the guise of a *wakfnama*. The Advocate General, who represented the valid trusts, if any, was discharged by consent on an undertaking being given that the Rs. 5 per mensem mentioned in clause 14 of the *wakfnama* would be secured. The plaintiff and the respondents other than Makba and the Administrator of Fatehbibi's estate claim either through Mahomedally, the grandson of Mariambibi, or through Mariambibi, or her daughter Aminabibi, and contend that Mariambibi had in law an absolute estate in the settled property, because she was the first life-tenant according to the terms of the *wakfnama*, and the life-estate according to the Muhammadan Law being invalid as a gift with a condition, the estate enlarges itself into an absolute estate for the benefit of life-tenant. As an authority for this contention, reference was made to the case of *Abdul Gafur* v. *Nizamudin* (1), decided in this High Court and subsequently in the Privy Council, where there are statements to the effect that under the Muhammadan Law, a life-estate is bad and would resolve itself into an absolute estate for the benefit of the donee. It is not certain that this proposition can be sustained in the case of *Shaffeis* to which sect the parties to this suit belong. There is some authority for the proposition that life estates are recognised among the *Shaffeis* and the alleged peculiarities of the *Shaffei* law brought to our notice by Mr. Mirza do not appear to have been considered in the case relied upon in either Court. We are, moreover, of opinion that the facts, which gave rise to the decision in *Abdul Gafur* v. *Nizamudin* (1), do not permit us to draw any such conclusion from that case as is contended for by the plaintiff, *viz.*, that Mariambibi's estate must be regarded as an absolute estate. Their Lordships held that 'the intention of the settlor was not to create a series of life rents (a kind of estate which does not appear to be known to Muhammadan Law) but to make the fee devolve from one generation of his descendants to another without its being alienable by them or liable to be taken in execution for their debts.' In the present case, the facts are that those claiming under Mariambibi obtained possession of the property from the *Mutawalli*, Shaik Ahmed, in the guise of beneficiaries under the trust-deed. They did not obtain the documents of title, because Sheikh Ahmed as *mutawalli* retained the *wakfnama*. There are passages in the *wakfnama* which would justify the trustee in handing over to the successive life-tenants, assuming the validity of the settlement, the possession of the properties, so long as he did not abdicate the position of *mutawali* which had been assigned to him. If, then, Mahomed Hoosein and Aminabibi, the children of Mariambibi, obtained possession of this property by the consent of the *mutawalli* on the footing that Mahomed Hoosein was entitled as a life-tenant under the *wakfnama*, her descendants cannot be permitted to deny that the person from whom the possession was

(1) 17 B. 1; 19 I. A. 170.

claimed had a title to such possession when it was handed over to Mahomed Hoosein. That is apparent from sections 115 and 116 of the Evidence Act; and if Mahomed Hoosein would be bound by the estoppel so created, all those claiming under or through him would be likewise bound. It is not simply a case of a beneficiary obtaining possession from a bare trustee, for Shaik Ahmed as one of the sons of the first *mutawalli*, Mahomed Ibrahim, was entitled, under the terms of clause 6 of the *wakfnama*, to a contingent beneficial remainder on failure of the limitations expressed for the descendants of Mariambibi, and we cannot hold that Shaik Ahmed handed over possession of these properties to Mahomed Hoosein except on the footing that the *wakfnama* was a valid document. Reliance was placed by the appellant's Counsel on the judgment of Buckley, J. in *In re Anderson*; *Pegler* v. *Gilliatt* (2), in which that learned Judge defined the limits of the rule laid down in *Board* v. *Board* (3), but in none of the cases cited in his judgment were the facts such as to raise an estoppel by conduct such as we have in the present case. On the death of Mahomedally, which occurred in 1905, the limitations in favour of the descendants of Mariambibi came to an end and the remainder for the benefit of the descendants of Mahomed Ibrahim took effect, if, for the purposes of this suit as between the parties other than the Administrator of Fatehbibi's estate, the *wakfnama* must be considered to be a valid document. Owing to the estoppel to which I have referred, we think the *wakfnama* must be treated as valid between those parties. Therefore, as against the appellant and the other original respondents, Makba is entitled to the property under the terms of the *wakfnama* both as trustee and as beneficiary. He was actually in possession of the property at the time when this suit was instituted by the plaintiff.

The only question remaining is as between Makba and the Administrator of Fatehbibi's estate. The Administrator of Fatehbibi can only claim under a resulting trust in favour of the settlor by reason of the invalidity of the trusts declared in the *wakfnama*. Such a trust would not be valid as a trust in the strict sense in which that word is used in the Indian Trusts Act nor would it be valid under the Statute of Frauds, because it has not been declared in writing, but it would be a *quasi* trust of the kind described in Chap. IX, section 84, of the Trusts Act. I do not refer to the Trusts Act as being applicable to the case because the resulting trust, if it arose at all, commenced long before 1891, when the Trusts Act came into force, but the reference helps to point the distinction between declared or specific trusts and trusts arising by operation of law.

Now, a person claiming under a resulting trust may be barred by limitation unless the resulting trust is of such a kind as to fall within the scope of section 10 of the Limitation Act. That section provides that "notwithstanding anything hereinbefore contained, no suit against a person in whom property has become vested in trust for any specific purpose, or against his legal representatives or assigns (not being assigns for valuable consideration), for the purpose of following in his or their hands such property, shall be barred by any length of time." The decision of the Calcutta High Court in the case of *Kherodemoney Dossee* v. *Doorgamoney Dossee* (4) is to the effect that a resulting trust in favour of the heiress of a testator, upon failure through invalidity of one of the trusts declared in the Will, is not a trust for a specific purpose within the meaning of section 10 of the Limitation Act. The argument of the appellant in this case is that if you have a trustee, who is created a trustee under a document vesting the property in him and that document contains a scintilla of valid trust though the greater part is invalid, the trustee is a trustee for a specific purpose with regard to all the property, the subject-matter of the transfer. This is substantially the same argument as was advanced by Mr. Phillips in *Kherodemoney's* case (4) and advanced unsuccessfully. *Kherodemoney's* case (4) was considered by this Court in *Vundravandas* v. *Oursondas* (5). Sir Charles Farran, there, explained how it is that a resulting trust cannot,

(2) (1905) 2 Ch. 70; 74 L. J. Ch. 433; 92 L. T. 725; 53 W. R. 510.

(3) (1873) L. R. 9 Q. B. 48; 43 L. J. Q. B. 4; 29 L. T. 459; 22 W. R. 206.

(4) 4 C. 455; 2 C. L. R. 112; 3 C. L. R. 315.

(5) 21 B. 646.

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except in one case which he mentions [which arose in *Salter* v. *Cavanagh* (6)], fall within the scope of section 10, and he stated that his decision upon the point was supported by the case of *Kherodemoney Dossee* v. *Doorgamoney Dossee* (4) and could not be substantially distinguished from it. In *Churcher* v. *Martin* (7), Mr. Justice Kekewich, discussing the question before him upon the assumption that those in possession were trustees in the proper and full sense of the term, said: "How can the possession of trustees enure to the benefit of him whose title was intended to be defeated by the deed which created the trust? How can the grantor be their *cestui que trust*? Because, it is urged, there is an express trust in his favour, an express trust necessarily resulting from the failure of the trusts declared. It would suffice to reply that such a resulting trust is implied by law, and that, whatever else it may be, it is not an express trust; but as *Salter* v. *Cavanagh* (6) was referred to, I may point out that the trust there spoken of as 'express' was one inferred from the deed, discoverable on the face of it, and not, as here, a trust against the deed, and due only to the fact that the deed is void." According to the English authorities, an express trust is a trust for an express purpose. According to almost all Indian authorities, a trust for a specific purpose is a trust for a specified purpose. Reference has, however, been made, on behalf of the appellant, to a judgment of Mr. Justice Beaman in the case of *Casamally Jairajbhoy* v. *Sir Currimbhoy Ebrahim* (8), in which that learned Judge states his opinion that for the purpose of limitation, there is no distinction to be drawn between resulting trusts and trusts for specific purposes, and that the only case in which limitation can run in favour of a trustee, whether by express words or by operation of law, is where he is in as a trespasser and not as a valid transferee. We dissent from that view of the law. We do not agree with the learned Judge that there is any indication in the judgment of the Privy Council in *Runchordas Vundravandas* v. *Parvatibai* (9), that their Lordships dissented from the decision of the Bombay High Court in *Vundravandas* v. *Cursondas* (5) as to the limited scope of section 10 of the Limitation Act. Had they considered that section 10 could be successfully invoked by the plaintiff, their decision, based upon the application of Articles of the Limitation Act relating to the period of adverse possession which, *ex hypothesi*, would not apply, is incomprehensible. Again the remarks of the Privy Council in *Balwant Rao* v. *Puran Mal Chaube* (10) show, [as pointed out by Candy, J. in *Cowasji Nowroji Pochkhanawalla* v. *Rustomji Dossabhoy Setna* (11)], "that the expression used by the Legislature 'for the purposes of following in his hands such property' means for the purpose of recovering the property for the trusts in question, *i. e.*, for the purpose for which the property was specifically vested in the trustee. Whether in the case of a resulting trust, the trust is 'express' or not, the purpose for which the property is sought to be recovered is certainly not 'specific' within the meaning of section 10, where the purpose is directly contrary to the terms of the settlement which purported to create the trust."

The result is, that, in our opinion, the claims of Fatehbibi's heirs under a resulting trust have long been barred by the law of limitation and the respondent Makba, who at the date of the suit was in possession of the trust property, can successfully defend his possession against those heirs.

We dismiss the appeal with costs, that is to say, the appellant must pay the costs of the respondent Makba; all other parties must bear their own costs. The decree should recite the joinder of the Administrator of Fatehbibi's estate and declare the decision that the claim of her heirs is barred.

Appeal dismissed.

Attorneys for the Appellants: Messrs. *Bicknell, Merwanji* and *Romer*.

Attorneys for the Respondent: Messrs. *Payne* and *Co.*

(6) (1838) 1 D. & W. 663; 56 R. R. 222.
(7) (1889) 42 Ch D. 312; 58 L. J. Ch. 586; 61 L. T. 113; 37 W. R. 682.
(8) 36 B. 214; 13 Bom. L. R. 717; 12 Ind. Cas. 225.
(9) 23 I. A. 71; 23 B. 725; 3 C. W. N. 621.
(10) 10 I. A. 90 at p. 96; 6 A. 1.
(11) 20 B. 511 at p. 587.

TRIPURARI PAL *v.* JAGAT TARINI DASI.

PRIVY COUNCIL.

APPEAL FROM THE HIGH COURT AT CALCUTTA.

October 31, 1912.

Present:—Lord Macnaghten, Lord Moulton, Sir John Edge and Mr. Ameer Ali.

TRIPURARI PAL AND ANOTHER—APPELLANTS

versus

JAGAT TARINI DASI AND OTHERS—RESPONDENTS.

Will—Construction—Shebaitship, *grant of.*

Where a Hindu made a Will appointing his minor son *shebait*, and his widow as guardian of the minor son, and, in the event of his death without obtaining majority, herself as *shebait*:

Held, that the gift of *shebaitship* to the son was absolute and the right of the widow to act as *shebait* was extinguished on the son attaining the majority and taking over the temple, and could not be revived on the subsequent death of the son.

Appeal heard *ex parte* from a judgment and decree of the High Court at Calcutta, dated August 19th, 1907, reversing a judgment and decree of the Subordinate Judge of Nadia, dated September 20th, 1905.

FACTS.—One Shib Chandra Pal died in 1884, leaving a widow, Brajomati Dasi, a son, Mukunda Murari Pal, two daughters, the defendants-respondents, Jagat Tarini Dasi and Nistarini Dasi and an adopted son. He made a Will of which the material part is as follows:

"My present begotten son, Makunda Murari, will be *shebait* for the performance of those ceremonies. If during the minority of the said Mukunda Murari Pal, I die, then my second wife, Brajomati Dasi, who gave birth to Mukunda Murari, will be *shebait* as his guardian, during the time of the said Mukunda's minority, and Mukunda, on attaining majority, will personally conduct the work of the *sheba*. God forbid, if during my lifetime or after my death, the said Mukunda dies, then the said Brajomati will be *shebait* and after her death my daughters Jagat Tarini Dasi and Nistarini Dasi."

The said Mukunda came of age and took over the *shebaitship* of the temple in question. On his death, the question was as to who was entitled to the *shebaitship*, Brajomati or the minor son of the said deceased Mukunda. The Subordinate Judge decided in favour of the minor son, the present appellant; but the High Court reversed the judgment of the lower Court and held in favour of the Brajomati and on her death, in favour of the aforesaid daughters of the testator,

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Mr. *Dunne*, on behalf of the Appellant, the minor son of Mukunda Murari, contended that upon the true construction of the Will, the title to the *shebaitship* and the *debutter* properties passed to the appellant on the death of his father. *Norendro Nath Sircar* v. *Kamalbasini Dasi* (1); Wills Act, section 111, referred to.

JUDGMENT.

LORD MACNAGHTEN.—Their Lordships are of opinion that in this case, the decision of the High Court cannot be supported. There is, in their Lordships' view, an absolute gift of the *shebaitship* to the son, Mukunda Murari, on his attaining 21, and it is not cut down, as far as they can see, by anything that follows. There are provisions in the case of his death as a minor, but no provision cutting down the absolute gift to him. The words are: "My present begotten son Mukunda Murari will be *shebait* for the performance of those ceremonies."

Their Lordships will, therefore, humbly advise His Majesty that the appeal ought to be allowed, and the judgment of the Subordinate Judge restored.

There will be no order as to the costs incurred in the High Court, except that any costs paid under the order appealed from must be returned, and there will be no costs of this appeal.

Appeal allowed.

Solicitors for the Appellant: Messrs. *Box & Co.*

(1) 23 I. A. 18; 23 C. 563.

BOMBAY HIGH COURT.

ORIGINAL CIVIL SUIT NO. 917 OF 1910.

July 19, 1912.

Present:—Sir Dinshaw D. Davar, KT., Judge,

HAJI AHMED HAJI HASSAM—PLAINTIFF

versus

ESSAJI TAJBHOY—DEFENDANT.

Civil Procedure Code (Act V of 1908), Sch. II, cl. 15 (a)—Arbitration—Award—Misconduct—Award when to be set aside—Reference to arbitration on the basis of exclusion of certain evidence—Umpire admitting this evidence.

An arbitrator or an umpire is the chosen Judge of the parties; his decision is final and the Court has no power to touch that decision or interfere with it merely on the ground that it is not correct or that it is the result of bias.

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It is because the award of an arbitrator or an umpire is final and the party against whom it is made is debarred from appealing to any Court of law, however unjust the award may be, that Courts have been most anxious to see that nothing unfair or irregular is done by the arbitrator or umpire while discharging his duties as such. The Courts have always been most alert to interfere and set aside any award in which it appears that the arbitrator or umpire has not acted with scrupulous fairness towards both parties.

In cases of reference to arbitration through the Court, the Courts have always exercised a most vigilant supervision over the conduct of the arbitrator to whom at the request of the parties it delegates the duty of deciding disputes between the parties and any irregularity or action, which is not consonant with the general principles of equity and good conscience which ought to govern the conduct of an arbitrator, is resented by immediately brushing aside the award of the arbitrator against whose decision there is no appeal.

A reference to arbitration was made through the Court on the basis and footing that an alleged adjustment was not to be taken into consideration by the arbitrators or the umpire, who were explicitly and imperatively directed by the Court not to take the said adjustment into consideration. In spite of this direction, the umpire admitted, at the request of one of the parties and in face of a protest from the other, the adjustment in evidence and used it as evidence against the latter in deciding an important question of *onus* of proof :

Held, that the admission of the adjustment, being an obvious breach of the direction of the Court contained in the reference order and a grave error of judgment which prejudiced the case, was a clear case of "misconduct in law" on the part of the umpire.

Mr. *Bahadurji*, for the Plaintiff.

Mr. *Setalvad*, for the Defendant.

JUDGMENT.—This suit was filed on the 11th of October 1910 as a Short Cause. The plaintiff is the mortgagee of several immoveable properties belonging to the defendant and he seeks to recover in this suit Rs. 5,69,166-8 9 with further interest from the 6th of October 1910. In his plaint, the plaintiff relies on an alleged adjustment of account, which he says took place on the 31st of August 1910, whereby a sum of Rs. 5,71,770-2 0 was found to be due by the defendant to the plaintiff. The defendant has put in a long written statement whereby he disputes the genuineness of the accounts of the plaintiff and states that the adjustment was obtained from him by false and fraudulent representations and is not binding on him and counter-claims that the plaintiff may be ordered to reconvey the mortgaged properties to him on payment of what may be found due to the plaintiff on proper accounts being taken by and under the directions of this Court. To his written statement, he annexes a formidable list of what he calls "particulars of false and fraudulent items in the plaintiff's books."

It was at first arranged between the parties that the matter should be referred to the arbitration of Mr. Lowndes but that arrangement having fallen through, on the 16th of March 1911, the parties obtained a Consent Order from the Court whereby all matters in dispute in the suit were referred to the arbitration of two Parsee gentlemen with a proviso that in case the arbitrators did not agree upon their award, the matters in dispute between the parties should stand referred to Mr. Kaikhushro Framji Modi as umpire. The arbitrators appointed by the order were unable to agree and the matters in dispute were referred to Mr. Modi as umpire.

The first meeting was held by the umpire on the 8th of September 1911 and the investigation of the accounts continued before him till the middle of March last when there was a serious split between the respective parties and Mr. Dinsha Jijibhoy, who represented the defendant before the umpire, retired from the reference alleging that gross breach of faith was committed on the plaintiff's part and that the umpire had acted in direct contravention of the order of the Court and intimated that his client was no longer willing to proceed with the reference and revoked the umpire's authority in the matter. The umpire, however, proceeded *ex parte* and on the 28th of March, six days after the defendant's attorney retired, made and published his award whereby he adjudged that Rs. 7,05,639 were due by the defendant on the 25th of March 1912 and he awarded that sum to the plaintiff with further interest at 9 per cent. per annum and directed that the defendant should pay the plaintiff's costs of the suit and of the reference before the arbitrators and umpire including the fees paid both to the arbitrators and the umpire.

On the 6th of April 1912, the defendant's attorneys gave notice that they would move that the award made by Mr. Modi, the umpire, may be set aside, that the arbitration may also be set aside and that the Court should proceed with the hearing of the suit. This notice of motion was partly argued before me on the 11th and 12th of April

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last and then stood over for further argument till after the summer vacation. The notice has now been fully argued before me after I had an opportunity of going through all the affidavits filed on the motion together with other papers in the suit and reference and the proceedings that have taken place before the umpire.

The main question in the suit is whether the umpire can be said to have so acted in the reference before him as to justify the Court in coming to a conclusion that his action amounts to what is known in law as "misconduct" and whether under the circumstances that have happened, this Court ought to set aside the award made by the umpire. After a very careful perusal of the affidavits of Messrs. Dinsha Jijibhoy and N. H. Moos, the respective attorneys of the parties, and the correspondence which has subsequently taken place, it is quite clear to me that the order of reference was obtained after due deliberation and much discussion between the said attorneys. The main consideration, I find, which induced the defendant to agree to refer matters to arbitration was the plaintiff's consent to abandon his contention as to the adjustment of the 31st of August 1910. The order specifically provides as follows:—

"And it is further ordered by and with such consent that the said arbitrators do proceed on the basis of there having been no adjustments and the adjustments relied upon by the plaintiff in this suit *shall not be taken into consideration by them*". It is further provided by the order that in the event of reference falling through for any reason whatever, the plaintiff would be entitled to rely on the adjustments in the plaint referred to.

The accounts between the plaintiff and the defendant which the umpire had to take are very long and extremely complicated. To the accounts filed by the plaintiff, the defendant filed numerous objections and surcharges. During the protracted hearings before the umpire commencing from the 8th of September 1911, I find that up to the middle of March 1912, the umpire was able to settle only three disputes. One was with reference to an item of Rs. 5,000, another was with reference to an item of Rs. 10-6-0 and the third was as to whether interest to be allowed to the plaintiff should be at the rate of 6 or 9 per cent. This last question was settled after prolonged hearings by the oath of the plaintiff and it got rid of about twenty-six objections but other objections remained to be dealt with. A formidable list of sur charges had to be considered and decided and long and complicated steamer-accounts had remained untouched. The split commenced when an objection as to Rs. 1,300 came to be considered. I do not think it is necessary to set out in detail the contentions of both parties as to this item of Rs. 1,300. As to what happened when this objection was taken in hand by the umpire, Mr. Dinsha Jijibhoy in his affidavit has given a very clear and explicit account. Although Mr. Moos has made two affidavits, he has not specifically denied the accuracy of Mr. Dinsha's version and I must accept this as the correct version. He says, in paragraph 4 of his affidavit affirmed on the 1st of April, this:—

"I this deponent further say that on objection 35 being reached in the proceedings before the umpire and my stating to him the facts relating to that objection, the umpire read the entry in the plaintiff's book relating to the acceptance by the plaintiff of the transfer of Rs. 4,800.****After doing so, the umpire told Mr. Moos that from that entry, it clearly appeared that the plaintiff had accepted the transfer and, that, therefore, if the plaintiff now wanted to hold the defendant liable for Rs. 1,300 which sum he, the plaintiff, had given up out of the said sum of Rs. 4,800, he, the umpire, was of opinion that the burden of proving that the defendant was liable lay upon him, the plaintiff. Thereupon Mr. Moos said that that would mean his calling the plaintiff into the witness box and that he would rather submit to that objection than put his client into the witness-box. The meeting was then adjourned and at the next meeting, both Mr. Moos and Mr. F. E. Dinsha appeared on behalf of the plaintiff and tendered in evidence the said writing of adjustment dated 31st of August 1910. I very strongly objected to the admission of the said writing of adjustment pointing out, as was the fact, that the plaintiff's attorneys in tendering the said document in evidence were, to their own knowledge, acting in direct violation of the specific arrangement aforesaid which was embodied in the said Consent Order of reference and

that the said arrangement was the basis and a fundamental term on the footing and faith of which *alone* I had agreed on behalf of the defendant to the said arbitration".

After hearing and noting the contentions of the Solicitors, the umpire decided in favour of admitting the adjustment in evidence and he makes the following note:—"I admit this account purely as a statement of account acknowledged to have been signed by the defendant". And he marked the adjustment as Exhibit A18. From the further notes made by himself, it appears that the moment this adjustment was put in and marked as an exhibit, Mr. Moos relied upon it as a clear admission by the defendant and argued that the *onus* has now shifted and lay on the defendant to prove that he was not liable to be debited with this Rs. 1,300. Evidently what was taking place so dazed the defendant's attorney that he is not shown in the arbitration proceedings to have said anything against Mr. Moos's contention and the arbitrator records his decision that the *onus* of proving that he was not liable for this sum was on the defendant. On the following day, the defendant's attorney appeared and pointed out very clearly and forcibly the injustice and hardship of the action of the umpire and suggested that as a special case the question should be submitted for the opinion of the Court. Mr. Moos's only answer was that he had no notice of this application. The umpire referred the defendant's Solicitor to the Court and postponed consideration of *that particular item only*, for a week within which he directed Mr. Dinsha to make any application he liked to the Court. The umpire proposed to proceed with the reference without waiting to see if the defendant did make any application and if he did to see what was the result of such application. When Mr. Dinsha Jijibhoy found that the umpire proposed to go on with the reference, with the adjustment Exhibit A-18 before him, he decided to withdraw from the reference and gave notice of such withdrawal.

It is now for me to consider whether the action of the umpire in admitting Exhibit A-18 as evidence before him is such as to amount to what is in law called "misconduct", and such as would justify an interference of the Court. This application has been the subject of much anxious consideration. The umpire is an officer of this Court who occupies a high position and has, for many years, been doing very important and responsible work in this Court. I have been all along most anxious not to do anything that would in any way cast the smallest reflection on his ability or his capacity to deal with questions that come up before him for adjudication. I am glad to say that throughout the prolonged discussion of this matter before me, no reflections are cast and no allegations made of any kind affecting the strict probity of the umpire. All that is alleged against him is that he has committed a grave error of judgment and has shown a very strong bias in favour of the plaintiff and against the defendant. Mr. Setalwad has pointed out various circumstances in connection with the umpire's judgment with reference to the sum of Rs. 5,000 in justification of his imputation of bias against the umpire. I refuse to go into this question. The umpire was the chosen Judge of the parties. His decision is final and the Court has no right whatever to touch that decision or interfere with it merely on the ground that it is not correct or that it is the result of bias. I have no doubt whatever that when the umpire came to the decision adverse to the defendant, he did so on convictions forced on his mind by the evidence before him and it is not for this Court to express any opinion as to the correctness or otherwise of such a decision and, therefore, I have given no thought whatever to the arguments addressed to me on the item in question.

The admission, however, of the adjustment as an Exhibit in the case is a matter of very grave importance and requires very careful consideration. It must be remembered that that document, the adjustment of the 31st of August 1910, is a powerful piece of evidence against the defendant. If that stands and is established against him, all his contentions with reference to the plaintiff's accounts go by the board and it would be held that he was liable to pay Rs. 5,65,711 with further interest on the date of the adjustment. If the suit had gone to a hearing before the Court, the defendant would have found it necessary to establish the allegations of fraud, misrepresentation, etc., which he sets up in his written statement before he would be allowed to go behind that adjustment. His legal advisers seem to have realised the difficulties of his position and appreciated

to very great gain to the defendant if this adjustment could be got rid of by some means. Mr. Dinsha Jijibhoy has stated that on behalf of his client he agreed to the reference to arbitration because thereby he got rid of the adjustment and he swears that "the basis and a fundamental term on the footing and faith of which *alone*" he agreed to go to arbitration was that the arbitrators were not to take into consideration this adjustment. The directions to the arbitrators in the order itself are clear, explicit and imperative. They are directed to proceed on the basis of there having been no adjustment and they are told that such adjustment *shall not* be taken into consideration by them. These directions contained in the Consent Order of reference are as binding on the umpire as they were on the arbitrators. In spite of this explicit order, in breach of clear understanding between the Solicitors, in the face of the strenuous opposition by the defendant's Solicitor, the plaintiff's Solicitor, Mr. Moos, not only tendered this document, which it had been agreed should be excluded from the arbitrators' consideration, but insisted on having the same recorded as an exhibit in the proceedings and unfortunately succeeded. I feel almost certain that if the umpire, instead of acting on the spur of the moment, had taken time to consider his decision, as he seems to have done on many other points of far smaller importance, he would have realised that the opposition to the admissibility of the adjustment was sound and would have decided accordingly. It was argued before me that the defendant's Solicitor himself had got this document marked for identification at an earlier stage of the reference before the umpire. I have read notes of proceedings when this document was marked for identification. It was merely called for as one of various other documents which the defendant alleged he had been induced to sign. It was never intended to be used as evidence in the case by the defendant. Here, however, not only has it been admitted in evidence but used against the defendant in deciding an important question of the *onus* of proof. In the face of the Havala entry in the plaintiff's own book, the *onus* of proving the defendant's liability to the plaintiff for this Rs. 1,300 lay clearly and heavily on the plaintiff. That was the opinion of the umpire. The meeting of the 16th of March stood over on that understanding. At the next meeting of the 18th of March, the umpire was engaged in considering the question of initialling the books of the plaintiff. At the meeting of the following day, the 19th of March, Mr. Moos re-opens the question of the *onus*, tenders the adjustment and advances certain plausible but fallacious arguments in support of his application to get this document in. The umpire admits the adjustment, marks it as an exhibit but at the same time attempts to make some sort of distinction. He says:—"I admit this account purely as a statement of account acknowledged to have been signed by the defendant." It is quite clear from this, that the umpire had before his mind the fact that he was implicitly directed not to look at the adjustment He, therefore, tries to make a distinction between an adjustment of account and a statement of account acknowledged to be signed by the defendant. I confess I fail to see the distinction. As soon as it is put in, it is made use of for the purpose of shifting the *onus*. What is then the position of the defendant? He must establish his allegations of fraud and misrepresentation before he can get rid of the effect of the admission said to be contained in that adjustment. If this merely affected one item of Rs. 1,300, it might have been said to be a matter of small importance, but once this document is before the umpire, it is quite clear that it would affect a great many very large and very important items; and while it would, in some cases, be used for shifting the *onus* from the plaintiff to the defendant, in many other matters, it would be used as it was used as admissions on the part of the defendant. When this matter was argued before me by the Advocate-General on behalf of the plaintiff, he stated that when the document was admitted, the umpire had decided most of the important matters in dispute between the parties and that very little remained to be done. He asked me to take a note of the offer he made on the 12th of April and accordingly I took the following note:—

"The Advocate-General offers to have Exhibit A-18 struck off from the proceedings and all matters decided after the admission of Exhibit A-18 be set aside and be re-considered by the umpire, if the defendant will consent to have the award remitted to him,

This offer to be without prejudice to all his contentions."

"Mr. Setalwad declines to go again to Mr. Modi. He says he would not advise his client to go back to Mr. Modi under any circumstances."

With a fuller knowledge of facts and after having looked at the accounts, the objections and the sur-charges, I am able to say that the learned Advocate-General was in error when he stated that most of the disputes between the parties had been decided when this exhibit was admitted. It seems to me that on the day this document was put in, more than six months after the umpire commenced the hearing of this reference, the parties had really made very little progress in the reference. Several of the objections were held to be sur-charges and were transferred to the list of sur-charges. The sur-charges, which contain many and some very heavy items, had never been touched. The steamer-accounts had never been taken in hand. The effect of disregarding the order of the Court and allowing the adjustment to go in as an exhibit is manifestly unjust to the defendant. A few instances would be quite enough to demonstrate this. In his list of sur-charges, the defendant claims credit for a sum of Rs. 75,000, which he says he has paid in cash to the plaintiff but for which no credit is given to him. There is another sum of Rs. 10,000 which he says he paid and which has not been credited to him. There is a sum of Rs. 25,000 which he says he re-paid on the very day that Rs. 40,000 are debited to him but which have not been credited to him. There is again another sum of Rs. 50,000, which he says he re-paid and which has not been credited to him. No doubt, he would have had to prove these sur-charges but when he had given all his evidence in support of his sur-charges and his allegations of payment of these large sums, he would be immediately faced with Exhibit A-13 and he would be asked:—"If you re-paid all these sums of moneys, here is an account which you have acknowledged to be correct and signed which shows no such payments." And it would be argued—as was argued by Mr. Moos—that this adjustment contains clear admissions, and that he never re-paid any such sums and that if he had done so, he would never have signed an account which contains no credit for these large re-payments. This is only one of the many ways in which in this reference this adjustment could be used as a deadly and destructive piece of evidence against the defendant. He stipulated specifically that it should not be so used. And though I much regret to be driven to this conclusion, I have no option but to hold that the admission of this adjustment by the umpire in the course of the proceedings before him was a clear case of "misconduct" on his part, misconduct as is understood in law. This act, I am driven to say, is an act of injustice to the defendant and calls for redress. It seems to me that the only course open to the defendant, under the circumstances, was the course adopted by his Solicitor. As soon as the defendant's Solicitor withdraws from the reference, the accounts are rushed through before the umpire and within six days all the accounts are passed and award made and published by the umpire.

It would be, I think, convenient here to see what, in law, amounts to "misconduct" on the part of an arbitrator or umpire. In *Ganga Sahai* v. *Lekhraj Singh* (1), the question has been considered by a Bench consisting of Mr. Justice Straight and Mr. Justice Mahmood. The judgment of the Court was delivered by Mr. Justice Mahmood in which he has held that "The word 'misconduct,' as used in the Civil Procedure Code, should be interpreted in the sense in which it is used in English Law with reference to arbitration proceedings. It does not necessarily imply moral turpitude, but it includes neglect of the duties and responsibilities of the arbitrators and of what Courts of Justice expect from them before allowing finality to their awards."

In the body of his judgment, the learned Judge has quoted two long paragraphs from Russell on the Powers and Duties of an Arbitrator and he has held that we in India must interpret the word 'misconduct' in the same sense in which it has been interpreted by English Judges.

It is because the award of an umpire or arbitrator is final and the party against whom it is made is debarred from appealing to any Court of Law, however unjust the award may be, that the Courts in England

(1) 9 A. 253.

and here in India have been most anxious to see that nothing unfair or irregular is done by the arbitrator or umpire while discharging his duties as such. The Courts have always been most alert to interfere and set aside any award in which it appears that the arbitrator or umpire has not acted with scrupulous fairness towards both parties and that seems to have been the tendency of the Court from very early times.

In *Jervis* v. *Bruton* (2), an arbitrator promised to hear more witnesses but he made his award without hearing them, and the award was set aside. In *Barton* v. *Knight* (3), the arbitrators hearing one party in the absence of another were held to have been guilty of partiality and that was held to be sufficient misconduct on the part of the arbitrator to justify the award being set aside.

In *Walker* v. *Frobisher* (4), the award was set aside on the ground of the arbitrator having received evidence after notice to the parties that he would receive no more; in which they acquiesced and the Lord Chancellor, Lord Eldon, in the course of his judgment, says:—"He (referring to the arbitrator) recommended to them not to produce any more witnesses. To that recommendation they accede, and in effect say:—'Upon the view of what is disclosed to you do what is right between us'. After this he hears these other persons; and he admits, he took minutes of what was said. It did not pass as mere conversation. It does not appear, that he afterwards held any communication with the other party; or disclosed what passed to him: but the arbitrator swears, it had no effect upon his award. I believe him. He is a most respectable man. But I cannot from respect for any man do that, which I cannot reconcile to general principles. A Judge must not take upon himself to say, whether evidence improperly admitted had or had not an effect upon his mind. The award may have done perfect justice: but upon general principles it cannot be supported".

In Halsbury's Laws of England, Vol. I, page 478, this is what is stated as the result of the authorities which are all collected immediately below that paragraph:—"It is difficult to give an exhaustive definition of what amounts to misconduct on the part of an arbitrator or umpire. The expression is of wide import, including on the one hand bribery and corruption and on the other a mere mistake as to the scope of the authority conferred by the submission". Then follows a long list of acts of commission and omission on the part of an arbitrator or umpire which have been held in the Courts in England to be acts of misconduct.

It seems to me from the authorities that the Courts, in cases of reference to arbitration through the Court, have always exercised a most careful and vigilant supervision over the conduct of the arbitrator to whom at the request of the parties it delegates the duty of deciding disputes between the parties and any irregularity or action, which is not consonant with the general principles of equity and good conscience, which ought to govern the conduct of an arbitrator, is resented by immediately brushing aside the award of the arbitrator against whose decision there is no appeal.

It was argued before me that the admission of a document which the arbitrator was ordered not to look at was not an irregularity as the Indian Evidence Act expressly excludes the application of the rules of evidence embodied in that Act to proceedings before an arbitrator. Exactly the same argument seems to have been advanced by Counsel before the Calcutta Court as appears from the report of the case of *Maria Ellen Howard* v. *Charlotte Margaret Wilson* (5), where Mr. Allen says to the Court—"The Evidence Act does not apply to proceedings before arbitrators". To which Sir Richard Garth, Chief Justice, replies:—"The meaning of that is that the strict rules of evidence do not so apply. It does not refer to those rules which are founded on the clearest public policy".

It is noteworthy to remark that in this case, Mr. Justice Pontifex refused to pass judgment on the award on the ground that the defendant communicated with the arbitrator behind the back of the other party and used a letter which was headed "without prejudice". The Appeal Court, however, pointed out that the plaintiff's advisers had not objected to the letter being received on that ground.

(2) (1691) 2 Vern. 251.
(3) (1705) 2 Vern. 514.
(4) (1801) 6 Ves. 70; 5 R. R. 223.

(5) 2 C. L. R. 488 at p. 491; 4 C. 31.

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In this case, the action of the umpire complained of is not a mere formal irregularity nor is it merely a mistake of admitting in evidence a document which ought not to have been admitted. The putting on record of the adjustment as an exhibit in the case was an obvious breach of the directions of the Court contained in the Reference Order made by the Court. This act changed the defendant's position most materially. He was faced with the very difficulty which he wanted to avoid because it was only in consideration of the adjustment not being used against him that he agreed to go to arbitration. It seems to have had great effect on the umpire's judgment for on the mere admission of it, he changed his mind and held that the *onus* of proving a particular item which he had said lay on the plaintiff was now on the defendant. In my opinion, the admission of that document in evidence was an act of injustice to the defendant and I think the defendant was perfectly justified under the circumstances in withdrawing from the reference and in subsequently asking the Court to set aside his award. In my opinion, the arbitrator committed a grave error of judgment in allowing the plaintiff's Solicitors to persuade him to admit the adjustment in evidence before him. This error has very greatly prejudiced the defendant's case and I am forced to the conclusion that the umpire, in admitting the adjustment in evidence and marking it as an exhibit in the proceeding before him, was guilty of what in law is called misconduct.

This being a reference through the Court the second Schedule to the Civil Procedure Code governs the procedure. Clause 14 provides for remitting the award to the same arbitrator or umpire. None of the grounds mentioned in this clause covers the present case and, therefore, I am precluded from considering the suggestion made by the learned Counsel for the plaintiff to remit the award to the same umpire. No doubt, I could have remitted the award to the same umpire with a direction to expunge Exhibit A-18 and proceed with the reference from the point where he admitted the adjustment as an exhibit, if the defendant had consented to such a procedure. But that consent is not given in spite of some pressure from the Court and, therefore, it is not open to me even to consider the advisability or otherwise of remitting the award to the same umpire under the provisions of clause 14 of the second Schedule to the Civil Procedure Code.

My finding on the question of "misconduct" makes it unnecessary for me to consider the other ground urged in support of the defendant's application to set aside the award, *viz.*, that the plaintiff has been "guilty of wilfully misleading the umpire."

Clause 15 (*a*) of the second Schedule to the Civil Procedure Code provides that the misconduct of the arbitrator or umpire is one of the grounds for setting aside an award and I am driven to the conclusion that it is imperative in the interests of justice that the award should be set aside. Such an order, I feel, would be but a bare act of justice to the defendant. I accordingly set aside the award and make an order superseding the arbitration. Strangely enough, neither section 104 nor Order XLIII permit an appeal against an order setting aside an award but it has been held to be a judgment and I am glad an appeal lies against my order. If an appeal is filed, the suit will be subject to such order as the Appeal Court may pass. If no appeal is filed after the expiration of the time for doing so, the Prothonotary will put this suit down on such Board as to him may appear most convenient in order that it may be proceeded with.

The plaintiff will pay all costs of the defendant of the application to set aside the award. The Judge hearing the suit will deal with costs of the reference and proceedings before the arbitrators and the umpire including the fees paid to them.

Order accordingly.

Attorneys for the Plaintiff: Messrs. *Payne & Co.*

Attorneys for the Defendant: Messrs. *Ardeshir Hormusji Dinshaw & Co.*

KELU ACHAN *v.* UMALA ACHAN.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 133 OF 1911.

October 17, 1912.

Present:—Mr. Justice Sundara Aiyar and Mr. Justice Sadasiva Aiyar.

KELU ACHAN—APPELLANT

versus

UMALA ACHAN AND OTHERS—RESPONDENTS.

Malabar Law and Usage—Tavazhi—*Medical expenses incurred by member of* tavazhi—*Right to recover from* karnavan *of* tarwad.

A member of a Malabar *tavazhi*, who has incurred expenses for his medical treatment, cannot claim the same as against the *karnavan* of the *tavazhi*, but can enforce its payment from the *karnavan* of the *tarwad*.

Second appeal against the decree of the Subordinate Judge of Palghat, in A. S. No. 998 of 1909, presented against the decree of the District Munsif of Palghat, in O. S. No. 272 of 1908.

Mr. *Kundu Panikar*, for the Appellant.

Mr. *Menon*, for the Respondents.

JUDGMENT.—The lower Courts have found that there has been a substantial increase in the income of the *tavazhi* property. We see no reason for holding that the plaintiff should not have increased the '*mucharam*' in the circumstances. Nor are we able to say that the amount allowed is excessive. The plaintiff's suit is to recover arrears for five years; it is contended that the claim for the 1st and 2nd year is barred by limitation. This plea was not raised in the Courts below. If it had been raised, the plaintiff might have been able to make a satisfactory answer to it. We cannot, therefore, allow it to be raised here for the first time. We are of opinion, however, that the plaintiff was not entitled to recover the expenses for his medical treatment from the *karnavan* of the *tavazhi*. It is the *tarwad* that is *prima facie* bound to look after the health of its members and the plaintiff would have a valid claim against the *karnavan* of the *tarwad* for any expenses legitimately incurred for medical treatment. No special reason is urged why the *tavazhi* should be held bound to pay in this case. We modify the decree of the lower Courts by disallowing Rs. 25, the amount awarded for medical expenses of the plaintiff. The decree of the lower Appellate Court is confirmed in other respects. The appellant will pay respondent's costs.

Decree modified.

VEERA RAGHAVA IYENGAR *v.* VELLAI MOOPPAI.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 404 OF 1911.

October 15, 1912.

Present:—Mr. Justice Sundara Aiyar and Mr. Justice Sadasiva Aiyar.

VEERA RAGHAVA AIYANGAR AND OTHERS—APPELLANTS

versus

VELLAI MOOPPAI AND OTHERS—RESPONDENTS.

Appeal, second—Small Cause suit—Suit for recovery of rent with incidental prayer for declaration of right.

Where in a suit for the recovery of rent, there is a prayer for a declaration of right, but no separate Court-fee is paid therefor, such prayer should be treated as merely incidental to the prayer for rent.

Such a suit is of Small Cause nature and no second appeal lies in the case.

Second appeal from the decree of the Court of the Subordinate Judge of Madura West, in A. S. No. 679 of 1909, preferred against that of the Court of the District Munsif of Mana Madura, in O. S. No. 256 of 1905.

Mr. *K. Bhashyam Aiyangar* for Mr. *S. Srinivasa Aiyangar*, for the Appellants.

Mr. *K. V. Krishnaswami Aiyar*, for the Respondents.

JUDGMENT.—The preliminary objection is taken that no second appeal lies in this case. We are of opinion that this contention should be upheld. The suit was one merely for recovery of rent. It is contended that the first prayer in the plaint is that the plaintiff's right to the *melwaram* of the land should be declared; but this can be treated as only incidental to the prayer for the recovery of rent. The cause of action, as stated in paragraph 10 of the plaint, is merely the non-payment of rent. No separate Court-fee was paid for the declaration. There is absolutely nothing anywhere in the plaint to suggest that the prayer for declaration was treated as an independent one. The second appeal is dismissed with costs.

Appeal dismissed.

EMPEROR v. GANESH NARAYAN DIKSHIT.

BOMBAY HIGH COURT.

CRIMINAL APPEALS Nos. 168, 169, 199, 200 AND 201 OF 1912.

August 25, 1912.

Present:—Mr. Justice Batchelor and Mr. Justice Rao.

EMPEROR—PROSECUTOR

versus

GANESH NARAYAN DIKSHIT—ACCUSED.

Criminal Procedure Code (Act V of 1898), s. 239—Joint trial—Same transaction—Accused conspiring to procure conviction of innocent persons—Several acts linked together by one design though done at intervals.

Five accused persons, *A.*, *B.*, *C.*, *D.* and *E.*, finding that a robbery was committed and that cash and ornaments worth a very large sum were stolen, aided and abetted each other in inducing a young man, *F*, whom they knew to be entirely innocent of the offence, for the consideration of a bribe of Rs. 100, falsely to confess to complicity in the crime, and to acquiesce in being prosecuted for it, the object being to share the loot with the real thieves. To this end, the accused wrongfully confined *F.*, fabricated false evidence in order to procure his conviction, knowingly instituted a false prosecution against him, and in that prosecution gave false evidence in order to secure his conviction.

All the five accused were jointly tried. *A.* was convicted of fabricating and giving false evidence to procure conviction of an offence, of wrongful confinement and of causing criminal proceedings to be instituted against a person without just or lawful ground. *E.* was convicted of giving false evidence with intent to procure conviction of the same offence as *A.* intended. It was urged that the joint trial of *A.* and *E.* was illegal:

Held, that the joint trial of *A.* and *E.* was not illegal inasmuch as

(*a*) section 239, Criminal Procedure Code, was distinctly applicable and, in the circumstances of the case, the joint trial was not only legal but was demanded in the interest of public time and public convenience;

(*b*) there was one sustained and continuous plot for screening the real offenders in the robbery and of exposing an innocent man to a false charge with a view that the accused or some of them might participate in the stolen property; to secure this end various means had to be adopted, one of the means, a mere incident in the whole transaction, being the giving of false evidence in the prosecution of *F.*;

(*c*) the accusation against all the accused was that they carried out a single scheme by successive acts done at intervals, but there was complete unity of project and the whole series of acts were so linked together by one motive and design as to constitute one transaction within the meaning of section 239.

Emperor v. *Datto Hanmant Shahapurkar*, 30 B. 49; 7 Bom. L. R. 633; 2 Cr. L. J. 578, followed.

King-Emperor v. *Krishna Rao*, 4 Bom. L. R. 53, distinguished.

Criminal appeals from convictions and sentences recorded by the Sessions Judge of Sholapur.

Messrs. *R. B. Karandikar* and *P. B. Shingne*, for Accused No. 1.

Mr. *P. B. Shingne*, for Accused No. 2.

Mr. *J. R. Gharpure*, for Accused No. 4.

Mr. *Binning* (with him Mr. *S. V. Bhandarkar*), for Accused No. 5.

Mr. *L. A. Shah*, Acting Government Pleader, for the Crown.

JUDGMENT.—The five appellants before us, hereinafter called the accused, were jointly tried before the learned Sessions Judge of Sholapur, and were convicted by that Judge in agreement with both assessors. At the material times to which the charges relate, the accused held the following characters: The first accused was the City Sub-Inspector of Police at Sholapur, the second accused was a Police Jamadar and by caste a Kaikadi, the third accused was a Police Havaldar or Head Constable, the fourth accused was a money-lender of Sholapur, the fifth accused was the Police Patil of the village Patkul in the Madha Taluka of the Sholapur District.

The accused No. 1 has been convicted of the offences: (*a*) of fabricating false evidence with intent to procure conviction of an offence punishable with imprisonment for seven years; (*b*) of wrongful confinement; (*c*) of causing criminal proceedings to be instituted against a person without just or lawful ground; (*d*) of giving false evidence with intent to procure conviction of an offence punishable with imprisonment for seven years.

The second and third accused have been convicted: (*a*) of the abetment of fabrication of false evidence with intent to procure conviction of an offence punishable with imprisonment for seven years; (*b*) of the abetment of wrongful confinement.

The fourth accused has been convicted: (*a*) of the abetment of the institution of criminal proceedings knowing that there was no just or lawful ground for such proceedings; (*b*) of the abetment of wrongful confinement.

The fifth accused has been convicted of the offence of giving false evidence with

intent to procure conviction of an offence punishable with imprisonment for seven years.

The facts and circumstances attending the alleged crimes are fully and lucidly stated at the beginning of the Sessions Judge's exhaustive judgment. It is unnecessary, therefore, to recapitulate them. It will be enough to say that in substance the accusation is this: that a robbery having been committed at the house of one Paricharak, and property, namely, cash and ornaments worth about Rs. 60,000 having been stolen from that house, the accused aided and abetted each other in inducing a young man, named Tukya Mang, whom they knew to be entirely innocent of the theft, for the consideration of a bribe of Rs. 100, falsely to confess to complicity in the crime, and to acquiesce in being prosecuted for it, the object being that the accused or some of them might share the loot with the real thieves; that to this end the accused wrongfully confined Tukya; fabricated false evidence in order to procure his conviction; knowingly instituted a false prosecution against him, and in that prosecution gave false evidence in order to secure his conviction.

According to the case for the Crown, the important dates in the whole series of transactions are as follows:—On the 29th October 1911, the burglary took place at the house of Paricharak; on the 30th October, Paricharak made his complaint to the Police; on the 7th November, the first accused, who had previously been placed on special duty in connection with various thefts of which Kaikadis had been suspected, was appointed to investigate the burglary at Paricharak's. He selected his own assistants for this purpose, and among the persons so selected were his subordinates the second and third accused. On the 22nd November, the first accused sends the second accused to Sholapur; on the 23rd November, the first accused goes to the village Penur; on the 24th November, we find the whole Police party at Patkul, the accused Nos. 1 and 3 being joined there by the second accused and a man called Yadu, who was a Police agent or spy. On the 25th November, the party proceed to the village of Sarola, where an interview is held with certain Kaikadis, who apparently were the real authors of the burglary at Paricharak's or were acting on behalf of the real authors. In the fields of this village Sarola on this day, these Kaikadis hand over to the first accused, in the presence of the second accused, and Yadu, certain property forming part of that stolen from Paricharak's house. The property so handed over to the first accused consisted of a valuable bundle of ornaments and about Rs. 2,000 in cash. This being received by the first accused, he and his assistant, the second accused, invite the Kaikadis to give up one of their own tribe for conviction, but this the Kaikadis refuse to do, though they promise to fee any person, presumably any innocent person, whom the Police could secure to undergo prosecution. That evening the first accused suggests to the second accused and Yadu that the person to be victimised should be the lad Tukya, a Mang youth, who about this time was anxious to be put on the '*Hazri*' or roll-call, in order to ensure that the Police should regard him as a person of good character. This procedure appears to be usual among members of such castes as the Mangs. On the 27th November, the accused Nos. 1 and 2, with Yadu, return to the Sarola fields, where they receive from the Kaikadis a further sum of twenty-five sovereigns to be paid as indemnity to the person whom the Police accused should select for wrongful prosecution and conviction.

On the 28th November, the second accused goes to Sholapur with Yadu, and on that day Yadu makes his first approaches to Eknath, who was the prospective father-in-law of the boy Tukya, and under whose protection and guardianship Tukya may be roughly stated to have been then living. These overtures were scouted by Eknath who refused to lend himself to the Police schemes. On the following day, the 29th November, the second accused resumed his negotiations, and in the end they resulted on that day in a settlement. This settlement was mainly brought about through the intervention of the fourth accused, who was Eknath's 'Savkar,' and the man to whom Eknath was looking for protection. The fourth accused, however, was won over by the second accused; and the fourth accused's influence finally succeeded in conquering Eknath's and Tukya's powers of

resistance. The result was that the fourth accused was paid Rs. 100 which was to be handed over to Tukya when Tukya should emerge from his wrongful imprisonment. That same evening, the 29th November, the second accused and Yadu and Tukya leave Sholapur by train and go to Mohol, where they spend the night on the Station platform. On the 30th November, the second accused, Yadu and Tukya, travel through the villages of Pokhrapur and Adhegaon. At Adhegaon they are met by the first accused and his party, who had arrived on the preceding day. The first accused tutors or coaches Tukya in the *role* which has been allotted to him to play; and, that done, the party move on to the village of Patkul which they reach about 4 o'clock in the afternoon.

The whole party then proceed to certain jungle or waste lands to the north of the village. The Police accused go ahead, Yadu and Tukya following. The ornaments, which accused No. 1 had received from the Kaikadis in the fields of Sarola. were taken on by him to Patkul, and these ornaments were buried by the first three accused in the sandy bed of a river running through those waste lands of Patkul. The place of concealment was then pointed out to Tukya, who was further directed what he was to do. When these preparations were complete, the Patil of the village, *i. e*, the fifth accused and the Panch were called for out of the village. Before these people, Tukya digs up the buried ornaments, which he professes himself to have concealed, and confesses that he was one of the thieves who broke into Paricharak's house.

On the first of December, the party come back to Pandharpur, Tukya being in custody and in charge of the first accused. At the first accused's directions, the second accused takes Tukya round the town of Pandharpur and shows him the house of Paricharak and other topographical features with which it was essential for the accused's scheme that Tukya should be more or less familiar.

On the 2nd December, Tukya is taken before the Magistrate, and there he makes the confession which he had been tutored to make, and which is Exhibit 19 in this case. That being done, the Police obtain a remand for fourteen days.

On the 20th December, Paricharak, who throughout had been profoundly dissatisfied with the first accused's investigations and their result, saw the Police Inspector Metkar and complained to him about the first accused's inquiries, so far as they had then proceeded.

On the fifth January, the accused Nos. 1 and 5 were examined as witnesses before the Magistrate in the case against Tukya and gave evidence in favour of that prosecution. On the 6th January, Paricharak has an interview with the District Superintendent of Police, Mr. Kelly, and the interview was attended by the two informants, Bhavani and Balvant, who were mainly responsible for inspiring Paricharak with doubt and suspicion as to the first accused's investigations. The result of this interview was that Mr. Kelly was determined personally to probe matters to the bottom and that without any delay. On the following day, the 7th January, Mr. Kelly accordingly in the presence of the inquiring Magistrate takes the statement of Tukya who was still in the lock-up. Thereafter Mr. Kelly proceeds straight to Sholapur where he examines all the available witnesses referred to in Tukya's statement. These examinations were largely completed on that very night. Those that could not be so completed were taken on the following day, the 8th January, when Mr. Kelly moves the Magistrate to enlarge Tukya on bail, and the Magistrate does so. Then Mr. Kelly goes to the village of Patkul following the same route which had been taken by the Police accused and Tukya. On the way, the Superintendent made close inquiries at the villages which the Police party had passed through, notably Pokhrapur and Adhegaon, and in the presence of many of those villagers, Yadu and Tukya were carefully identified before Panches. On the 12th January, the first three accused were arrested; on the 14th January Tukya was discharged, and an order was made by the Magistrate under section 476 of the Criminal Procedure Code against these accused and others. The District Magistrate himself conducted the preliminary inquiry, and as a result committed these accused to take their trial before the Court of Session.

As the learned Sessions Judge has ob-

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served, the questions which really arise for answer are two: *first*, was Tukya innocent of the offence of house breaking and theft with which he was charged? and *secondly*, if so, did the accused knowing him to be innocent of the said offence conspire to fabricate false evidence connecting him with the crime, and to get him arrested and prosecuted? As we have noticed, the Judge and the Assessors were all agreed in answering these questions adversely to the accused. The learned Judge's own judgment is sufficient proof of the care and thoroughness with which he conducted this trial; and he in turn bears witness to the great care and attention which the assessors paid to the case.

It appears to us desirable to consider the case first in its broader aspects paying special regard to natural and ordinary probabilities consistent with the usual motives of human conduct. Judged by this test, the original story for the defence, the story, that is, that the accusation against Tukya was true, has very decidedly less claim to credit than the story for the Crown—apart from there being no evidence for the defence and much evidence for the Crown. For the prosecution case, though it discloses an odious conspiracy in which no Court should lightly believe, contains nothing unreasonable, nothing inconsistent with the conduct which would be pursued by men who put avarice before honesty and fraud before duty; whereas the original story for the accused is in violation of ordinary probabilities at every turn. For upon that story what are we asked to believe? We are asked to believe that Tukya, on being seen by the Police party in the waste lands of Patkul, immediately ran away, was pursued and captured; that he forthwith made a confession and showed some stolen ornaments buried near the particular spot where he was seized. Now the burglary was over a month old. The Police had no sort of clue or evidence against Tukya. Tukya was as well entitled as the accused themselves to be walking about these waste lands of Patkul. There is no conceivable reason why he should have forced suspicion on himself by running away; no motive why he should confess; and if we concede that all this happened so, yet we must go further and suppose that Tukya also happened to have secreted the property just at this particular spot where the Police happened to come upon him, although this particular spot is in the lands of Patkul and Tukya is a permanent resident of Sholapur, and has no sort of connection with Patkul, a village some forty miles away. Other circumstances in the confession also call for notice; among them the evidently inspired parenthesis that Tukya's associates in the crime were more robust than he, a simple-minded weak lad, a circumstance which would be of great importance to the Police if they inspired this confession but which could be of no importance whatever to Tukya. Then there is the inexplicable assertion that since the theft Tukya had been wandering idly about the jungle as if seeking arrest, though he lived and worked in Sholapur; the established falsehood that Tukya was a resident of Najana in Moglai; the entirely casual manner in which the other burglars happening to come across Tukya as he was vaguely wandering in the lands of Sarola immediately recruited him, a useless and unneeded stranger, to join them in their crime; and *lastly* his complete ignorance of even the caste of these sudden confederates, so that all he could say of them is that "they were probably Mussalmans as two or three of them wore beards." It is quite certain that whoever the gang of robbers were that pillaged Paricharak's house their numbers were not recruited in this fashion. In truth, the more we study this confession in the light of obvious facts and probabilities, and quite apart from the evidence for the prosecution, the plainer becomes the inference that it is a fiction and a stupid fiction. Indeed these circumstances are so unanswerable that in the Court below, the defence abandoned the theory that Tukya was a real thief, and nothing has been heard of it here. But upon that footing what is left to the defence? Nothing but a vague suggestion that the whole prosecution may be the result of a conspiracy on the part of some undefined persons who had a grudge, not only against the Police accused, but against the Savkar of Sholapur, and the Police Patil of Patkul.

Postponing for a moment the consideration of this suggestion, let us examine the evidence, for it is upon the evidence

that the appeal must be decided. As we have observed, the only evidence called is that for the prosecution. First, then, we have an overwhelming body of evidence which traces the second accused with Yadu and Tukya from Sholapur through Mohol and Pokhrapur to Adhegaon and so to Patkul. This journey is proved, not only by Tukya, but by a large body of unrelated witnesses who come from various villages, are wholly independent of one another and of this case, and have not any interest to link them together; nor has any one of them any cause of grudge or malice against any one of these accused.

One proposition is thus, we think, established beyond the reach of doubt, and that is that, as Tukya says, he was not accidentally found wandering in the Patkul lands, but was designedly taken there by the Police accused. But the ornaments were incontestably produced in these lands by Tukya. And the only possible theory to account for the presence of the ornaments in this place of their concealment is that, as Tukya and the witnesses say, they were taken there and buried there by the Police accused.

This, in our judgment, is as certain as any proposition can be made certain by human evidence; and its consequences, when fairly realised, set the whole case for the prosecution beyond suspicion. For since we have the truth of Tukya's evidence on these essential parts of the case thus demonstrated, there is no conceivable reason why we should not trust Tukya also in regard to the preceding events at Sholapur; indeed that evidence, and that evidence alone, can account for the presence of the whole party at Patkul and the travesty which was there played out. It was suggested by Mr. Karandikar that Tukya should be regarded as an accomplice, but we think it would be an abuse of language to apply such a word to this unfortunate lad, an unintelligent youth of a depressed and despised caste, who was forced into reluctant and helpless submission by the threats of the powerful accused Nos. 1, 2 and 4. Tukya was no more an accomplice in the accused's guilt than the traveller who delivers up his purse at the mouth of the highwayman's pistol is an accomplice of the highwayman. This witness, therefore, who was believed by the Judge and assessors who saw him, who is unshaken by a long and severe cross-examination, and who is supported at every possible point by the ordinary probabilities of the case, needs no corroboration: he is entitled to credence on his own merits, and if the convictions had proceeded on his sole testimony, we should have been prepared to affirm them. But, as we have noticed, that is far from being the case. Tukya, who is corroborated as to the village incidents by the cloud of independent witnesses from the villages, is corroborated also as to the Sholapur incidents of 28th and 29th November by his prospective father-in-law, Eknath, with whom he was living, by Eknath's wife, Pema, by his former employers, Vithu Mali and Tukaram Maratha, and by Tukaram's brother in-law, Maruti Daji. We are satisfied that these witnesses are witnesses of truth.

The result is that, on the testimony of Tukya and the corroborating testimony of the witnesses from the villages and from Sholapur, re-inforced by the general considerations to which we have referred at the beginning of this judgment, we have the whole case for the Crown established from the preliminary machinations in Sholapur down to Tukya's extorted confession of the 2nd December.

The above evidence is enough, and more than enough, to justify the convictions of all the accused. We have, however, in addition, the evidence of the Police spy and accomplice, Yadu. He tells the same story as the truthful witness Tukya; he is corroborated in all essentials by the same independent witnesses as well as by the diaries of the Police accused Nos. 1 and 2; his protracted cross-examination was wholly barren of any inference against him; and his original story was surprised out of him by the promptitude of the District Superintendent of Police, Mr. Kelly, before he had motive or opportunity for invention. In these circumstances, we accept Yadu's deposition as truthful, and are prepared to act upon it.

It remains to notice such arguments as seem to call for notice in respect of each accused who has appeared by Counsel or Pleader. It must be said *in limine* that the only difficulty in dealing with the defence lies in ascertain-

ing what precisely the defence is. The main argument was addressed to us by the Honourable Mr. Karandikar who appeared for accused No. 1; but it was obvious throughout his address that he had no constructive or consistent defence to offer. The defence adopted after full consideration by his client, a man of experience and education, was that Tukya was in truth one of the Pandharpur thieves; that line of defence, however, which was abandoned by accused's legal advisers before the Sessions Court, was also disavowed by Mr. Karandikar here. As we have shown, it is a wholly impossible defence. It thus devolved upon accused No. 1's Pleader to submit another line of argument, and it is unfortunate that one of the contentions suggested by the learned Pleader is a contention which his client plainly repudiated before the Sessions Judge—we mean the contention that, Tukya being innocent, the first accused was imposed upon by the second accused. This suggestion, however, will not bear examination for a moment. The second accused, a mere Jamadar, was the direct subordinate of first accused, who had specially selected him as his assistant in these matters; the first accused was, not only formally or ostensibly, but really in charge of the whole investigation, and, as his diaries show, was directing and superintending every step taken; nor could accused Nos. 2 and 3 adopt any measure of importance otherwise than by his orders. Also, as we have said, this particular defence was in terms declined by first accused when it was suggested to him by the Sessions Judge; and, finally, it is wholly irreconcilable with the evidence of Tukya and Yadu.

Next, it was suggested that possibly the accused might themselves be the victims of a conspiracy. The suggestion was so nebulous and unsubstantial that, as we think Mr. Karandikar would acknowledge, he himself found some difficulty in putting it into words. Of course, the accused were under no obligation to prove anything and they are entitled to advance any theory to which an air of plausibility can be given; but, if it is to prevail, even a theory in defence must bear some relation to established facts; it must not be wholly in the air, but must, so to say, have a foot on the solid earth somewhere. These easy conditions the present theory wholly fails to satisfy. There is no person living of whom it can be, or has been, suggested that he bears malice, not only against these Police accused, but simultaneously also against the wealthy Savkar of Sholapur and the Police Patil of the remote village Patkul. Nor is it possible to hold that accused No. 1 alone may be the victim of other people's conspiracy. It is no light matter to trump up a false case against a Sub-Inspector of Police, and the half-hearted suggestion that some of his official superiors may have had an interest in doing so, entirely fails. Moreover, the whole genesis of the case for the Crown flatly negatives such a theory. That case has its origin in the sudden and unforeseen action of Mr. Kelly, who, after his interview with Paricharak and his informants on 6th January, immediately posted off to the lock-up and there, on the 7th January, recorded Tukya's statement in the presence of the Magistrate. Since the 2nd December, Tukya had been in the lock-up in the direct custody of the Police, and we observe that one member of the Police guard was accused No. 2's own brother. It is certain that, during Tukya's detention prior to Mr. Kelly's interview with him, he was kept very safe from any influences, if any influences existed, which could possibly have hampered the first accused or his schemes. Thereafter, the case against accused was clinched by the same activity. Tukya gave to Mr. Kelly the names of Yadu and the Sholapur witnesses, and Mr. Kelly hastened off to Sholapur where he examined these witnesses that same night and the following day. All was done before any witness could be tampered with, and at a time when no witness could have anticipated Mr. Kelly's visit. The village witnesses were discovered with similar expedition, Mr. Kelly proceeding to Patkul along the exact route which the accused had followed from Sholapur. It is thus abundantly proved that, as there was no motive or occasion for anybody to bring false accusations against the first or any other accused, so there was no time or chance or opportunity for any such concoction.

In the case of the second accused, nothing that can be called a separate defence has been attempted. The evidence proves that he was throughout the main instrument employed by first accused in this conspiracy, and that the first accused could not have chosen a more willing or active confederate

in the prosecution of the common objects of the crime.

Accused No 3, who was not represented before us, was with the accused Nos. 1 and 2 and Tukya at Adhegaon before the party moved on to Patkul, and, at Patkul, he assisted accused Nos. 1 and 2 in burying the ornaments which Tukya was to pretend to discover. There can be no doubt of his guilt, and the learned Sessions Judge has given due weight to the fact that he was probably acting more or less under the influence of his superiors, accused Nos. 1 and 2.

Mr. Gharpure for the 4th accused has, quite rightly, mainly restricted his argument to the question of motive, contending that no sufficient reason has been shown why this man, a money-lender, should have joined in the first accused's schemes. But even if this assumed absence of proved motive were a fact, we should be compelled to disallow the argument; and we should do so without hesitation, seeing that the guilt of this accused is abundantly proved by the witnesses whom we believe, namely, Tukya, Eknath, Bai Pema and Yadu. It is clear that none of these persons has any motive in giving false evidence against this well-to-do Savkar, nor are they the kind of persons who would have the courage to incur his displeasure. Indeed, as the evidence shows, it was to this man, as being his Savkar, that Eknath threatened to appeal when the second accused first tried to bully him into sacrificing Tukya. This danger was, however, at once removed by the second accused, who proceeded to win over the fourth accused, and enlist his assistance in favour of the fraud; and it was this betrayal by the fourth accused, their only influential acquaintance, which finally reduced Eknath and Tukya to helpless acquiescence in the conspirators' plot. As to the Savkar's motive, it does not appear to us to be far to seek; apart from the possibility of a share in the unlawful profits, it was, no doubt, a great thing for this accused to stand well with a Police Officer of the rank of Sub-Inspector, while in his view, we think, it was a small thing that a boy of the Mang caste should be wrongly condemned to what he was led to believe would have been a few months' imprisonment. Thus the question of accused No 4's motive causes neither obscurity nor difficulty, and upon the faith of the witnesses named we must affirm his conviction.

In the case of the accused No. 5, there is a preliminary point raised by his learned Counsel, which we must deal with before we can come to the merits. The point is that objection is taken on the ground that accused No. 5 was charged and tried jointly with the accused No. 1, though one of the charges against the accused No. 1 was, like the charge against accused No. 5 himself, the charge of giving false evidence against Tukya. From this circumstance, it is urged that the joint trial of accused No. 5 with accused No. 1 was illegal and for this argument reliance is placed upon the decision of this Bench in *King-Emperor* v. *Krishna Rao* (1). We think that that case is on the facts immediately distinguishable from the case which is now before us.

So far as the facts in *Krishna Rao's case* (1) are to be collected at all from the judgment, it would appear that the Court there had before it nothing more than this that two accused persons were severally charged with giving false evidence and were tried together. The offences, says the Bench, were distinct: there was no charge of mutual abetment or conspiracy such as under section 239 might possibly have justified a joint trial.

Here the facts are very different, for the case for the prosecution, and it is that which must be looked at when we are considering the propriety of the charges, was that there was one sustained and continuous plot for the purpose of screening the real offenders in this robbery, and of exposing Tukya, an innocent man, to a false charge with a view that the accused or some of them might participate in the stolen property. To secure this end various means had to be resorted to. One of those means, and only one, a mere incident in the whole transaction, was the giving of false evidence in the prosecution of Tukya.

It appears to us, therefore, that section 239 of the Code is distinctly applicable, and that, in the circumstances of the case, the joint trial was not only legal but was demanded in the interests of public time and public convenience.

We may add that during the course of the hearing before the Sessions Judge,

(1) 4 Bom. L. R. 53.

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additional charges were framed against the fifth accused charging him with abetment of the other accused in respect of other offences committed in the course of this plot. The case in this respect resembles *Emperor* v. *Datto Hanmant Shahapurkar* (2), and here, as there, the accusation against all the accused persons is that they carried out a single scheme by successive acts done at intervals, but there was complete unity of project, and the whole series of acts were so linked together by one motive and design as to constitute one transaction within the meaning of section 239. This preliminary objection must, therefore, be disallowed.

Coming to the merits and applying the evidence which, for reasons already given, we hold to be trustworthy, we cannot doubt the propriety of this accused No. 5's conviction of having intentionally given false evidence before the first class Magistrate. It is true that the charge in this respect was not framed with all the precision desirable, but Mr. Binning candidly admits that he can make no point of this since his client certainly had full notice of the particular part of his deposition which was impeached as false. And that is unquestionably the fact. The deposition in question is Exhibit 46, and in it this accused stated on solemn affirmation that he accompanied the first accused and the rest of the Police party on their first exodus from the village Patkul to the waste lands to the north; that there he saw Tukya running away; that he and others pursued and arrested Tukya; and that Tukya said he was a Mang from the Nizam's Dominions and confessed that he had committed the robbery at Pandharpur and had got the property. It is to be observed that in this original deposition, there is nothing to suggest that the accused No. 5 did not accompany the Police party from the village Patkul itself—indeed that is the plain implication in the deposition; but the main ground upon which the deposition is now sought to be saved is, not that accused No. 5 was with the Police party when they started, but that after they had started and had been gone some minutes, a constable came and fetched the Patil, who then followed the party to the waste land. It is plain that this rather fine distinction receives no countenance from the original deposition, but appears to owe its origin to the ingenuity of Counsel seeking some means of harmonising the deposition with the accepted evidence. But the evidence is fatal to the suggested harmony, for on the evidence it is clear that the Patil did not accompany the Police party at any time on their excursion to the waste lands, but that he went there only afterwards when, after Tukya's pretended capture, he on the first accused's orders took out a Panch from Patkul. This is clear not only from the evidence of the accomplice Yadu and the witness Tukya, but also from the evidence of the witnesses Abaji Vinayak, Sakhya Hari, Shankar Hari, Chandya Khandu and the two Panch men, Krishna and Shivlinga. These last two witnesses prove further that when they and the Patil went out at the Sub-Inspector's summons, they lost their way to the particular spot where Tukya was in custody: there could have been no losing of the way if the Patil had only just returned from the spot after witnessing Tukya's capture.

There is nothing on the record to bear out the accused's present attempted defence or to suggest that the witnesses should not be believed. We must, therefore, come to the conclusion that the Patil did not accompany the Police party on their excursion which led to the seizure of Tukya, and all that part of his deposition, to which reference has been made, was false in fact. But if it was false in fact, it was certainly false to the accused No. 5's knowledge. He has been acquitted on the charge of complicity in the general conspiracy, and though the record contains matters of suspicion against him even in this respect, we are willing to accept the Judge's view as most in favour of the accused and hold that he was no party to the conspiracy prior to the 30th of November. That, however, has no bearing upon the charge upon which he has been convicted, and which, for the reasons given, has, in our opinion, been fully established against him.

We have now explained the reasons for which, in our opinion, these convictions must all be affirmed. Our judgment has run to some length owing solely to the importance of the case, and not at all to the difficulty; for difficulty there was none. No case in our experience has been more convincingly established. We need not waste words in

(2) 30 B. 49; 7 Bom. L. R. 633; 2 Cr. L. J. 578.

reprobation of this crime. Such persons as the accused are not to be affected by mere words of whatever severity; they are to be reached only by sharp punishment and the fear of punishment. The sentences imposed by the Sessions Judge have been carefully considered by us, and having regard to the character of this crime, a wicked and cowardly conspiracy against a defenceless lad, we are unwilling to reduce any one of the sentences by a single day.

The convictions and sentences are, therefore, confirmed, and these appeals are dismissed.

In parting with the case, we desire to place on record our high sense of the admirable work of the District Superintendent of Police, Mr. Kelly. It is to this Officer's detective ability, zeal and promptitude that the cause of justice is indebted for the exposure and punishment of this grave and carefully prepared conspiracy. A copy of these observations should be forwarded to Government for their information.

Appeal dismissed.

ALLAHABAD HIGH COURT.

CRIMINAL REFERENCE No. 476 OF 1912.

July 11, 1912.

Present:—Sir George Knox, Kt., Judge.

JIWA—APPLICANT

versus

EMPEROR—OPPOSITE PARTY.

United Provinces Municipalities Act (I of 1900), s. 147—Power of Municipal Board to have shop lawfully possessed vacated.

A Municipal Board is not empowered to require a person to give up his shop situate on land, not belonging to Municipality, of which he is lawfully in possession.

Criminal reference by the Sessions Judge of Saharanpur.

FACTS appear from the following order of reference made by the Sessions Judge.

ORDER OF REFERENCE.

In this case and Case No. 23, applications have been presented for the revision of an order of the Joint Magistrate of Roorkee, convicting the applicant Jiwa Ram of an offence punishable under section 147 of the Municipalities Act and fining him Rs. 10, and inflicting a further fine of Rs. 3 per day until he complied with a certain order of the Municipal Board of the Hardwar Union, and an order of the Deputy Magistrate of the Roorkee Sub-Division, fining him Rs. 25, for the same offence. The facts, so far as they appear from the record are, that, on the 31st of May 1911, the Municipal Board passed a resolution, a copy of which is on the record of the case, tried by the Deputy Magistrate, to the following effect. I give the words in full as they are of importance:—

Report Secretary Sahib dar bare dukanat ki jo platform par namauzun malum hote hain parhi gai, tajviz hui ki qawaid dar bare mumanent karne kholne dukanat platform ke kinare par banai jawen.

No rules, so far as the record in either case goes, were framed on this resolution, but apparently the resolution itself was taken as a rule. As a result of this resolution, the shopkeeprs occupying shops along the platform or esplanade fronting the Ganges were required to clear out. At least it is obvious from the circumstances of the case and the judgment of the Joint Magistrate that this was what they were required to do. I mention this because in the course of arguments before me, the learned Government Pleader attempted to show that all that was required was that the side of the shop fronting the esplanade should be closed. This, however, is obviously not the case. The wording of the resolution shows this, and Mr. Hobart's judgment clearly shows what the present applicant was punished for, was not vacating his shop. A notice in pursuance of resolution of the 31st of May 1911, was issued on the 14th of February 1912. All the other shop-keepers, except the applicant, obeyed the notice and cleared out. In respect of the shop in question, the applicant is a tenant of the Rani of Landhaura. She apparently was willing that he should give up the shop and was prepared to remit the rent due for the remaining period of his lease. He, however, as I have already said, declined to obey, with the result that a prosecution was launched against him and he was convicted and fined by the Joint Magistrate on the 16th of March 1912. In spite of this, he still remained recalcitrant and a second prosecution was launched as a result of which he was convicted by the Deputy Magistrate on the 3rd of May. The grounds on which

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the applicant came to this Court in revision are not tenable. The main question that is raised, is the lack of notice as required by law. It is also urged that the applicant had not been given another shop in exchange and that for that reason, he was not compelled to obey the order. This second ground obviously cannot be relied on. As regards the first, even if it be allowed that sufficient notice was not given to the applicant on the first occasion, there is no doubt that he had ample notice before the second prosecution. In fact it is proved that the Municipal Secretary himself went and served the notice. In arguments before me, the application was supported on totally different grounds. By these arguments, the validity of the whole transaction was challenged. Before considering this question, I may clear the ground by saying that it is an admitted fact that the land and the shop in question are not the property of the Municipality. The question then arises as to the right of the Municipality to require the applicant to vacate the shop. I have searched through the Municipal Act and can find no section under which a Municipal authority is empowered to require a person to give up his shop situate on land, not belonging to Municipality, of which he is lawfully in possession. I have examined the rules of the Hardwar Union and I can find no rule which would justify such an action by the Municipality, and lastly, even supposing it was in the power of the Municipality to make rules such as those foreshadowed by the resolution of the 31st of May, these rules would not come into effect until they had been published in the Gazette and confirmed by the Local Government as laid down in section 133 (2) of the Municipalities Act. Therefore, it appears to me that the whole action of the Municipality in this matter has been *ultra vires*, and, therefore, the applicant has not disobeyed any lawful direction given by the Board. It was suggested in arguments by the learned Government Pleader that the real object is to prevent the applicant and the other shop-keepers, who had shops near him, from encroaching on the esplanade, which is admittedly Municipal property. The Municipality has ample powers to prevent this. It is not for an encroachment that the applicant has been convicted and punished. I accordingly am of opinion that the convictions and sentences in these two cases should be set aside, and I accordingly report them under section 438 of the Criminal Procedure Code for the orders of the Honourable High Court.

JUDGMENT.—This case has been properly reported by the Sessions Court of Saharanpur. The order passed under section 147 of Local Act I of 1900 is illegal. It is set aside. The fine or any portion of it, if paid, will be refunded.

Reference accepted.

BOMBAY HIGH COURT.

CRIMINAL REFERENCE NO. 62 OF 1912.

August 29, 1912.

Present:—Mr. Justice Batchelor and Mr Justice Rao.

EMPEROR—PROSECUTOR

versus

INTYA SALABATKHAN—ACCUSED.

Criminal Procedure Code (Act V of 1898), ss. 337 (3), 209, 215, 437—Pardon—Approver—Discharge of co-accused by Magistrate—Pardon withdrawn—Approver committed to Sessions—Power of High Court to direct further inquiry against discharged accused—Joint trial of approver and discharged persons—Quashing of commitment.

Five persons were originally sent up for trial on a charge of dacoity. At the beginning of the Magisterial inquiry, conditional pardon was granted to one of the accused and the case proceeded against the remaining four accused. When the approver was examined as witness, he denied all knowledge of the dacoity and in the absence of material evidence against the four accused, they were discharged by the Magistrate under section 209, Criminal Procedure Code. Subsequently, the pardon tendered to the approver was withdrawn and he was committed for dacoity to the Court of Session.

The material piece of evidence against the approver was his confessional statement incriminating both himself and the other accused. The Sessions Judge referred the case to the High Court for quashing the commitment of the approver and for an order directing re-trial of the discharged accused *along with* the approver:

Held, (1) that the High Court had power, under section 437, Criminal Procedure Code, to direct that further inquiry should be held in the case of the discharged accused and that if that inquiry ended in the framing of the charge, the said accused should be committed to the Court of Session;

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(2) that the provisions of sub-section 3 of section 337, Criminal Procedure Code, were fully carried out when they were applicable, namely, during the pendency of the Magisterial proceedings, and they did not constitute any bar against the High Court's ordering that, if the inquiry against the discharged persons ended in a commitment, they should be committed to be tried jointly with the approver;

(3) that even if the commitment of the approver were not quashed, the High Court could order the joint trial of the discharged accused with the approver by directing that the trial of the approver should be delayed till the Magistrate passed his final orders in the case of the discharged accused.

Sub-section 3 of section 337 contemplates only a case where there has been a commitment made by the Magistrate to the Court of Session or the High Court. It omits to consider the case where the Magistrate himself on his own responsibility discharges the accused person. The meaning of the sub-section is that the approver shall not be set at large until the judicial proceedings pending against the accused are finished. It is immaterial whether the proceedings are finished by a Magisterial order of discharge before a trial or by a Judge's order of acquittal after trial. In the case of the Magisterial discharge, the sub-section would be satisfied if the approver were detained in custody or on bail until the order of discharge was made, and the provisions of the sub-section would be inapplicable to any proceedings held thereafter.

Criminal Reference made by the Sessions Judge of Khandesh.

Mr. *M. V. Bhat*, for the Accused.

Mr. *L. A. Shah*, Acting Government Pleader, for the Crown.

JUDGMENT.—This is a Reference made by the learned Sessions Judge of Khandesh in the following circumstances. Five persons were originally sent up for trial before the first class Magistrate, West Khandesh, on a charge of dacoity under section 397, Indian Penal Code. At the beginning of the Magisterial inquiry, pardon was granted to one of the accused, named Intya, whom we will hereafter refer to as the "approver;" and the case proceeded against the remaining four accused. The case, however, never went beyond the Magistrate's Court, for in that Court the approver, examined as a witness, denied all knowledge of the alleged dacoity, and in the absence of material evidence against the four accused, they were discharged by the Magistrate under section 209 of the Criminal Procedure Code. After that was done, the pardon which had been tendered to the approver was withdrawn. The case against him in regard to the dacoity was proceeded with under section 339 of the Criminal Procedure Code, and it has ended in his being committed for trial to the Court of Session.

The learned Sessions Judge points out that the result of these proceedings, if they are to terminate where they now stand, is that the four accused persons, who were discharged, will escape ever having been tried upon one material piece of evidence which was not laid before the Magistrate, but which could be laid before the Court, if the discharged accused are ordered to be re-tried along with the approver. This piece of evidence is a confession which was made by the approver, and which is said to incriminate both himself and the other accused.

The question which we have to answer is, whether we have power to direct that the accused persons, who were discharged, shall be subjected to a re-trial jointly with the approver. We are of opinion that that question must be answered in the affirmative. It is clear that, under section 437 of the Criminal Procedure Code, in the case of any accused person who has been discharged, we have power to direct further inquiry. We have also power to direct, if that inquiry should end in the framing of a charge, that the accused person be committed for trial to a particular Court. *Prima facie*, therefore, we have power to order in the case of these accused persons, who were discharged, that there shall be a fresh inquiry, and if that inquiry ends in the framing of a charge, the four accused persons shall be committed to the Court of Session in Khandesh.

It is said, however, that under section 337 of the Criminal Procedure Code, sub-section 3, we have no power to direct that the trial of the four accused persons should be joint with that of the approver. But we are unable to accept the argument. It is clear that sub-section 3 of section 337 contemplates only a case where there has been a commitment made by the Magistrate to the Court of Session or the High Court. It omits to consider the case now before us, that is to say, the case where the Magistrate himself on his own responsibility discharges the accused person. It seems to us, however, manifest that the meaning of sub-section 3 is merely this: that the approver shall not be set at large until the judicial proceedings pending against the accused are finished. It is, we

think, for the purposes of the section, immaterial whether the proceedings are finished by a Magisterial order of discharge before trial or by a Judge's order of acquittal after trial. In the case of the Magisterial discharge, the sub-section would, we think, be satisfied if the approver were detained in custody or on bail until the order of discharge was made.

Now, in the case before us, these requirements of sub section 3 have been satisfied. The inquiry has proceeded to its lawful end. During that inquiry, the approver was examined as a witness, as required by sub-section 2 of the section; the approver was detained in custody or bail until the end of the proceedings; and the Magisterial inquiry terminated by the Magistrate's order discharging these accused persons. When that order was made, it seems to us that the provisions of sub-section 3 were spent, and are inapplicable to any proceedings held thereafter.

The present position of affairs is that the approver is under an order of commitment in the Court of Session, and that the four accused persons are discharged. Seeing that the provisions of sub-section 3 were fully carried out at the time when they were applicable, namely, during the pendency of the Magisterial proceedings, we are of opinion that they do not now constitute any bar against our ordering that, if the inquiry against the discharged persons ends in a commitment, they be committed to be tried jointly with the approver. We do not discuss the various cases, notably, *Queen-Empress* v. *Bhiu* (1), to which reference was made in argument, because none of these cases appears to us to have any direct bearing upon the state of facts now before us.

The next point taken was that this Court has no power to set aside the commitment of the approver, as the Sessions Judge in his reference asks us to do. Under section 215 of the Criminal Procedure Code, a commitment once made can be quashed by this Court upon a point of law only; and there is some difficulty in holding that the point now under consideration is a point of law. Without deciding that question, however, it appears to us that we can attain the object aimed at by another means. As we have said, it will be enough for us to direct that the District Magistrate, either himself, or by a competent Magistrate whom he may depute, do hold a fresh inquiry in the case of the four accused persons; to direct further that if upon that inquiry the Magistrate is of opinion that a charge should be framed, he shall frame a charge committing these accused persons for trial to the Court of Session; that in that case, the trial of these four accused persons shall be held jointly with the trial of the approver already committed; and that in order that no practical difficulty be created by these directions, the trial of the approver before the Court of Session be delayed until the Magistrate has passed his final order in the inquiry into the case of the four accused persons.

Order accordingly.

(1) 23 B. 493.

ALLAHABAD HIGH COURT.

CRIMINAL REVISION PETITION No. 497 OF 1912

July 31, 1912.

Present :—Mr. Justice Tudball.

JAGDAMBA PRASAD AND OTHERS—APPLICANTS

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1893), s. 107—Security to keep peace—Procedure.

A Magistrate, in ordering a person to furnish security to keep the peace, must follow the directions laid down in Chapter VIII of the Code of Criminal Procedure and give the person bound over an opportunity to show cause.

Criminal revision against an order of the Officiating District Magistrate of Pilibhit.

Mr. *Satya Chandra Mukerji*, for the Applicants.

Mr. *R. Malcomson*, Assistant Government Advocate, for the Crown.

JUDGMENT.—This application in revision arises out of peculiar circumstances. It appears that in the absence of the District Magistrate of Pilibhit, a Police report, which is not to be found on the record, was submitted to a Magistrate of the first class who was then in charge. On the basis of that report, the Magistrate, on the 3rd of June, which was a holiday, sent for certain persons and simply ordered them to give security to keep the peace up to the 7th of June. It appears that there was some meeting or other connected with the Arya Samaj,

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and accordingly the Magistrate was afraid that it might end in a breach of the peace. He accordingly passed the aforesaid order. The period for which the order was given has expired. The matter, therefore, does not call for interference by this Court. But it is necessary to point out that the Magistrate's action was quite illegal and improper in that he has ignored completely all the directions which have been laid down in Chapter VIII of the Code of Criminal Procedure in respect of security for keeping the peace. The persons who were bound over had not even been given an opportunity of showing cause, and none of the procedure laid down in Chapter VIII was followed. If the order had covered a larger period and if it had been still in force, it might then have been necessary to set it aside. As, however, nothing has happened and the period has expired, there is no necessity for interference by this Court. Let the record be returned.

Record returned.

BOMBAY HIGH COURT.

CRIMINAL APPLICATION FOR REVISION No. 252 OF 1912.

September 27, 1912.

Present:—Mr. Justice Batchelor and Mr. Justice Rao.

In re ARDESHIR KAVASJI KARANJAVALLA—ACCUSED.

Criminal Procedure Code (Act V of 1898), ss. 195, 435—Revision—"Inferior criminal Court"—District Registrar—Sanction to prosecute granted by District Registrar—High Court's power to interfere.

A District Registrar is not an inferior Criminal Court within the meaning of section 435, Criminal Procedure Code.

Queen-Empress v. *Tulja*, 12 B. 36, followed.

Consequently, the High Court has no power, under section 435, Criminal Procedure Code, to interfere with an order passed by a District Registrar granting sanction for the prosecution of a person for an offence.

Mr. *T. R. Desai*, for the Accused.

Mr. *L.A. Shah*, Acting Government Pleader, for the Crown

JUDGMENT.—The applicant before us was, on the 24th of May last, summoned to attend on the 5th of June following before the Sub-Registrar in connection with the proposed registration of an agreement which had been entered into between the applicant and one Dinshaji. The applicant did not attend, and the agreement was registered as against Dinshaji only. On the 3rd of July, Dinshaji appealed to the District Registrar praying that the agreement should be registered as against the applicant also. On the 11th of July, the District Registrar issued a summons to the applicant to attend on the 19th of July, at 11 o'clock in the morning. The applicant did not so attend; but learning later in the day that the District Registrar had, in consequence of his absence, made an order against him at about 3-30 or 4 o'clock in the afternoon, he sought to see the District Registrar. It would appear that the District Registrar saw him, but declined to modify the order already made. That order was an order passed apparently under section 195, Criminal Procedure Code, and directed the applicant's prosecution under section 174, Indian Penal Code.

The present application is, in the words adopted by the applicant, this: "He prays that your Lordships will be pleased to send for the record and proceedings and reverse the order directing prosecution." The only question, therefore, we have to decide is whether we should reverse that order or not. It is urged by Government Pleader that we have no jurisdiction or authority to interfere with the order, whatever our views might be concerning it upon its merits, and we are of opinion that that contention must prevail. The application is made under section 435, Criminal Procedure Code, which defines our revisional power. That section enables us to call for and examine the record of any proceeding before any inferior Criminal Court situate within the local limits of our jurisdiction.

Ground No. 4 of the grounds taken in the petitioner's own application recites that "neither the Sub-Registrar nor the Registrar is a Court." That, therefore, is the view which the petitioner himself has adopted upon this subject. We are of opinion that as it happens the view is correct. We think that the District Registrar is not within the meaning of section 435 an inferior Criminal Court and we may refer to *Queen-Empress* v. *Tulja* (1) in support of our opinion. If that is so,

(1) 12 B. 36.

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then it is clear that under section 435, Criminal Procedure Code, the application does not lie and we have no authority to interfere with the action which the District Registrar has taken. That being so, we must reject this application and decline to express any opinion one way or the other with regard to the merits of it.

Application rejected.

CALCUTTA HIGH COURT.
CIVIL REFERENCE No. 12 OF 1912.
December 2, 1912.
Present:—Sir Cecil Brett, Kt., Judge, and Mr. Justice Richardson.
In the matter of PURNA CHANDRA CHATTERJEE, MUKTEAR.

Legal Practitioners Act (XVIII of 1879), *ss.* 13, 14 —*Grossly improper conduct*—Muktear *adding his own name to list of* Muktears *in* vakalatnamah *at request of person representing executant of* vakalatnamah—*Absence of improper motive—Apology by* Mukhtear.

A *Muktear* added to the names, that were given in a *vakalatnamah*, his own name, and also altered certain words in the body of the *vakalatnamah*, at the request of the person who appeared to represent the individual who had executed the *vakalatnamah*, without any improper motive. He pointed out to that individual, who came to engage him to file a criminal appeal, that he could not do it unless the *vakalatnamah* contained his name, and thereupon at the request of this person he added his name:

Held, that although the *Mukhtear* was wrong in making the alteration in the *vakalatnamah*, yet in doing so, he was not actuated by any improper motive which would constitute grossly improper conduct under the Legal Practitioners Act, and that, therefore, there was no reason for passing any order under section 14 of the Act.

The *Mukhtear* in an apology expressed his regret for what he had done:

Held, that the apology might be accepted.

Reference by the District Magistrate of Murshidabad, through the Sessions Judge of Murshidabad, under the Legal Practitioners Act. The reference was as follows:—

REFERENCE BY THE MAGISTRATE.

One Umesh Ghosh, while in Jangipur Sub-Jail, duly executed a *vakalatnamah* on the 11th June empowering six Vakils to conduct his appeal.

On the 13th June, Babu Purna Chandra Chatterji together with another *Mukhtear*, without the knowledge of those six Vakils, and without Umesh Ghosh's authority, altered such *vakalatnamah*, changing the words 'Vakil', and '*vakalatnamah*' into 'Pleader' and '*pleadernamah*' and added his own name and that of four other *Mukhtears* to such Vakils' names and endorsed the word 'accepted' on such paper and signed such acceptance.

On the same day, he presented an appeal petition to me with such 'power' attached, intending me to believe that Umesh Ghosh had duly empowered him to conduct the appeal.

Such conduct is such as is contemplated in clause (*b*) or (*f*) of section 13 Legal Practitioners Act.

While I have endeavoured to discuss impartially the relative seriousness of the *Mukhtear's* conduct, I have forborne at the end from giving any more definite opinion than that he should be suspended or dismissed, because on the last day, a Barrister from Calcutta deliberately contended that I had for personal vindictiveness instituted these proceedings. I find the charge against the *Mukhtear* is proved. I beg to request that the High Court will be pleased to pass such orders as it may think fit.

Mr. *Pugh*, Counsel, Babus *Nil Madhab Bose* and *Tarakeswar Pal Chowdhury*, for the Mukhtear.

Babu *Ram Charan Mitra*, Senior Government Pleader, for the Government.

JUDGMENT.—This Reference has been made to the Court under section 14 of the Legal Practitioners Act by the District Magistrate of Berhampur through the Sessions Judge of that District against one Purna Chandra Chatterji, a *Mukhtear* of that District. The District Magistrate, in a proceeding, attached to his letter making the Reference, has come to the conclusion that Purna Chandra Chatterji is guilty of grossly improper conduct in his professional capacity on the following facts:—It appears that one Umesh Chandra Ghosh had been convicted and sentenced by one of the Criminal Courts at Jangipur in the District of Murshidabad. He wished to appeal and his maternal uncle took to him in the District Jail a written *vakalatnamah* for the purpose of engaging certain Pleaders to conduct the appeal. This *vakalatnamah* was executed by the prisoner affixing his mark in the presence of one of the Jail officers and was handed over to his maternal uncle. This

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person appears to have undertaken to arrange for conducting the appeal before the District Magistrate. The uncle's name is Gopal Chandra Ghosh. He appears to have come to Berhampur and from his affidavit it appears that he went to Purna Chandra Chatterji, the *Mukhtear*, whose conduct is the subject of reference. The *Mukhtear* took instructions from him but informed him that he could not appear to argue the appeal as his name was not included in the *vakalatnamah*. Afterwards in accordance with the request of Gopal Chandra Ghosh, he added to the names, that were given in the *vakalatnamah*, his own name and the names of other *Mukhtears* and also altered certain words in the body of the *vakalatnamah*. The appeal was finally argued and the appellant was acquitted. Afterwards, proceedings were taken against Purna Chandra Chatterji by the District Magistrate under the Legal Practitioners Act. But from the papers that have been submitted to us, it is not very clear how these proceedings were originated. It would, however, appear that the attention of the District Magistrate was directed to the *vakalatnamah* and that he asked for some explanations from Purna Chandra Chatterji. At the same time, it appears from the examination of Purna Chandra Chatterji, as recorded by the District Magistrate, that he was told that he was not obliged to explain how the alteration took, place. In consequence, Purna Chandra Chatterji at the time said nothing about it. The proceedings under the Act appear then to have been taken by the District Magistrate. The District Magistrate, in making the reference to this Court, has held that the conduct of Purna Chandra Chatterji was grossly improper, because he made the alteration in the *vakalatnamah* and because those alterations were not authorised by the person who executed the *vakalatnamah*. In the defence of Purna Chandra Chatterji before us, it has been argued by the learned Counsel that although the alteration was admittedly made by Purna Chandra Chatterji, it was not made with any improper motive so as to amount to grossly improper conduct within the meaning of section 14 of the Act. We have been referred to the affidavit sworn by the uncle of the accused who was the person who went to Purna Chandra Chatterji in order to instruct him to conduct the appeal and from that it would appear that the addition of names and the alteration were made by Purna Chandra Chatterji in the *vakalatnamah* at the request of the person. It seems that he pointed out to him that he could not appear to argue the appeal unless the *vakalatnamah* contained his name and that thereupon at the request of this person, Purna Chandra Chatterji added the names to the *vakalatnamah*. The question is whether in such circumstances, the conduct of Purna Chandra Chatterji is such as to call for punishment under the provisions of section 14 of the Legal Practitioners Act or in fact to amount to grossly improper conduct as contemplated by that section. We are of opinion that on the facts stated, it can hardly be held that the conduct attributed to Purna Chandra Chatterji amounted to grossly improper conduct. No doubt, he was wrong in making the alteration in the *vakalatnamah*. But, as it appears from the facts stated before us that the alteration was made at the request of the person who appeared to represent the individual who had executed the *vakalatnamah*, we think that it cannot be said that in making the alteration Purna Chandra Chatterji was actuated by any improper motive which would constitute under the provisions of the section grossly improper conduct.

We may observe that there appears at the time when these proceedings were instituted to have been some friction between the District Magistrate and the members of the Muktear's Association at Berhampur and in connection with that and with the present case, an apology was made by Purna Chandra Chatterji to the District Magistrate. In that apology, Purna Chandra Chatterji expressed his regret for what he had done in connection with the *vakalatnamah*. In the circumstances, we think that, though the conduct of Purna Chandra Chatterji was certainly improper in making the alteration in the *vakalatnamah*, the apology may be accepted.

We, therefore, see no reason on this Reference to pass any order under section 14 of the Legal Practitioners Act against Purna Chandra Chatterji, holding as we do that the conduct which formed the subject of the reference is not such as to bring him within the purview of that section of the Act.

In re KESHAV NARAYAN MANOLKAR.

BOMBAY HIGH COURT.

CRIMINAL APPLICATION FOR REVISION No. 299 OF 1912.

September 27, 1912.

Present:—Mr. Justice Batchelor and Mr. Justice Rao.

In re KESHAV NARAYAN MANOLKAR —APPLICANT.

Criminal Procedure Code (Act V of 1898), s. 476 —Offence committed by person not party or witness in case—Jurisdiction to order prosecution—Stay of criminal proceedings—Pendency of civil appeal.

It is not necessary under section 476, Criminal Procedure Code, that the person proceeded against should be a party or a witness in the proceedings before the Court ordering his prosecution. All that is required is that such an offence, as is there referred to, should be either committed before the Court or brought under its notice in the course of judicial proceedings.

The mere pendency of a civil appeal is not in itself sufficient ground for staying criminal proceedings, under section 476, Criminal Procedure Code.

In re *Devji* valad *Bhavani*, 18 B. 581, followed.

FACTS.—In an application for Probate of a Will by a minor's guardian, it was found that the Will was a forgery. The applicant was an executor of the Will but he did not appear in the case as a party or a witness. The Court ordered applicant's prosecution under section 476, Criminal Procedure Code, for forgery.

Mr. *Campbell* (with him Mr. *K. H. Kelkar*), for the Applicant.

Mr. *L. A. Shah*, Acting Government Pleader, for the Crown.

JUDGMENT.—Three points have been taken by the learned Counsel who appeared to support this application in revision. The *first* is, that the Court below had no jurisdiction in the case, inasmuch as the present applicant was not a party or a witness in the proceeding before the lower Court. Having regard to section 476 of the Criminal Procedure Code, we are clear that no such condition is required. All that is required is that such an offence as is there referred to should be either committed before the Court or brought under its notice in the course of a judicial proceeding. That condition was satisfied in this case, and the circumstance that the present accused was neither a party nor a witness seems to us to be irrelevant under section 476, Criminal Procedure Code.

Secondly, it was complained that the procedure adopted was irregular, inasmuch as the Civil Court was not authorized to issue a warrant for the arrest of the applicant. Even if this argument were good in law, we do not think that it could benefit the present applicant at this stage of the proceedings. We think, however, that it is not good in law, and that sub section 2 of section 478, Criminal Procedure Code, is ample authority for the action which the Assistant Judge took.

Lastly, it was urged that these criminal proceedings should be stayed inasmuch as from the judgment of the Civil Court there was pending a first appeal which had been lodged by the *Nazir*. We have, however, following *In re Devji* valad *Bhavani* (1), frequently expressed our view in this Court that the mere pendency of a civil appeal is not in itself sufficient ground for staying criminal proceedings such as these now under notice.

Then Mr. Campbell asked us to consider his client's application for bail. We are, however, unwilling to substitute our jurisdiction for that of the Assistant Judge who has taken such great pains in this case. At an earlier period of it, he refused bail on grounds which then were doubtless sufficient. We think that the most that we can say on this head is that the applicant, if so advised, may renew his application to the Assistant Judge, and if he is able to show that the trial is likely to be unduly delayed or that there is any adequate ground for varying the previous order, we feel sure that the Assistant Judge will vary it. We now discharge the Rule.

Rule discharged

(1) 18 B. 581

SUBRAMANIAN CHETTY *v.* MUTHIA CHETTY.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1137 OF 1909.

April 21, 1911.

Present:—Sir Ralph Benson, KT., Judge, and Mr. Justice Sundara Aiyar.

S. M. S. SUBRAMANIAN CHETTY—PLAINTIFF—APPELLANT

versus

V. K. A. MUTHIA CHETTY—DEFENDANT—RESPONDENT.

Damages—Cause of action—Contract to transfer negotiable instrument—Failure to perform—Measure of damages—Unstamped promissory-note executed on settlement of accounts—Admissibility in evidence—Promissory-note for previous debt dishonoured—Revival of debt.

A., as the agent of *B.*, took, in the name of a third party, a negotiable promissory-note from *C.*, a debtor of *B.*, for the sum due. On settlement of accounts between *A.* and *B*, in May 1905, it was agreed that *A.* should take possession of, and deliver to *B.*, the said promissory-note duly endorsed. *A.* failed to carry out this covenant and hence *B.* instituted a suit in December 1906 to recover from *A.* the amount of the note. At the settlement of issues, *A.* offered to hand over the note:

Held, (1) that it could not be said that *B.* had not sustained any damage. *A.* by taking the note in the name of a third party and allowing it to remain in his possession and neglecting to hand it over to *B.*, put it out of *B.*'s power to sue the debtor on the original consideration. *A.*, having more than reasonable time within which to perform his obligation under the covenant, his offer of performance of the obligation after the institution of the suit, could not affect *B.*'s right of action;

(2) that it was not necessary for *B.* to prove that *C.* had become insolvent or that *B.* would be unable to realise his debt if he sued *C.*;

(3) that *B.* was entitled to recover from *A.* the amount for which *C.* had executed the debt.

A promissory-note, executed in lieu of a previous debt, is only a conditional satisfaction of the debt. If the creditor retains the note in his own hands and it is dishonoured, the previous debt revives. But if the note has been endorsed to a third person, no suit can lie on the original debt.

Where on settlement of accounts between principal and agent, a promissory-note is executed, which being unstamped is inadmissible in evidence, nothing can be recovered on the settlement itself, as there is no completed obligation created by way of settlement except by the promissory-note.

Second appeal against the decree of the District Judge of Madura, in Appeal Suit No. 458 of 1908, presented against that of the Subordinate Judge of Madura (East), in Original Suit No. 115 of 1906.

Mr. *C. V. Anantakrishna Aiyar*, for the Appellant.

Mr. *K. Srinivasa Aiyangar*, for the Respondent.

JUDGMENT.—The defendant was plaintiff's agent at Jaffna carrying on business on plaintiff's behalf from March 1900 to August 1903. The plaintiff sues to recover three sums of money from the defendant. The first sum is claimed on account of a debt due to the plaintiff from a Jaffna debtor, from whom the defendant had taken a negotiable promissory-note for the amount due, in the name of a third party, one Subramanian Chetty, in August 1903, before he left Ceylon on the termination of his agency. Subsequently, when there was a mediation between the plaintiff and the defendant in connection with the settlement of the latter's accounts, it was agreed that the defendant should obtain possession of the promissory-note, get it duly endorsed in plaintiff's favour by the payee and deliver it over to the plaintiff. The defendant failed to carry out this covenant and the plaintiff, therefore, claimed to recover from him the amount of the note. At the time of the settlement of issues in the suit, the defendant offered to hand over the note to the plaintiff. He, subsequently, got the necessary endorsement in plaintiff's favour made and produced the note in Court. The plaintiff refused to receive it and the Subordinate Judge held his refusal justified and passed a decree in his favour. On appeal, the District Judge held that the plaintiff's claim for damages was premature and dismissed it. The ground of his judgment is that the plaintiff did not prove that he sustained any damage in consequence of the defendant's breach of his obligation under the covenant as he did not prove that the executant of the note had become insolvent or that he would be unable to realize his debt if he sued him. Now the defendant's contract, which is evidenced by Exhibit A, was made on 2nd May 1905, and the suit was not instituted till 4th December 1906. There can, therefore, be no doubt that the defendant had more than reasonable time within which to perform his obligation. We are unable to uphold the view that the plaintiff has not sustained any damage which he is entitled to recover. The defendant's offer of performance of his obligation, after the institution of the suit, cannot affect the plaintiff's right of action if he had such right at the date of the suit. We are of opinion that he was entitled to claim from the defendant the amount for which the Jaffna

debtor had executed the note Exhibit III. He could not have maintained a suit against the debtor in the Ceylon Courts for the original debt, for which Exhibit III had been executed, so long as it was outstanding in the hands of a third party. The principle, on which such a suit cannot be allowed to be maintained, has been clearly explained in "*A debtor, In re*" (1) by F. Moulton, L. J. The learned Judge says:—"A parallel case where a bill is taken in payment of a debt, say for instance in payment for goods sold, exactly illustrates what is the effect of taking a bill. It is perfectly true that it is only a conditional payment. It is a payment if the bill is paid, and if it is in your hands when it becomes due and is dishonoured, the debt revives. But if you have availed yourself of the character of the bill as a negotiable instrument, and have passed it out of your possession, so that the right to proceed on that bill is vested in some one else and not in you, at the date of the dishonour, the suspension of the debt continues just as much as if the bill was not overdue. A moment's consideration will show that the Courts would not be administering justice if they did not hold this to be the case, because otherwise you could sue for the price of the goods, while another man, through possession by your act of the negotiable instrument which had been given for the price, could make the debtor pay the amount over again . . . . When you have got it back, you can wipe it out, and the debtor can no longer say:—'There is an outstanding bill which suspends your right.'" These observations are exactly applicable to this case. The defendant, by taking the note in Subramanian's name and allowing it to remain in his possession and neglecting to hand it over to the plaintiff, put it out of the plaintiff's power to sue the debtor on the original consideration. See also *Ex parte Matthew* (2), *Davis* v. *Reilly* (3), Leake on 'Contracts,' page 633 (5th Edition). We reverse the District Judge's decision with respect to this item.

(1) (1908) L. R. 1 K. B. 344; at p. 350; 98 L. T. 652; 15 Manson 1; 77 L. J. K. B. 409.

(2) (1884) 12 Q. B. D. 506; 51 L. T. 179; 32 W. R. 813; 1 Morrel 47.

(3) (1898) 1 Q. B. 1; 66 L. J. Q. B. 844; 77 L. T. 399; 46 W. R. 96.

The two other items of the plaintiff's claim are based on Exhibits B and C, executed by the defendant in the plaintiff's favour on settlements of the accounts between the parties on their respective dates. These documents have been held by the lower Courts to be promissory-notes and to be inadmissible in evidence as they are not stamped. The appellant does not dispute this finding but contends that he is entitled to recover the amount in the circumstances of the case on the settlements themselves, but we agree with the lower Courts that the obligation created by the settlements was intended to be evidenced only by Exhibits B and C and that there was no completed obligation created by way of settlements except by those documents. The result is, that the decree of the lower Appellate Court, in so far as it modified the decree of the Subordinate Judge, must be set aside and the latter decree restored. The parties will pay and receive proportionate costs in this and in the lower Appellate Court.

Decree modified.

BOMBAY HIGH COURT.

ORIGINAL CIVIL SUIT NO. 12 OF 1912.

August 5, 1912.

Present:—Mr. Justice Beaman.

JETHIBAI—PLAINTIFF

versus

PUTLIBAI—DEFENDANT.

Transfer of Property Act (IV of 1882), s. 59—Equitable mortgage, essentials of—Deposit of title-deeds—Existence of debt—Intention to create security—Contract Act (IX of 1872), s. 25—Acknowledgment of time-barred debt without promise to pay—Equitable mortgage in lieu of time-barred debt—Right to enforce—Limitation Act (IX of 19 8), s. 19—Evidence Act (I of 1872), ss. 21, 32—Entries by creditor in samadaskat *book of debtor—Admission—Relevancy—Admissibility.*

The mere possession of title-deeds coupled with the contemporaneous existence of a debt is insufficient to raise the presumption that there was an equitable mortgage by deposit of title-deeds. In order to establish such a mortgage, it must also be proved that the title-deeds were deposited by the debtor as *security* for the debt, that is, the intention accompanying the deposit was to create a security for the debt.

A mere acknowledgment of indebtedness without any promise to pay is not such an agreement as is contemplated by section 25 of the Contract Act.

JETHIBAI *v.* PUTLIBAI.

Where time-barred debts are accepted by the debtor and made the consideration for an equitable mortgage effected by the deposit of title-deeds, the consideration would be valid and good in law and the equitable mortgage would afford a sufficient ground for the action of the mortgagee to sue for the debt, even though the requirements of section 25 of the Contract Act are not complied with. By the deposit of title-deeds as security for debt, the equitable mortgagor virtually discharges the debt by assigning to the creditor an interest corresponding in money value with the debt due on the property mortgaged. A time-barred debt may be a good consideration if accepted by the obligor as such.

Entries, made by a creditor in the *samadaskat* book of his debtor, in which the creditor mentions the fact of the debt and the deposit of the title-deeds, fall within the language and intention of section 31 (2) of the Evidence Act.

Although such entries are admissions in favour of the creditor, they are not excluded by section 21 of the Act, as that section allows admissions of this kind to go in evidence if admissible also under section 32.

Messrs. *Talyarkhan* and *Dastur* (with them Mr. *Davar*), for the Plaintiff.

Messrs. *Shortt* and *Desai*, for the Defendant.

JUDGMENT.—In this suit, the plaintiff seeks to enforce an alleged equitable mortgage for a consideration of Rs. 6,079 against a house in 2nd Bhoiwada Lane, the property of the deceased Parvatibai, against her executrix under the Will, her grandmother, Putlibai. The relationship of the parties commenced with Damodar Kanji, who left a widow Putlibai and a son Daya Damodar. Daya Damodar left him surviving a daughter Parvatibai. The plaintiff claims through one, Laxman, who left a widow Jaykore and a sister Jethi, the present plaintiff.

The alleged equitable mortgage is said to have been made by Putlibai and Parvatibai in or about August 1905 to Laxman in consideration of a balance of Rs. 5,079, at that time due as the result of long money transactions between himself and Damodar Kanji, and after Damodar Kanji, his son Daya Damodar and the further consideration of Rs. 1,000, said to have been advanced by the said Laxman to Putlibai and Parvatibai to meet the expenses of a suit which had originally been brought against Putlibai and the deceased Daya Damodar.

It is important to state at the outset that the evidence of one Samuel Ezekiel, a Municipal clerk, shows that Parvatibai was born in the month of December 1887 and, therefore, attained her majority in December 1905, something less than a year before this alleged equitable mortgage.

Daya Damodar died in the autumn of 1905, a few months before Parvatibai attained her majority. The Court has first to look at the evidence upon which the plaintiff relies for establishing the fact of the alleged deposit of title-deeds by Parvatibai or by her agent, generally or specially authorized in this behalf, Putlibai, in the month of August 1906; or from the point of view of the plaintiff, it will be more correct to say that the title-deeds are alleged to have been deposited some time previously to the entry made by the deceased Laxman in the *samadaskat* book of Parvatibai in August 1906. The plaintiff's case indeed appears to be that the deposit of the title-deeds preceded the actual creation of the mortgage and is left, so far as the evidence in this case goes, quite indefinite. But it may be presumed that the deposit is alleged to have been made subsequently to the death of Daya Damodar and before the entry in Parvatibai's *samadaskat* book of 1906.

The plaintiff opened her case with the evidence of her husband Daya Virji and followed that up by the evidence of one Virji Bhagwan. Touching the material point of the deposit of title-deeds, neither of these witnesses knows anything. It is true that in cross-examination it was being elicited from Virji Bhagwan that he had heard Putlibai's account of the deposit (which certainly would not have helped the plaintiff's case) when the witness was stopped. The plaintiff further asked to put in the answers given by Putlibai to certain interrogatories administered to her. The object with which the plaintiff wished to introduce that evidence was to show an inconsistency between what was then said by Putlibai and what is set forth in her written statement. How far answers to interrogatories are admissible in evidence except as admissions and when the person making them is not called as a witness, is a matter upon which I entertain some doubt. If Putlibai's answer to the first interrogatory had been admissible (and it has been put in by the plaintiff), it supports the case of the defendant and is the only direct evidence before the Court with the exception of one witness Narayan Shanker, upon whom I shall make more comments later on about the *factum* of the deposit.

The plaintiff has doubtless relied upon the presumption, which was originally drawn in the English Courts, since this

doctrine of equitable mortgage by title-deeds was created, in the year 1781, that from the mere adverse possession of title-deeds and the existence of a debt, the Courts were to infer that there had been a deposit with the intention of creating a security for the debt. It may be doubted whether the existing law in England is as strict in regard to that presumption since it has been so strongly reflected upon in many cases, almost immediately following the three decisions of Lord Thurlow in *Russell* v. *Russell* (1); *Featherstone* v. *Fenwick* (2) and *Hurford* v. *Carpenter* (3) by Lord Eldon, until it may be said to have been directly challenged in *Chapman* v. *Chapman* (4), decided by Lord Langdale as it used formerly to be, and in this country Courts are to be governed by their own Statutes. The language, no doubt, designedly used in section 59 of the Transfer of Property Act, in my opinion, points clearly to the Legislature having meant to adopt the principle of *Chapman* v. *Chapman* (4), afterwards distinctly affirmed in the case of *Dixon* v. *Muckleston* (5), for that passage in section 59 of the Transfer of Property Act lays particular stress on the intention of the depositor to create a security. So that even where there was a deposit and where there was a debt, although in the first instance there might still survive from the Courts of England a leaning towards drawing a presumption of the kind I have mentioned, that presumption might usually be displaced, and in any event, I think, it will be the duty of the Court to ascertain as far as possible what the intention accompanying the deposit really was. No doubt, that emphasizes, as Lord Eldon emphatically repeated on more than one occasion, the mischief of the whole doctrine of these equitable mortgages by deposit of title-deeds, namely, that the Courts have to uphold the transfer of interests in immoveable property by parole in direct opposition to the Statute of Frauds (to which full effect is given by our Registration Act) and not by writings. Still the law is now too well settled and in this country has been legislatively enacted in terms clear enough to preclude the need of any further discussion of underlying principles.

Reverting, then, to what I understand to be the starting point of the plaintiff's case, namely, that there was a deposit and co-existing debt, it is first to be decided whether both these conditions precedent to the drawing of the presumption required by the plaintiff are established. The evidence, upon which the plaintiff relies in support of the alleged deposit and of the existence of a contemporaneous debt, is to be found in Exhibits E and K, and Exhibit I and nowhere else. It is in evidence that Laxman used to lend money or have dealings with Damodar Kanji and Daya Damodar. Unfortunately for the plaintiff, the books of Laxman for the years between 1901, 1902 and 1906 are not forthcoming. No one knows what has become of those books. And this brings me to a singular episode in this case, which I may as well here explain, comment upon and dismiss. The title-deeds, upon which this suit is based, and one of the late Laxman's account-books were, it appears, discovered by Mr. Dalpatram and the Official Assignee, upon the information supplied by the attorneys of the parties who were then litigating with the present plaintiff, in a room of the Railway Station at Colaba. To make this intelligible, it must be explained that on the death of Laxman, leaving a widow Jaykore (and after the death of Jaykore), litigation commenced between two persons, Motilal and Gokuldas of the one part, and the present plaintiff of the other; and it appears to be the theory of the plaintiff now that during her life-time the widow Jaykore was going on pilgrimage and took these title-deeds as well as other documents of her husband and lost them at the Colaba Station. It is the suggestion of the defendant that some theory, however untenable, has to account for the non-production of the books. It is quite possible that the persons really responsible for carrying the books away and leaving them at Colaba Station were the two opponents of the present plaintiff Gokuldas and Motilal. However that may be, it appears to be a fact proved by the

(1) (1783) 1 Br. Ch. Cas. 269.
(2) (1784) 1 Br. Ch. Cas. 270 note.
(3) (1785) 1 Br. Ch. Cas. 270 note.
(4) (1851) 13 Beav. 308; 20 L. J. Ch. 465; 15 Jur. 265; 17 L. T. (o. s.) 70; 88 R. R. 507.
(5) (1872) 8 Ch. 155; 42 L. J. Ch. 210; 27 L. T. 804; 21 W. R. 178.

evidence of Mr. Dalpatram that after the death of Laxman and his widow Jaykore, the title-deeds, upon which it is sought to establish this equitable mortgage, were discovered in the "Lost Goods Room" of the Colaba Railway Station. So that we have to start our investigation into the alleged indebtedness of the deceased, Daya Damodar, and after him his daughter, Parvatibai, to the deceased Laxman upon what can be got from Laxman's account-books of the *Samvat* year 1958, Exhibit I, in this case. The account between the parties in that book shows a total indebtedness of, say roughly, Rs. 3,000. There is then a hiatus of from four to four and a half years before the plaintiff is able to produce any further evidence whatever relating to the alleged existing debt. That must be sought in the deceased Laxman's book of the *Samvat* year 1962, Exhibit K in this case. Turning, however, to the account of Putlibai and Parvatibai as representing the deceased Daya Damodar, it will be seen that it opens with a statement of balance of Rs. 5,079. At the foot of this are two one-anna receipt stamps, evidently affixed to obtain the signatures of Parvatibai and Putlibai. Against the top stamp, Putlibai's mark is set; but there is no signature or mark of Parvatibai. In the same account, there immediately follows an item of Rs. 1,000, said to have been advanced by Laxman to Parvatibai to defray Solicitors' costs of the litigation then being carried on against her and her son, Daya Damodar. Beneath this again, there are two one-anna receipt stamps against one of which Putlibai has set her mark. Again there is no signature of Parvatibai. The dates of these entries in the account-book of the deceased Laxman and all their particulars exactly correspond with the two similar entries admittedly in the handwriting of the deceased Laxman in Parvatibai's *samadaskat* book, Exhibit E. But while in the latter the two entries are immediately followed by a statement that the title-deeds, which are the basis of this suit, are with the writer Laxman as security for the above mentioned sums, as well as a certain power, nothing of that kind occurs in Laxman's own book, and in Exhibit E, being a *samadaskat* book, of course, there is neither of the signatures of Putlibai or Parvatibai.

The question first to be considered is whether Exhibit E is admissible in evidence at all, and, if so, of what value that evidence can be. As I stated at the close of the argument upon this exhibit when it was tendered, I think it cannot be excluded for want of registration upon the principles stated in a former judgment of mine in *Shapurji* v. *Bai Ratanbai* (6) [see also the cases of *Kedarnath Dutt* v. *Shamloll Khettry* (7) and *Gokul Das* v. *Eastern Mortgage and Agency Company* (8)]. Having regard to the common practice in Gujarat of entering accounts of this kind in what are called *samadaskat* books belonging to the debtors, I think, it may fairly be said that these entries by the creditor in such a book fall within the language and intention of section 32, clause (2) of the Indian Evidence Act; and although they are admissions in his own favour, they are not excluded by section 21 of the Act, for that allows admissions of this kind to go in evidence if admissible also under section 32. I am, therefore, in no doubt as to the admissibility of this exhibit; but it is altogether another question what weight should be attached to it. It is here, and here alone, that there is any evidence whatever of the intention with which the deposit title-deeds was made. If that evidence could be trusted implicitly, then there would be an end of the case. It was strongly contended from the commencement on behalf of the defendant that inasmuch as no debt was proved to be existing against the alleged depositor, that is to say, Parvatibai, there could be no case of an equitable mortgage.

The debt, which the plaintiff alleges constituted the consideration of the mortgage, is made up, as I have said, of a balance of Rs. 5,079 and a further advance of Rs. 1,000. So far as the balance is concerned, there can be no question but that it is time-barred and was time-barred at the time Putlibai acknowledged it in Laxman's book, Exhibit K. So that even were Putlibai at that time authorised to

(6) 9 Bom. L. R. 287 (*Notes*).
(7) 11 B. L. R. 405; 20 W. R. 150.
(8) 33 C. 410; 10 C. W. N. 276; 4 C. L. J. 102.

sign for Parvatibai, section 19 of the Limitation Act could not help the plaintiff. Nor can the acknowledgment of this debt, time-barred at the time it was so acknowledged, be an agreement within the meaning of section 25 of the Indian Contract Act. A mere acknowledgment of indebtedness without any promise to pay is certainly not such an agreement as was contemplated when the Legislature enacted section 25 and so it has been held over and over again in our Courts: See *Chowksi Himutlal* v. *Chowksi Achrutlal* (9). The other part of the consideration, however, namely, Rs. 1,000 alleged to have been advanced to Parvatibai as well as Putlibai on the 6th of August 1906, is not open to that objection. The only question touching that is whether Putlibai was authorised to acknowledge the debt on behalf of Parvatibai; whether in fact the loan was made to Parvatibai at all, and not as it appears on the face of it to Putlibai herself. In this connection, I may revert to the fact already noticed that in Exhibit K, both factors of consideration were evidently intended to be acknowledged by Parvatibai as well as Putlibai, but neither was. Parvatibai was at that time of full age and there is absolutely no evidence to show that in acknowledging the first balance or the receipt of the latter advance, Putlibai was acting as an agent of Parvatibai. So that a consideration of the material question whether or not there was a deposit of these title-deeds, and, if so, with the intention of securing these two sums, may start from the point that Parvatibai, the alleged mortgagor, was certainly not liable in law for any part of the consideration for the equitable mortgage which the plaintiff now seeks to have enforced against her. And it appears to have been the defendant's view that if that were so, there would be an end of the plaintiff's case. I, however, am of a different opinion. I think there can be no doubt of the correctness of Mr. Dastur's contention on behalf of the plaintiff that he is not compelled to invoke the aid either of section 19 of the Limitation Act, or section 25 of the Indian Contract Act, but that if the sums of money shown in Exhibits E and K were actually debts due to him (whether time-barred or not) by Daya Damodar, Putlibai and Parvatibai or by the two former alone and yet were accepted by Parvatibai and made the consideration for the equitable mortgage effected by the deposit of the title-deeds, then the consideration would be valid and good in law and the equitable mortgage would afford a sufficient ground for the plaintiff's present action. It cannot be doubted that a time-barred debt may yet be good consideration if deliberately accepted by the obligor as such. This is as old as the second resolution in *Twyne's case* (10), and although the English Courts have always looked with disfavour upon the doctrine of previous moral obligation, certain instances of that doctrine have survived all the reflections cast upon it. Thus it will be sufficient answer to what I understand to be the main part of the defendant's case to point to sections 59 and 60 in our own Contract Act. It is also well-settled that an executor may pay a time-barred debt. I also agree with Mr. Dastur that if Exhibit E be proved to the satisfaction of the Court to express the whole truth of the matter, then it could not be attacked on the ground that it fails to comply with the requirements of section 25 of the Contract Act, for a mortgage, whether legal or equitable, by which security is given for a debt, is something, I think, quite different from a mere agreement to pay a debt otherwise time-barred. In the case of a legal mortgage, no opening exists for any such argument as that upon which the defendant here relies, for there the form of the instrument would, were that necessary, comply in all respects with the requirements of section 25; yet I do not think that in any contest upon it, it would really be brought for the purposes of argument within the scope of that section, and the case appears to me to be precisely the same where the alleged mortgage is equitable instead of legal, that is to say, analysis reveals that what has been done between the parties is something more than a mere agreement to pay *in futuro* (which is what section 25 of the Contract Act sanctions in the case of an

(9) 8 B. 194.

(10) (1601) 3 Coke 212.

otherwise time-barred debt). By the deposit of title-deeds as security for debt, whether time-barred or not, the equitable mortgagor virtually discharges the debt by assigning to the creditor an interest corresponding in money value with the debt due on the property mortgaged.

That being my view of the law governing the transaction in question, it becomes clear, I think, that the decision of the case must depend upon the answer given to a mere question of fact, namely: Were the title-deeds deposited as security for the debt, as alleged by the plaintiff, or were the title-deeds deposited, as contended by the defendant, merely for the purpose of safe custody? In answering that question, considerations drawn from the nature of the debts which are alleged to form the consideration, will doubtless have weight; and it was for that reason that I have gone at greater length than otherwise I should have done into that part of the defendant's case. In favour of the plaintiff there is this fact, and as far as I can see this fact alone, that the title-deeds certainly were in her brother's possession, and she has produced the *samadaskat* book of the deceased Parvatibai with the entry Exhibit E, which, if true, shows how the title-deeds so came to be in Laxman's possession. But apart from that fact and that single piece of questionable evidence, there is absolutely nothing to support the plaintiff's case, nor will the presumption, upon which the English Courts used to place so much reliance, here avail her, for if it is to be a matter of mere presumption from the deposit of deeds with the contemporaneous existence of debt, the ground of that, I think, would entirely be cut away if the debts were shown to be non-existent in law. However, so far as Parvatibai, the alleged mortgagor, is concerned, there was no debt shown to have been incurred by her to Laxman nor any debt proved to have been binding upon her at the time the alleged deposit was made. The bulk of the alleged consideration money, as I have shown, was certainly not a debt owed at that time by Parvatibai. The lesser sum of Rs. 1,000 appears on the face of the documents to have been advanced to Putlibai. The plaintiff, as I have said, has put in the answers of Putlibai to interrogatories, and if the Court is entitled to look at those (which I rather doubt), Putlibai is found to declare that she deposited the title-deeds with Laxman for safe custody. It is also her case that not only the loan of Rs. 1,000 was made to her personally but that she has completely discharged it. In addition to this, there is the evidence of the witness Narayan Shankar, which I mentioned at the opening of this judgment. If that witness is to be believed, there can be no doubt of the truth of Putlabai's defence, namely, that these title-deeds never were deposited with Laxman by way of equitable mortgage. I do not, however, place much reliance upon the evidence of Narayan Shankar. On the face of it, his evidence is so full of improbabilities and exposed to criticism as obvious as destructive that I should have been disposed to dismiss it altogether in calculating the probabilities for and against the truth of the rival cases. I must not, however, forget that where the central fact is left so much in uncertainty, the onus of proof lies heavily upon the plaintiff. She does not discharge it, in my opinion, as she evidently thinks she did by merely producing the title-deeds, and then by pointing to an entry in Laxman's own hand-writing in his own favour showing how he became possessed of them. That very entry goes some way towards corroborating the truth of the defendant's case. The defendant's story is that on the death of Daya Damodar in the autumn of 1905, his mother Putlibai went on a pilgrimage, and, before leaving, deposited these deeds and other books of account with Laxman. The entry Exhibit E shows that although the balance was struck and further advances made on August 6th, 1906, the actual deposit of the deeds must have taken place at some previous time, for the entry is to the effect that "the deeds are lying with us." This entirely accords with the version given by the defence. Moreover, if the deeds had been lying for any length of time with Laxman before they were thus allocated to be the security for pre-existing debts, the deposit must certainly in the first instance have been made by Putlibai and not by Parvatibai, and it is almost equally certain that at the time the deposit was made, there could have been no intention of thereby creating a security, or in other words, giving the plaintiff's brother Laxman the equitable

mortgage. All these considerations point to the probable truth of the defendant's version, namely, that at first, at any rate, Putlibai did deposit the title-deeds of this property with Laxman for safe custody. Then what evidence is there of Parvatibai, after having come of age, having given authority to Putlibai to convert the custody of Laxman from that of a mere trustee into that of a mortgagee? Once more I repeat, except the entry in Laxman's hand-writing in Parvatibai's *samadaskat* book, absolutely none. Considering the terms of confidence upon which these two women were with Laxman in the year 1900, considering that Putlibai is so illiterate as not to be able to sign her own name (and there is nothing to show that Parvatibai was in a better position to safeguard her own interest), I should hesitate indeed before accepting this single uncorroborated piece of evidence made by the plaintiff's brother himself and not really exposed to any critical scrutiny by the ignorant women, against whom it was to be used, as a sufficient ground for holding that an equitable mortgage had been created and the plaintiff was, therefore, entitled to succeed in this suit. On the contrary, after having given my best attention to the evidence as a whole, I have no hesitation in holding that the plaintiff has failed to prove the essential fact she was bound to prove, namely, that the title-deeds were deposited with her brother and deposited as security for the debts set forth in Exhibit E and Exhibit K by Parvatibai or by anyone, generally or specially, authorized by her to act on her behalf in a matter of such importance.

The result of this finding of fact is that the plaintiff's suit must be dismissed with all costs.

Suit dismissed.

Attorneys for the Plaintiff: Messrs. *Mehta* and *Dalpatram*.

Attorneys for the Defendant: Messrs. *Hiralal & Co.*

ALLAHABAD HIGH COURT.

EXECUTION FIRST CIVIL APPEAL NO. 194 OF 1912.

December 9, 1912.

Present:—Mr. Justice Tudball and Mr. Justice Rafique.

SATYA SHANKAR GHOSAL AND OTHERS —DECREE-HOLDERS—APPELLANTS

versus

MAHARAJ NARAIN CHOUDHRI AND OTHERS—JUDGMENT-DEBTORS—RESPONDENTS.

Stay of execution during pendency of appeal—Power of lower Court to stay execution—Jurisdiction—Decree for possession executed.

A Court has no power to stay execution after an appeal has been filed to the High Court. The utmost that the lower Court can do is to stay its hands and go no further.

Where a decree for possession of the house has been executed, the decree can no longer be stayed, until the decree has been set aside in appeal; the Court below has no power to go backward to drive the decree-holder out of possession and re-place the judgment-debtors in possession.

Execution first appeal from the decision of the Subordinate Judge of Benares, dated the 25th of April 1912.

Mr. *J. N. Choudhri* (with him Mr. *H. K. Mukerji*), for the Appellants.

Dr. *Satish Chandra Banerji* (with him Mr. *Sital Prashad Ghose* and Dr. *S. N. Sen*), for the Respondents.

JUDGMENT.—The circumstances out of which this appeal has arisen are as follows:—The decree-holder, on the 26th of January 1912, obtained a decree for possession of certain house property together with mesne profits and costs. Under the decree, the judgment-debtors were directed to vacate the house within one month, *i. e.*, the judgment-debtors were allowed one month's grace to remove their property. On the 11th of April 1912, the decree-holder applied to execute the decree. He asked to be put in possession of the house by ejectment of the judgment-debtors because the latter had not vacated it. They also asked for attachment and sale of moveable property in order to recover the costs and mesne profits. On the 20th of April 1912, the judgment-debtors filed an appeal against the original decree in this Court. No application was made at the time for stay of sale. On the 23rd of April 1912, the *Amin* in the Court below gave possession to the decree-holders and duly ejected the judgment-debtors. Move-

able property was also attached. On the 24th of April 1912, the judgment-debtors filed an application stating that they had filed an appeal in the High Court and had also applied to that Court for stay of execution, (which was incorrect), and they asked the Court executing the decree to postpone the proceedings until the order of the High Court was received. On the 25th of April, they made another application to the Court below stating that they had filed the appeal, but the decree-holders had in execution dispossessed them and attached their property, that they had money ready as security and they asked the Court to release the property and restore them to possession. The Court thereupon ordered the money to be deposited in the treasury as security, released the moveable property and passed an order to the *Amin* to re-place the judgment-debtors in possession. Accordingly, the decree-holders were dispossessed and the judgment-debtors re-placed in possession. It is against this order that the present appeal has been made. In the first place, on filing an appeal against the original decree, if the judgment-debtors wished to secure stay of execution, they ought to have applied at once to this Court for that purpose. The lower Court had no longer any power to stay execution after the appeal had been filed in this Court. In the next place, the decree having been executed in so far as possession of the house concerned, that portion of the decree could no longer be stayed, it having been executed. The utmost that the lower Court could have done on the 25th of April was to stay its hands and go no further. It had no power whatsoever to go backward to drive the decree-holders out of possession and re-place the judgment-debtors in possession. Its order was clearly passed without jurisdiction and was completely *ultra vires*. We accept the appeal, set aside the order of the Court below and direct that the decree-holders be at once restored to the possession which will be theirs until the decree is set aside. The appellants will have their costs in this Court including fees on the higher scale.

Appeal allowed.

PRIVY COUNCIL.

APPEAL FROM THE HIGH COURT AT ALLAHABAD.

November 8, 1912.

Present:—Lord Macnaghten, Lord Moulton, Sir John Edge and Mr. Ameer Ali.

SRI NARAIN AND ANOTHER—APPELLANTS

versus

Lala RAGHUBANS RAI—RESPONDENT.

Hindu Law—Joint family—Alienation—Immoral debts, proof of.

A general charge of immorality is not sufficient to prove that the debts were contracted for immoral purposes.

Appeal from a judgment and decree of the High Court at Allahabad, dated November 30th, 1909, varying a judgment and decree of the Subordinate Judge of Mainpuri, dated September 26th, 1907.

FACTS.—The appellants were the sons of Jang Bahadur, one of the original defendants. The said Jang Bahadur, jointly with his brother, Raja Bahadur, had contracted large debts from the plaintiff. On Bahadurs' making default in payment of interests, the plaintiff sued them as well as the present appellants asking for foreclosure of the mortgage of ancestral immoveable properties for the said debt.

The appellants alleged that the Bahadur brothers had squandered their ancestral property, were of immoral habits and had contracted the debts in question without family necessity. The Subordinate Judge decreed the plaintiff's claim in part, but the High Court allowed it in full.

Mr. *Ross, K. C.*, for the Appellants, contended that the share of the appellants could not be liable for the debt in question. It was for the mortgagee to prove that the debts were contracted for the benefit or necessities of the family. It has been proved that the said debts were contracted for immoral purposes to the knowledge of the respondent.

Mr. *DeGruyther, K. C.*, for the Respondent, contended that the appellants ought to have proved that the debts were contracted for immoral purposes. The debts were in point of fact contracted to discharge antecedent debts.

Mr. *Ross*, heard in reply.

JUDGMENT.

LORD MACNAGHTEN.—In this case, their Lordships entirely agree with the High Court that the appellants have failed to prove their case. Their evidence comes to nothing more

than a general charge of immorality which is not sufficient.

Their Lordships will, therefore, humbly advise His Majesty that this appeal should be dismissed, and the appellants will pay the costs.

Solicitors for the Appellants: Messrs. *T. L. Wilson & Co.*

Solicitors for the Respondents: Messrs. *Barrow, Rogers* and *Nevill.*

BOMBAY HIGH COURT.

ORIGINAL CIVIL SUIT.

September 26, 1912.

Present:—Sir Dinshaw D. Davar, Kt., Judge.

In re DHURAMSI MORARJI GOCULDAS —PETITIONER.

High Court—Jurisdiction—Testamentary Judge—Power to declare Will invalid—Power to issue Letters of Administration in face of Will—Practice—Original Civil Jurisdiction.

A Judge, exercising testamentary and intestate jurisdiction of the High Court of Bombay, has no power to declare that a Will made by a testator is invalid or inoperative in law by reason of the testator having no power to make such a Will and dispose of the property mentioned therein by that Will. Such a declaration can only be made by the High Court in the exercise of its Original Civil Jurisdiction.

The Testamentary Judge can adjust no civil rights to property between the parties.

Where a Will exists, the Testamentary Judge cannot ignore its existence and direct Letters of Administration to issue in the absence of a pronouncement by a Court of competent jurisdiction that the Will is in effect invalid and inoperative in law, although none of the executors under the Will are willing to act in the matter.

Mr. *Setalvad*, for the Petitioner.

Mr. *Craigie*, for the Opponent.

JUDGMENT.—Mr. Dhuramsi Morarji Goculdas, a very well-known and wealthy merchant of Bombay, died on the 13th of May 1912. He left him surviving a widow and three sons. During his life time, he was in possession and management of a very large estate consisting both of moveable and immoveable properties.

On the 4th of April 1902, Mr. Dhuramsi executed a Will which was prepared in the office of Messrs. Craigie, Lynch and Owen and the Will is duly attested by Mr. Craigie and his clerk. By this Will, he appointed Sir Narayan Ganesh Chandavarkar and Messrs. Tribhowandas Varjiwandas, Bhagwandas Narotamdas, Gopaldas Liladhar and Pritamlal Dhirajlal, the executors and trustees thereof. On the 10th of August 1903, Mr. Dhuramsi executed a codicil whereby he revoked the appointment of Gopaldas Liladhar and in his place substituted his brother Mr. Narotam Morarji Goculdas as the executor and trustee of his Will and in all other respects he confirmed the said Will by the codicil. In the third paragraph of his Will, Mr. Dhuramsi declares that all the property, both immoveable and moveable, which he possessed, was his own absolute property, and he then proceeds to deal with and dispose of the whole of that property by the said Will. In his Will, he gives legacies to his relatives, servants and cows. He then directs that a school or college and failing that an orphanage should be established at an outlay of Rs. 1,25,000 and that such institution should bear his name. He creates a trust of Rs. 1,50,000 in favour of his wife Ruttonvahu and after making various other provisions he deals with and disposes of the residue of his estate. Two of Mr. Dhuramsi's sons are adults, the third is a minor. The eldest son, Mr. Ruttonsi, has presented a petition to this Court headed. "In its Testamentary and Intestate Jurisdiction." In that petition, he states that his father, the late Mr. Dhuramsi and his sons were members of a joint Hindu family and that the entire property which he died possessed of was joint and ancestral property. He claims that he is now the eldest male member of the joint family and manager of the property and that as such he is entitled to administer that part of the joint family property which stands in the name of Dhuramsi Morarji. He has annexed to his petition a schedule enumerating certain shares in Joint Stock Companies, Government Promissory Notes, Municipal Bonds, etc., but has omitted to give any schedule of immoveable properties which I was told at the hearing are of the value of more than twenty lacs of rupees. In this petition, he says that Letters of Administration to the estate of the said Dhuramsi Morarji Gocaldas limited to such property as he held as a member of joint Hindu family may be granted to him having effect throughout the Bombay Presidency and that such property may be exempted from payment of Probate Duty.

In re DHURAMSI MORARJI GOCULDAS.

On the presentment of this petition, the Testamentary Registrar directed citations to be issued to all the executors. The citations called upon the executors named in the Will and the codicil to appear before the sitting Judge in Chambers and produce the Will and the codicil and to accept or refuse the office of executor thereunder and otherwise to show cause why administration as prayed should not be granted to the petitioner.

* * * * *

I have no reason whatever to doubt that the statements made in the petition are wholly correct and it is possible that the petitioner would later on be entitled to ask me to make the order he seeks by his present petition. The difficulty that faces me now is: Can I make this order at this stage in the face of the Will and the codicil? This application is made to me in my capacity as Testamentary Judge. A Judge exercising testamentary and intestate jurisdiction of the High Court of Bombay has no power to declare that a Will made by a testator is invalid or inoperative in law by reason of the testator having no power to make such a Will and dispose of the property mentioned therein by that Will. The Testamentary Judge can adjust no civil rights to property between the parties. I have now produced before me a Will in which the testator declares that the property in question is his own absolute property. The petitioner contends that that is an incorrect statement and that the property was joint ancestral property and has devolved upon him and his brothers by survivorship. The Will gives numerous legacies and directs a charitable institution to be established and creates several trusts. If I accede to the petitioners's request and make the order that he prays for, I would in effect be making a declaration that the Will and the codicil are inoperative and invalid in law. As a Testamentary Judge, I have no power to make any such declaration and it would bind no one. Besides this, I feel that I cannot ignore the existence of the Will and direct letters to issue in the absence of pronouncement by a Court of competent jurisdiction that the Will is in effect invalid and inoperative. Such a declaration can only be made by the High Court in the exercise of its Original Civil Jurisdiction, and until that declaration is made, I feel bound to withhold making the order such as is asked for. The Will and the codicil have been produced before me by Mr. Craigie, who appeared for Mr. Narotam Morarji Goculdas, whose instructions to him were that he was to say or do nothing that would in any way embarrass the petitioner or his brothers and he has carried out those instructions. While the matter was being argued by Mr. Setalvad, it struck me that perhaps an originating summons would have best served the purpose which the petitioner has in view, but on further consideration I doubt whether that would be an effective procedure. However, that is a matter entirely for the consideration of the advisers of the petitioner. Although none of the executors are willing to act in the matter, it must be remembered that the Will seeks to establish a large charity and there are numerous beneficiaries under the Will and I cannot, in testamentary proceedings, make an order to their prejudice and without their having an opportunity of being heard in support of the Will. Until in properly constituted legal proceedings a declaration is obtained from a Court of competent jurisdiction that the late Mr. Dhuramsi Morarji Goculdas had no power to make a testamentary disposition of the properties that were in his possession during his life time and that the Will and codicil executed by him are invalid and inoperative in law, I feel that I would not be justified in granting Letters of Administration as prayed in the present petition and ignoring the Will and the codicil that are produced before me. I direct that the Will and the codicil produced by Mr. Craigie and handed in to me be delivered to the Testamentary Registrar to be by him lodged in the registry. After a declaration is obtained that these two documents are not operative and are invalid in law, I shall be ready to entertain any application that may be made to me for an order of the nature prayed for in the present petition. In fact, I see no difficulty in renewing the application on the present petition supported by a decree of this Court declaring the Will and codicil inoperative and invalid.

I must, under the circumstances, decline to make the order asked for at this stage.

Attorneys for the Petitioner: Messrs. *Payne & Co.*

Attorneys for the Opponents: Messrs. *Craigie, Blunt & Caroe.*

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No 868 OF 1912.

November 11, 1912.

Present:—Mr. Justice Benerji.

GULLA MAL AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

CHUNNI LAL—DEFENDANT—RESPONDENT.

Specific Relief Act (I of 1877), s. 22—Specific performance of contract—Unfair advantage to plaintiff—Hardship to defendants—Discretion of Court.

Where a contract conferred an undue advantage on the plaintiff and caused a hardship to the defendant which was not anticipated at the time when the contract was entered into, the Court can, in its discretion, refuse specific performance of that contract.

Shib Lal v. *Collector of Bareilly*, 16 A. 423; A. W. N. (1894) 161, distinguished.

Second appeal from the decision of the Subordinate Judge of Barielly, dated the 31st July 1911.

Mr. *M. L. Agarwala*, for the Appellants

Dr. *Satish Chandra Banerji*, for the Respondent.

JUDGMENT.—This suit is in substance one for specific performance of a contract embodied in a document executed on the 25th of January 1910. The parties owned certain house property jointly. Under an award made in 1861, a portion of this property was partitioned, but some of it still remained joint. It is said that under the contract in question, it was agreed that the property which had remained joint should be divided in the manner provided for in the document. On the basis of this agreement, the plaintiffs brought the suit out of which this appeal has arisen and claimed the reliefs set forth in the plaint. The facts of the case are fully stated in the judgment of the Munsif. He dismissed the suit on the ground that the agreement of the 25th of January 1910 was entered into by the defendant without a full knowledge of its contents and that it was not binding on him. He also came to the conclusion that the contract made in that document gave the plaintiffs an unfair advantage and that the performance of it would cause undue hardship to the defendant. The lower Appellate Court affirmed the decision of the first Court not on the ground that the contract was not entered into by the defendant with full knowledge of the circumstances, but on other grounds mentioned in the judgment. I gave the parties an opportunity of compromising the case but nothing was done. I referred certain issues to the Court below by my order, dated the 3rd of May 1912. It has been found by the lower Appellate Court that the defendant executed the document of the 25th of January 1910 with full knowledge of its contents, but the learned Subordinate Judge has found that this document confers undue advantage on the plaintiffs and causes a hardship to the defendant which was not anticipated at the time when the document was executed. These findings must be accepted in this appeal.

Section 22 of the Specific Relief Act provides that a Court is not bound to grant specific performance merely because it is lawful to do so, but has a discretion in the matter and clauses (1) and (2) of the section provide that if the circumstances under which the contract is made are such as to give the plaintiffs undue advantage though there may be no fraud, and where the performance of the contract would involve some hardship on the defendant which he did not foresee, whereas its non-performance would involve no such hardship on the plaintiff, the Court should exercise its discretion and refuse to grant specific relief. In view of the findings in this case, the plaintiffs gained undue advantage. Certain portions of the property which have been found to belong to the defendant would go under the deed to the plaintiffs. The closing of the door, which now exists, and the opening of another door in that portion, which is in front of the defendant's *sehdari*, would cause great hardship to the defendant, which he did not foresee at the time. The opening of the door at that place might lead to considerable litigation between the defendant and *Musammat* Ram Kali. The present case is very similar to those mentioned in some of the illustrations to section 22, for example, illustrations (*e*), (*h*) and (*j*). Having regard to the findings at which the Courts

below have arrived, there was unfairness and inequality in the contract and as the plaintiff would still have the right to obtain partition, those Courts were justified under the circumstances in exercising the discretion vested in them under section 22 of the Specific Relief Act. The learned Counsel for the appellants referred to the case of *Shib Lal* v. *The Collector of Bareilly* (1). That case has reference to its own peculiar circumstances and there is no general proposition of law laid down in it which would help the appellants. I do not think I should be justified in interfering with the discretion vested in the Courts below under section 22, which they have exercised not arbitrarily but on reasonable grounds. I dismiss the appeal with costs.

Appeal dismissed.

(1) 16 A. 423; A. W. N. (1894) 161.

PRIVY COUNCIL.

APPEAL FROM THE HIGH COURT AT CALCUTTA.

October 29, 1912.

Present:—Lord Macnaghten, Lord Moulton, Sir John Edge and Mr. Ameer Ali.

SACHINDRA NATH ROY AND OTHERS—APPELLANTS

versus

THE SECRETARY OF STATE FOR INDIA IN COUNCIL—RESPONDENT.

Privy Council Appeal—Practice - Concurrent findings —Question of fact.

The Privy Council, not sitting as a Court of first instance, cannot take into account even well-founded criticism and disturb the concurrent findings in effect of two lower Courts purely on a question of fact, unless it is satisfied that such findings are erroneous.

Appeal from a judgment and decree of the High Court at Calcutta, dated March 27th, 1907, affirming a judgment and decree of the Subordinate Judge of Murshidabad, dated March 30th, 1904.

FACTS.—Special leave to appeal was granted by the Board on March 19th, 1908.

The respondent as plaintiff brought a suit against the appellants as defendants for a declaration that a certain *jalkar* or fishery appertained to or was part and parcel of *Jalkar* Gangapath Islampur and for recovery of possession of the same. The main questions for determination were, (1) whether the suit was barred by the law of limitation and the principles of estoppel and *res judicata* and (2) whether, on true construction and effect of the documentary evidence, the findings of the High Court were incorrect. The *jalkar* in question, extending from Pointi in the District of Bhagalpore to Sahibganj and Tartipur in the District of Maldah, was given in the time of Nawab Ali Vardi Khan in favour to one Kailo Maharani. Her family remained in possession thereof until 1805 when it was sold for arrears of revenue and purchased by the Government. In 1867, the said *Jalkar* was divided into two portions both being called *Jalkar* Gangapath Islampur. In 1870, the southern portion was sold to and permanently settled with one Paresh Nath who remained in possession till 1883 when it was sold to one Krishna Lal Singh *benami*, who remained in possession till 1892, when it was again sold for arrears of Government revenue and purchased by Government. Sometime after the last purchase, it was found that this southern portion of the said *Jalkar* was in the wrongful possession of the defendants, which discovery led to the present suit.

Messrs. *DeGruyther, K. C.*, and *Ross, K. C.*, appeared for the plaintiffs and argued that the suit was barred by the law of limitation, the principle of estoppel and the rule of *res judicata*. The High Court wrongly interpreted certain documents and failed to consider certain other documents which were material to the case. The respondents had not established their right to claim any relief set forth in their plaint.

Sir *Earle Richards, K. C.*, and Mr. *Dunne*, were not called upon to reply on behalf of the Respondent.

JUDGMENT.

LORD MACNAGHTEN.—This case has been very ably argued by Mr. DeGruyther. Speaking without having heard the other side, it is impossible to say that much of his criticism was not well-founded. But this Board is not sitting as a Court of first instance. The Board is not satisfied that the two judgments, which are in effect concurrent, are erroneous. It is purely a question of fact. Both Courts have come to a certain conclusion, and their Lordships do not think that they can interfere.

Their Lordships will, therefore, humbly advise His Majesty that the appeal ought to

be dismissed, and the appellants will pay the costs.

Solicitors for the Appellants: Messrs. *Downer* and *Johnson*.

Solicitor for the Respondent: *Solicitor, India Office*.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 464 OF 1912.

December 3, 1912.

Present:—Mr. Justice Chamier.

PRAG AND OTHERS—DEFENDANTS—APPELLANTS

versus

RAM NIRANJAN AND OTHERS—PLAINTIFFS—RESPONDENTS.

Mortgage—Prior and subsequent mortgages—Father impleaded as party to suit—Effect of decree on son.

A. mortgaged his share in 1887 to *B*. In 1892, he mortgaged the same share to *C*. In 1893, he again mortgaged that share along with other properties to *B*. A part of the consideration of the mortgage of 1893 was the sum due under the mortgage of 1887. In 1899, the heirs of *C*. brought a suit on the basis of the mortgage of 1892 and impleaded *B*. as subsequent mortgagee. At the time of the suit, *B*. was in Jail and had a son who had not been impleaded as a party to the suit:

Held, that *B*.'s son, who was not impleaded in the suit, was not bound by the decree obtained therein as he was not effectively represented in the suit.

Second appeal from a decision of the District Judge of Jaunpur, dated the 8th of January 1912.

Mr. *Muhammad Ishaq Khan*, for the Appellants.

Mr. *D. R. Sahwney*, for the Respondents.

JUDGMENT.—The facts found by the lower Appellate Court are as follows:

In April 1887, Akbar Ahir mortgaged his share in a fixed-rate holding to the respondent, Ram Niranjan, for Rs. 40. In May 1892, he mortgaged the same property to one Bhagwan Das. In June 1893, he mortgaged the same property along with a house, trees etc., to Ram Niranjan for Rs. 150, out of which the sum of Rs. 61-8-0 was due upon the mortgage of 1887. In 1899, the heirs of Bhagwan Das sued upon the mortgage of 1892 and obtained a decree for sale in execution of which they themselves bought the holding in August 1901. In that suit, they impleaded Ram Niranjan as a puisne mortgagee. Ram Niranjan had at the time a minor son, Bhagwan Prasad, who was joint with him and was interested in the mortgage. The decree shows that Ram Niranjan did not defend the suit. It is said that he was in Jail and that he sent a petition from Jail claiming to be a prior mortgagee of the property. The fact that he was in Jail was admitted before me but there is no such petition on the record. By deeds dated 1904 and 1909, the heirs of Bhagwan Das sold the plots of land to the grandsons of the original mortgagor Akbar and it has been found that the real purchaser was Akbar himself.

Ram Niranjan and his sons (two were born after the previous suit) have now sued upon the mortgage of 1893. The Munsif dismissed the suit but the Additional Judge on appeal held that the mortgage of 1893 was originally binding upon Akbar's family to the extent of the sum due upon the first mortgage of 1887 and that it could to that extent be enforced against the property in the hands of Akbar and his family, notwithstanding the suit of 1899 and subsequent proceedings. His view was that the sons of Ram Niranjan, not having been impleaded in the previous suit, were not bound by the decree obtained therein and that as the property had got back to the mortgagor, the latter could not be allowed to hold it free of the mortgage which had not been paid off.

If the decree of 1899 was binding upon the sons of Ram Niranjan, then it seems clear that the auction-purchasers held the land free of all encumbrances created by the mortgagors and it follows that when Akbar bought the land years afterwards from the auction-purchasers, he also obtained it free from encumbrances.

Thus the question for decision is whether the decree was binding upon the eldest son of Ram Niranjan who was not impleaded in the suit (the other sons were born later and may be disregarded). There is no evidence that the plaintiffs in the former suit were aware of the existence of Ram Niranjan's son but they would, no doubt, have discovered his existence if they had made inquiries. They were content to implead the person who appeared to have advanced the money.

Reference has been made to cases in which it has been held that a son cannot avoid a decree passed upon a mortgage made by his father merely on the ground that he was not a party to the suit but that he must show

RAM NATH v. BULAQI RAM.

that the mortgagee had notice of his interest and that after a sale has taken place in execution, he cannot avoid the sale except upon showing that he was not bound to pay the debt secured by the mortgage.

Those cases have little bearing upon the present case. Here the family consisting of Ram Niranjan and his son Bhagwan Prasad were in the position of first mortgagees as regards part of the amount due to them. All that they had to do was to plead and prove the first mortgage, a mere formality, for the existence of the first mortgage was disclosed by the mortgage of 1893, which was admitted by the plaintiffs in that suit. Had they done so, the plaintiffs in that suit would have been required to pay the amount due on the mortgage of 1887. It is the amount now due on that mortgage which has been decreed to them in the present suit. Ram Niranjan was not sued as manager of the family property and being at the time in Jail, he was not in fact in a position to manage that property. The question is whether Ram Niranjan's son was effectively represented in the suit. In my opinion, he was not. In many cases, it is possible to presume that a father represented his sons in previous litigation but in the present case, on the facts no such presumption arises. It appears to me that Ram Niranjan's eldest son was not bound by the decree obtained against his father and, therefore, could have enforced the mortgage of 1887 against the auction-purchasers and that the present defendants-respondents are in no better position. The appeal is dismissed with costs including fees on the higher scale.

Appeal dismissed.

S. N. DAR, B. A. LL. B.,
Vakil ~~High~~ Court,
SRINAGAR (Kashmir)

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 603 OF 1911.

November 29, 1912.

Present:—Mr. Justice Robertson and Mr. Justice Beadon.

RAM NATH—PLAINTIFF—APPELLANT

versus

BULAQI RAM—DEFENDANT—RESPONDENT.

Hindu Law—Joint family—Debt—Loan for immoral purposes, proof of—Self-acquired family property.

If a debt is contracted for an immoral purpose by a Hindu father, it is not binding against the son, even if the property is acquired by the father himself.

Although in order to prove that a debt was incurred for an immoral purpose, it is not sufficient to prove isolated acts of immorality or even general immorality but there must be clear connection between the immoral life and the debts contracted, yet it is not necessary to show that the proceeds of each loan was separately spent on a specific act of immorality. It would be sufficient to prove that the borrower was at the time living a licentious life, beyond his means, indulging in drink, riot, prostitution and debauchery, and that at the same time, he was without any business or occupation on which the money might legitimately have been spent, without showing on which particular act of immorality the money was spent. If it is proved that at the time of the loan, the borrower was notoriously wasting his substance in riotous living and spending large sums beyond his income and above his station in life, in this way only, the loan contracted in the midst of such living and spent upon it would be a loan contracted for immoral purposes.

Second appeal from the order of the Additional Divisional Judge of Lahore, dated 21st October 1910, affirming that of the Sub-Judge, 1st class, of Lahore, dated 26th January 1910, dismissing plaintiff's claim.

FACTS.—This was a suit for a declaration to the effect that $\frac{1}{4}$th share of a *kothi* and compound known as Ice Factory together with shops attached to the Ice Factory, situate in Lahore, Anarkali *Bazar*, and bounded on three sides, *i.e.*, north, east and south, by thoroughfares and mortgaged to defendant No. 1, according to a registered sale-deed of 1904, shall not be liable to attachment in execution of a decree passed by the District Judge, Lahore, in favour of defendant No. 1 and against defendant No. 2. Both the Courts dismissed the suit. The plaintiff appealed to the Chief Court.

Lala *Lajpat Rai* and Diwan *Mehr Chand*, for the Appellant.

Chaudhri *Shahab-ud-Din*, Lala *Gobind Ram* and Mr. *Asquith*, for the Respondent.

JUDGMENT.—This is a revision under section 70 (1) (*b*) of the Punjab Courts Act, and having been admitted becomes an appeal under clause 4 of that section.

After hearing lengthy arguments, we come to the conclusion that the case can be decided without much difficulty on one point only. It is admitted on all hands that if the debt in question was contracted for an immoral purpose, the debt is not binding against the son of Thakur Das who contracted it. This

would be the case even if the property had been acquired by Thakur Das himself. We are, however, of opinion that the property belonged to Karm Narain, and was ancestral in the hands of Thakur Das. The first Court held that the attempt to prove that the Rs. 3,000 borrowed was immediately spent in gambling had failed, and, consequently, that the debt could not be held to have been contracted for an immoral purpose and the learned Divisional Judge accepted this finding and conclusion; and the learned Counsel for the respondent endeavoured to support that view and quoted various authorities [*Bahadur Singh* v. *Desraj Parmanand* (1), *Khalilul Rahman* v. *Gobind Pershad* (2); *Ram Narain Koer* v. *Mahabir Pershad Singh* (3); *Nanomi Babuasin* v. *Modhun Mohun* (4); *Suraj Bunsi Koer* v. *Sheo Persad Singh* (5); *Chandradeo Singh* v. *Mata Prasad* (6)], all of which we have consulted in aid of his contention. The gist of all these rulings amounts to this, that it is not sufficient to prove isolated acts of immorality or even general immorality, but that there must be a clear connection between the immoral life and the debts contracted.

While we accept this as a correct statement of the Hindu Law on the subject, we are unable to agree to the contentions put forward for the respondent that it is necessary to show that the proceeds of each loan was separately spent on a specific act of immorality. No doubt, for instance, to prove that a loan was obtained and then spent on the purchase of jewellery to be presented to a prostitute in order to gain her favour, would be to prove that the loan was procured for an immoral purpose. But it would, in our opinion, equally be sufficient to prove that the borrower was at the time living a licentious life, beyond his means, indulging in drink, riot, prostitution and debauchery, and that at the same time he was without any business or occupation upon which the money might legitimately have been spent, without showing on which particular act of immorality the money was spent. In fact, if it is proved clearly that at the time the borrower was notoriously wasting his substance on riotous living, and spending large sums beyond his income and above his station in life in this way only, a loan contracted in the midst of such living and spent upon it would be a loan contracted for immoral purposes. Indeed, it can hardly ever, if ever, be possible and must always be extremely difficult to prove specific expenditure on one specific act of immorality. Here we are, the appeal being one under section 70 (1) (*b*), bound by the findings of fact of the lower Appellate Court. The finding on this point is that at the time the Rs. 3,000 in question were borrowed, Thakur Das was "a gambler, drunkard, and whoremonger." He was contracting enormous debts, he borrowed Rs. 15,000 within two months, and the conclusion is irresistible that this loan was contracted to be expended on gambling, drinking and whoremonging, that is, "for an immoral purpose".

This being so, the share of Ram Nath, who is a member with Thakur Das of joint Hindu family, is admittedly not liable for this debt. It is unnecessary to discuss any other point.

We accordingly accept the appeal and decree the claim with costs throughout.

Appeal allowed.

(1) 53 P. R. 1901.
(2) 20 C. 328.
(3) 13 C. 208.
(4) 13 C. 21 (P. C.); 13 I. A. 1.
(5) 6 I. A. 88; 5 C. 148; 4 C. L. R. 226.
(6) 31 A. 176 (F. B.); 6 A. L. J. 263; 1 Ind. Cas. 479.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 427 OF 1911.

October 25, 1912.

Present:—Mr. Justice Sundara Aiyar and Mr. Justice Sadasiva Aiyar.

KOOLAPPA ROWTHAR *alias Syed* MUHAMMAD ROWTHER—APPELLANT

versus

M. APPU ASARI AND OTHERS—RESPONDENTS.

Alienation—Invalid alienation—Right of alienee to sue for possession.

An alienee, who obtains no valid rights under his alienation, cannot maintain a suit for possession of the property.

Second appeal against the decree of the Subordinate Judge of Palghat, in A. S. No. 418 of 1910, presented against that of the District Munsif of Palghat, in O. S. No. 42 of 1908.

ABDULLAH KHAN v. BASHARAT HUSSAIN.

Mr. *C. V. Anantakrishna Iyer*, for the Appellant.

Mr. *K. R. Subramanya Aiyar*, for 2nd Respondent.

JUDGMENT.—Two contentions have been urged in support of this second appeal. It is argued that the property in question is not really trust property belonging to the *chattram*. Exhibit I clearly shows that the whole property was dedicated to the charity. By the *karar*, Exhibit E, all the income of the property in 1881 except $10\frac{1}{2}$ *pirds* of paddy was appropriated for the performance of the charity. The parties to the *karar* agreed to divide the rest among themselves and also agreed that, if there was any increase in the income, the various members should divide it between themselves. At the same time, they entered into an agreement that they would defray the expenses of any repairs that might be required. There is no intention apparent in that document to affect the trust created by Exhibit I. It was an arrangement for the management of the trust property. Whether the provisions for the division of any increase in the income between the members would be upheld as valid in law or not, it is unnecessary to decide for the purposes of this case. The document does not, in terms, say that the excess income to be divided is to be appropriated by the members for their personal use. The other question argued is that, although the sale by Chokalingam's sons to the plaintiff may be invalid, still the plaintiff is entitled to recover as standing in the shoes of Chokalingam and that the defendant must be held to be estopped from disputing the plaintiff's right to recover, just as he would be estopped from contesting a suit by Chokalingam himself for the recovery of the property. This contention cannot be upheld. It is, no doubt, true that a mortgagee would, ordinarily, be estopped from contesting the mortgagor's right to redeem. But this does not give an alienee who has obtained no valid rights under his alienation to maintain a suit for the property. The plaintiff having no valid title, his suit was rightly dismissed by the lower Courts. We dismiss the second appeal with costs.

Appeal dismissed.

PRIVY COUNCIL.

APPEAL FROM THE HIGH COURT AT ALLAHABAD.

November 29, 1912.

Present:—Lord Macnaghten, Lord Moulton, Sir John Edge and Mr. Ameer Ali.

Saiyid ABDULLAH KHAN—APPELLANT

versus

Saiyid BASHARAT HUSSAIN—RESPONDENT.

Registration Act (III of 1887), ss. 17, 49—Agreement between mortgagor and mortgagee as to disposal of rents and profits—Evidence Act (I of 1872), s. 92—Admissibility of previous negotiations to vary terms of document—Transfer of Property Act (IV of 1882), s. 65 (a), application of—Mortgage executed before Act.

An agreement between a mortgagor and mortgagee as to the mode in which the rents and profits of the mortgaged property (exceeding Rs. 100 in value) are to be dealt with, requires compulsory registration and, if unregistered, is inadmissible in evidence.

It is no more permissible in India than in England to contradict or vary the express and unambiguous terms of a written instrument by reference to preliminary negotiations or previous conversations.

Section 65 (*a*) of the Transfer of Property Act can have no application to a case where the mortgage was executed before the date of the Act, though one of the further charges was subsequent to it.

Consolidated appeals from a judgment and two decrees of the High Court at Allahabad, dated December 22nd, 1908, partly reversing and partly affirming a judgment and decree of the Subordinate Judge of Meerut, dated December 22nd, 1905.

Mr. *DeGruyther, K. C.*, (with him Mr. *O'Gorman*) on behalf of the Appellant, contended that the mortgage was an usufructuary mortgage and, therefore, the mortgagee in possession was not liable to render an account to the mortgagor. The lease and the mortgage were two distinct transactions and could not be read together. As to subsequent arrangement by means of a *rukka*, it was not registered and, therefore, could not be admissible in evidence.

Sir *E. Richards, K. C.*, on behalf of the Respondent, contended that here a construction was going to be put on the document which was contrary to fact. There are other pieces of evidence on record which go to show the nature of original transaction and the circumstances of the case.

Mr. *Dube*, following, stated that the deed as usufructuary mortgage was fictitious and the lease was a device to secure the interest. The deed and the lease should be read together.

[LORD MOULTON: Here the lease and the deed clasp].

JUDGMENT.

LORD MACNAGHTEN.—The respondents in these consolidated appeals are the representatives of the late plaintiff, Saiyid Basharat Husain, now deceased, who was the owner of valuable *zemindari* property, subject to a mortgage dated the 25th of August 1880, and three further charges tacked to it. The mortgage of 1880 and these further charges are now vested in the appellant.

The controversy in this case arose out of these mortgage transactions. The original mortgagee was Husain Ali Khan, who made the advances to Basharat Husain, and took the securities in the name of his wife.

Basharat Husain brought a suit for redemption. His right to redeem was not disputed. The only question was as to the terms and conditions on which the decree for redemption should be made.

On the part of the appellant, it was maintained that the rights of the parties must be governed by the provisions of the mortgage-deed of 1880, which was duly executed and duly registered. On the other hand, the mortgagor contended, (1) that the real intention of the parties was to be gathered, not from the mortgage-deed, but from negotiations and conversations alleged to have taken place before the mortgage was executed; and (2) that on the mortgagor relinquishing the mortgaged property which had been leased to him immediately after the date of the original mortgage, an agreement was come to between the mortgagee and the mortgagor as to the mode in which the rents and profits of the property were to be dealt with. The only evidence produced in support of this alleged agreement was a letter or *rukka*, neither registered nor witnessed, purporting to be dated the 11th of June 1881, and to be signed by the mortgagee (who died in 1886, ten years before the institution of the suit). The Subordinate Judge of Meerut, who was the trial Judge, came to the conclusion that the document in question was a forgery. The learned Judges of the High Court considered it genuine and gave effect to it. It is not necessary for their Lordships to determine whether the document is genuine or not. By the provisions of the Registration Act (III of 1877), such a document being unregistered is inadmissible in evidence.

As regards the first contention on the part of the mortgagor, which appears to have been argued at great length in the Courts below, it seems impossible to support the decision of the High Court. It is no more permissible in India than it is in this country to contradict or vary the express and unambiguous terms of a written instrument by reference to preliminary negotiations or previous conversations. The Indian Evidence Act is clear on the point.

The consideration for the mortgage of 1880 was the sum of Rs. 70,000. The mortgage was expressed to be for the term of eight years. The mortgage-deed contains the following statement:—

"It is agreed by mutual consent of the parties to this document that the profits of the property mortgaged shall belong to the aforesaid mortgagee in lieu of the interest on the mortgage money, and I, the mortgagor, shall have no claim for mesne profits. The mortgagee also shall have no right to claim interest on the mortgage money advanced by him."

The mortgagee relied on this provision. The learned Judges of the High Court refused to give it any effect, holding that the mortgage was usufructuary only in form, and that the security was intended to be a simple mortgage carrying interest at the rate of 6 per cent. per annum. In coming to this conclusion, the learned Judges seem to have been influenced both by the preliminary negotiations to which the mortgagor and his witnesses deposed, and by the circumstance that by a deed, practically contemporaneous with the mortgage, the property was leased to the mortgagor for the period of the mortgage on very favourable terms at a rent which worked out at 6 per cent. per annum on the sum secured. The net profits of the property in mortgage were apparently not less than Rs. 6,000. The rent reserved was only Rs. 4,200. Favourable as the terms were, the mortgagor very soon fell into arrear. The mortgagee brought a suit against him, and he then gave up possession to the mortgagee. It may be that if the mortgage-deed means what it says, it would have been better for him to have fought the case out. Such is evidently the view of the High Court. But after all, that is no concern of the Court. It

was for the mortgagor to judge what was the wisest course for him to pursue.

Having regard to the eagerness of wealthy money-lenders to obtain security on *zemindari* property and the competition among them for a position thought so advantageous, there does not seem to be anything strange in the apparently easy terms of the first mortgage transaction between the lender and the borrower.

Their Lordships agree with the High Court in thinking that the mortgage and the lease were parts of one and the same transaction. But there is no inconsistency between the two instruments. Nor would there have been any inconsistency if the mortgage itself had contained a provision for granting a lease on the terms upon which the lease was actually granted.

One point was raised by the mortgagee before the Subordinate Judge on which he failed. It was not dealt with by the learned Judges of the High Court because they were against the mortgagee on the main question. The point was raised again before this Board; it was this: part of the property expressed to be mortgaged was withdrawn from the security in consequence of a successful claim to it by the mortgagor's sister. The mortgagee claimed damages or compensation for the diminution of his security. The Subordinate Judge rejected that claim, being of opinion that the mortgagee when he took his security was aware of the circumstances of the property and the position of the mortgagor's family. Their Lordships think that the Subordinate Judge was right. They consider that the Transfer of Property Act, (IV of 1882), section 65 (*a*), on which reliance was placed (whatever the construction of that section may be), can have no application to the present case where the mortgage was executed before the date of the Act, though one of the further charges was subsequent to it.

Their Lordships will humbly advise His Majesty that the appeals should be allowed, the orders of the High Court discharged with costs (any costs paid thereunder being re-paid), and the order of the Subordinate Judge restored.

The respondents will pay the costs of the appeals.

Appeals allowed.

Solicitors for the Appellant: Messrs. *Ranken Ford, Ford* and *Chester.*

Solicitors for the Respondent: Messrs. *Barrow, Rogers* and *Nevill.*

BOMBAY HIGH COURT.

CIVIL APPEAL No. 33 OF 1912.
SUIT No. 681 OF 1909.
September 26, 1912.

Present:—Sir Basil Scott, KT., Chief Justice, and Sir N G. Chandavarkar, KT., Judge.

Nawab BEHRAM JUNG—PLAINTIFF

versus

Haji SULTANALI SHUSTRY—DEFENDANT.

Civil Procedure Code (Act V of 1908), s. 129, O. XLI, r. 10—Security for costs—Bombay High Court Rules, r. 725.

A., a resident of Hyderabad who had no immoveable property in British India, filed a suit against *B.* on the Original Side of the Bombay High Court. The hearing of the suit occupied eight days and *B.* made no application for security for costs. On the suit having been dismissed, *A.* filed an appeal and deposited Rs. 500 as security for costs of the appeal in accordance with the rules of the Bombay High Court. *B.* applied that *A.* may be required to give security for costs in the lower Court under Order XLI, rule 10 of the Code of Civil Procedure:

Held, (1) that rule 725 of the rules of the Bombay High Court and not Order XLI, rule 10, was the governing rule with reference to appeals from the Original Side;

(2) that *A.* having complied with rule 725, and *B.* having abstained, in the original suit, from applying for security of the costs of the original hearing, there was no reason why the Court should exercise its discretion to order security for the said costs.

Mr. *Bahadurji*, for the Plaintiff.

Mr. *Kanga*, for the Defendant.

JUDGMENT.—In this case, it appears that a suit was filed on the Original Side of the Court by the present appellant who was known at the time to be a resident in Hyderabad without immoveable property in British India. The suit was contested and occupied eight days in the hearing. The defendant, however, made no application for security for costs before or at the hearing of the suit in the original Court.

Now that the appellant has filed an appeal and has deposited the prescribed amount according to the rules of this Court, *viz.*, Rs. 500, as security for costs of the appeal

and within a fortnight of the date fixed for the hearing of the appeal, the respondent gives notice to the appellant to show cause why he should not deposit in Court Rs. 7,500, as security for both the costs of the appeal and the costs in the lower Court.

The contention on behalf of the respondent is that the case is governed by Order XLI, rule 10, and that as the appellant is residing out of British India, the Court is bound to demand security not only for the costs of the appeal but also for the costs of the original suit.

If Order XLI, rule 10, applied to the case, it would not appear to be imperative upon the Court to demand security for the costs both of appeal and the original suit. The section says:—"The Appellate Court may, in its discretion,...demand from the appellant security for the costs of the appeal, or of the original suit, or of both: Provided that the Court shall demand such security in all cases in which the appellant is residing out of British India, and is not possessed of any sufficient immoveable property within British India...." But as the security which is previously referred to is security for the costs of the appeal or of the original suit or of both, it is not clear that 'such security' is meant in every case to include costs of 'both.'

We are of opinion, however, that this Court sitting on appeal from the original suit is not governed by Order XLI, rule 10.

Section 129 of the Code says: —

"Notwithstanding anything in this Code, any High Court established under the Indian High Courts Act, 1861, may make such rules, not inconsistent with the Letters Patent establishing it, to regulate its own procedure in the exercise of its original civil jurisdiction as it shall think fit, and nothing herein contained shall affect the validity of any such rules in force at the commencement of this Code."

Now, the rule in force at the commencement of this Code is No. 725, which provides that with the memorandum of appeal the appellant shall, unless specially exempted by an order of the Court or allowed to appeal as a pauper, deposit in Court the sum of Rs. 500, as security for the costs of the respondent in the appeal, or if more than one, for the costs of each respondent having different interests.

That rule is imperative unless an order is obtained exempting the appellant and it is a rule inconsistent with the Order XLI, rule 10.

The rule has always been regarded as the governing rule with reference to appeals from the original side as is apparent from *Ahmed* bin *Shaik Essa Khaliffa* v. *Shaik Essa* bin *Khaliffa* (1), in which section 549, which is re-produced in Order XLI, rule 10, was referred to on behalf of the respondent.

The appellant having complied with Rule 725 and the respondent having abstained from applying for security of the costs of the original hearing, as he could have done, we see no reason why we should exercise our discretion by ordering that the appellant do now give security for the costs of the original hearing. We have been referred to no reported case in which such an order has been made, and we do not think (although we do not doubt our power, if it were necessary in the interests of justice, to make such an order) that a case has been made out for such an order at present.

We, therefore, reject the motion.

Costs to be costs in the appeal.

Motion rejected.

Attorneys for the Appellant: Messrs. *Payne & Co.*

Attorneys for the Respondent: Messrs. *Matubhai, Jamietram & Madan.*

(1) 13 B. 458.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 182 OF 1911.

August 13, 1912.

Present:—Mr. Justice Sundara Aiyar and Mr. Justice Sadasiva Aiyar.

CHILLAMUTHU—APPELLANT

versus

MUTHUDAYAR SERVAI AND OTHERS—RESPONDENTS.

Benami *transaction—Purchase of property by husband in wife's name—Presumption—Passing of consideration—Trespass—Owner not in possession at time of trespass—Right to damages.*

There is no presumption that the purchase of property by a husband in his wife's name was *benami* for the former. The true test of ownership is, who paid the consideration for the purchase.

Motivahu v. *Purushotam Dayal*, 29 B. 306; 6 Bom. L. R. 975, referred to.

VYASACHARYA NARAYANACHARYA v. VENKUBAI RANGACHARYA UPADYA.

An owner of immoveable property is entitled to damages against any one trespassing on it, whether the owner was or was not in possession at the time of trespass.

Second appeal against the decree of the District Court of Ramnad, in A. S. No. 133 of 1910, presented against that of the District Munsif of Sivaganga, in O. S. No. 50 of 1908.

Mr. *K. N. Aiya*, for the Appellant.

Mr. *Sreenivasa Aiyangar*, for the Respondents.

JUDGMENT.—The judgment of the District Judge in this case is unsatisfactory. The plaintiff claimed the property as her own and alleged that the 1st defendant took possession under a mortgage executed by the 2nd defendant, plaintiff's father, to the 1st defendant and that the 2nd defendant was not the owner and had no title to execute any mortgage. The 1st defendant, in his defence, did not claim any title to the property under the mortgage executed by the 2nd defendant and contended that he had thrown up the mortgage and never took possession and was not, therefore, liable to the plaintiff for any damages. The District Munsif found that the 1st defendant took possession and awarded mesne profits for three years prior to the suit and one year afterwards.

On appeal, the District Judge has decided the case apparently on the question of title. He does not find that the 1st defendant was not in possession of the land. He says that according to *Bai Motivahco* v. *Purushotam Dayal* (1), the purchase of property by a husband in his wife's name is to be regarded as *benami* for himself and that the same presumption would apply in Southern India. He does not find, as a fact, that the purchase-money was supplied by the 2nd defendant. The Judge observes generally that "other documents seem to indicate that the property belongs to the 2nd defendant." He has not discussed the evidence or recorded a specific finding that the land belongs to the 2nd defendant. Seeing that the 1st defendant did not claim any title in himself under the mortgage, if the plaintiff was in possession of the property and the 1st defendant took possession, that would be sufficient to entitle the plaintiff to recover damages against him. If the plaintiff was not in possession when 1st defendant entered on possession, the plaintiff would still be entitled to recover damages if she was the owner. We are unable to understand the District Judge's award of 8 annas damages. It is impossible to see on what principle he has proceeded. He apparently allows nominal damages. But if, as he seems to think, the plaintiff was not the owner, it is not easy to see on what ground she is entitled to any damages at all.

There must be a finding on the question, how long the 1st defendant was in possession and what mesne profits are payable for that period? We reverse the decree of the District Judge and remand the appeal for fresh disposal according to law. If a decision on the question of title becomes material, both parties should be allowed to adduce evidence in respect of it. The costs of this second appeal will abide the result.

Appeal allowed.

(1) 29 B. 306; 6 Bom. L. R. 975.

BOMBAY HIGH COURT.
FULL BENCH.

SECOND CIVIL APPEAL No. 541 OF 1911.
September 30, 1912.

Present:—Sir Basil Scott, Kt., Chief Justice, Sir N. G. Chandavarkar, Kt., Judge, Mr. Justice Batchelor and Mr. Justice Rao.

VYASACHARYA NARAYANACHARYA —APPELLANT

versus

VENKUBAI RANGACHARYA UPADYA —RESPONDENT.

Hindu Law—Adoption—Settlement by adoptive mother in favour of her daughter—Consent of natural father of adopted son—Repudiation of agreement by adopted son after majority—Right of daughter to enforce agreement.

A settlement of immoveable property by an adopting Hindu widow in favour of her daughter, to take effect upon the daughter obtaining majority, assented to by the natural father of the adopted boy at the time of the adoption, cannot be enforced by the daughter against the adopted son who repudiates it on attaining majority.

Second appeal from the decision of the Assistant Judge of Dharwar, in Appeal No. 214 of 1909, confirming that passed by the Subordinate Judge at Haveri, in Civil Suit No. 235 of 1908.

VYASACHARYA NARAYANACHARYA *v.* VENKUBAI RANGACHARYA UPADYA.

ORDER OF REFERENCE.

BEAMAN, J.—The question referred to a Full Bench is: Whether the terms of an agreement entered into between the natural and adoptive parent as conditions of the adoption, are binding upon and can be enforced against the adopted son?

Possibly so stated, the question may appear too wide to admit of an unqualified answer. The facts of the case, which have given rise to this reference, might, however, enable the Full Bench to answer the question with reference to the case, if not generally.

An agreement was entered into (for the purposes of this reference it may be taken that the agreement, though not incorporated in the deed of adoption, was a condition of that deed, and so understood by the parties to it) between the natural father of the adopted boy and his adoptive mother, by which the former agreed to validate for the minor adopted son, the absolute gift of some 56 acres of the ancestral immoveable property by the widow to her daughter, who was also the daughter of the widow's deceased husband.

The following cases have been relied on in support of the donee's contention that the gift can be enforced against the adopted son: *Chitko* v. *Janaki*(1); *Ravji Vinayakrav Jaggannath* v. *Lakshmibai*(2); *Basava* v. *Lingangauda* (3) and *Visalakshmi Ammal* v. *Sivaraman* (4).

It may be observed that the intended gift was made to the sole reversioner. Had it, therefore, been of the whole life-estate, it would apparently have been effectual and good in law, irrespective of all other considerations, as doing no more than accelerating the reversion: *vide Pilu* v. *Babaji Naru* (5). Speaking for myself, notwithstanding the dictum of Lord Morris, I cannot see any good reason in principle why a gift of part only of life-estate, accelerating to that extent the reversion, should not be equally effectual and valid. But this High Court appears to have held the contrary: vide *Pilu* v. *Babaji* (5).

We doubt, and chiefly on the authority (leaving aside general principles for a moment) of *Bhasbat Rabidat Singh* v. *Maharani Indar Kunwar* (6), whether on the facts stated, the gift can be enforced against the minor adopted son. As, however, there is a considerable current of authority which seems to set the other way, we do not care to give effect to that doubt ourselves. Again, speaking for myself, I might adopt the referring judgment of the Judges in *Visalakshmi Ammal* v. *Sivaraman* (4) as my own, only guarding myself against adopting one passage in it, in which those learned Judges appear to say that prior alienations of the life-estate remain unaffected by the subsequent adoption. In my view, an adoption at once terminates the life-estate, and, therefore, all alienations, merely co-extensive with it. Again we do not rest upon any distinction (as the Full Bench of the Madras High Court appeared to do in that case) between a case in which the agreement is incorporated in the adoption-deed and one in which it is not. Provided that the agreement was in fact intended to be a condition of the adoption, it appears to us immaterial whether it was or was not incorporated in the adoption-deed.

We feel grave doubt whether the reasoning either in *Chitko* v. *Janaki* (1) or in *Ravji Vinayakrav Jaggannath* v. *Lakshmibai* (2), is adequate to support the conclusions reached by the learned Judges who decided those cases. It is to be noted that no case decided in our Court has gone so far as we are asked to go in this case though the principle of the decisions may well be thought capable of such extension. An agreement by which the adopting widow is to be allowed to retain her life-estate, notwithstanding the adoption, differs in fact and in principle from an agreement under which a power is conferred upon her which, as a widow enjoying a life-estate, she could by no other means obtain.

It is only necessary at this stage to make a single comment upon the Privy Council cases relied on by the plaintiff-respondent. Although their Lordships do appear to recognize that such agreements conditioning an adoption are not necessarily void, the furthest they go is to say that the minor may ratify them on attaining majority. But this also implies that he has the option of ratifying or not ratifying. And that is in effect, in all cases of the kind, to say that the

(1) 11 B. H. C. R. 199.
(2) 11 B. 381.
(3) 19 B. 428.
(4) 27 M. 577; 14 M. L. J. 310.
(5) 34 B. 165; 11 Bom. L. R. 1291; 4 Ind. Cas. 584.
(6) 16 C. 556; 16 I. A. 53.

agreement *per se* is not binding upon him, and cannot be enforced *per invitum*.

If the plaintiff's contention be sound, and is really supported by the decisions in such cases as *Chitko* v. *Janaki* (1) and *Ravji Vinayakrav Jaggannath* v. *Lakshmibai* (2), then by an agreement between the natural father and the adoptive mother of a boy about to be adopted, a power can be conferred upon the mother, which is unknown to the Hindu Law.

Briefly, we think that the fallacy of the plaintiff's argument, if it be a fallacy, lies in borrowing considerations from the law of contract to use in the domain of status. Status may, of course, be created by contract, but once created, we doubt whether its legal incidents, rights and obligations can be controlled, abrogated or restricted, by any term in the contract creating it.

Analysis will reveal that in such a case as we are considering, what actually has happened is that a contract has been made for the minor, one of the results of which is [or was in the cases of *Chitko* v. *Janaki* (1) and *Ravji Vinayakrav Jaggannath* v. *Lakshmibai* (2), while here it is even more startling] that the adopted boy agreed to treat himself as not adopted so long as the adoptive mother lived. For in law, his adoption, just as his natural birth, had he been born to her in wedlock, puts an end to her life-estate and at once relegates her to the position of a Hindu widow entitled to maintenance. So that what may be thought to be almost the absurdity of this view can be illustrated by saying that such an agreement, viewed solely with reference to its legal consequences, is exactly the same as though a son could agree not to be born.

We also doubt whether the natural father has any power whatever to stipulate for more than conditions precedent to the adoption, as for example, that the adoptive mother should pay him a sum of money. It may be doubted whether in this single relation, the natural father can be regarded as in any true sense the guardian of the minor boy who is being given in adoption. He is rather, as the Judges in *Chitko* v. *Janaki* (1) pointed out, a proprietor. No question can be made of his motives, nor his conduct challenged on the ground that it is against the interests of the minor. Thus a rich father may give his son in adoption to a poor mother, and though that would be clearly against the minor's interest, the adoption could not be gainsaid. Doubtless if he stipulated for a payment, so much of the contract, which precedes the creation of the status, might possibly be impugned, but once the status was created, it could not be undone. These are only a few of the considerations which induce us to think it desirable to refer this question to a Full Bench. If adoption is in essence a religious sacrament, creating a new status, much of the reasoning of those learned Judges who have favoured the recognition of preliminary bargainings, and the making of conditional contracts, some of the terms of which reach as far as to cut down the legal incidents of the status, would have to be very carefully re-considered.

HEATON, J.—I concur. I think, for the reasons given, it is necessary to refer the question to a Full Bench

Messrs. *Setlur* and *Nadkarni*, (with him Mr. *K. H. Kelkar*), for the Appellant.

Mr. *G. S. Mulgaonkar*, for the Respondent.

JUDGMENT.

SCOTT, C. J.—In my opinion, the question referred is one not necessarily involved in the decision of the case, and one which should not now be considered. The alternative suggestion in the referring judgment is that the question for our decision should be limited with reference to the facts of the case. I agree that it should be so limited but I do not think that in that condition, it is uncovered by sufficient authority.

The document, which purports to transfer the absolute interest in certain immoveable property to the daughter of the adopting mother, also reserves for the use of the latter all the rest of the property then in her possession for life subject to certain outstanding charges for maintenance of other widows. Notwithstanding this reservation, the adopted son sued for the whole of the property of his adoptive father in Suit No. 212 of 1895 immediately he attained majority and obtained possession of that property under a decree of the Court from his adopting mother. For this reason, the facts of the case do not give rise to the general question stated in the referring judgment.

We must take the question for our decision to be, whether a settlement of immoveable property by an adopting widow in favour of

her daughter to take effect upon the daughter attaining majority assented to by the natural father of the adopted boy at the time of the adoption can be enforced by the daughter against the adopted son who repudiates it on attaining majority?

The exact terms of the settlement were as follows:—"My daughter is entitled to immoveable property valued as above. Until she attains majority, it should be in my possession. I myself shall carry on Vahivat of the same. When she attains majority and marries, it should be given into her possession. Even if I subsequently adopt a son, he has no ownership and right to this share". As observed in the referring judgment, an agreement, by which the adopting widow is to be allowed to retain her life-estate notwithstanding the adoption, differs in fact and in principle from an agreement under which power is conferred on her which as a widow enjoying the life-estate she could by no other means obtain.

In *Ravji Vinayakrav Jagganath* v. *Lakshmibai* (2), Farran, J. stated that if the stipulations of an agreement contemporaneous with an adoption were unreasonable, such as giving to the widow an absolute power of disposition over the property, they should be rejected as *ultra vires* of the father of the adopted boy. In *Venkappa* v. *Fakirgowda* (7), an Appellate Bench of this Court, following the test suggested by Farran, J., held that stipulations in an agreement made on the occasion of adoption between the natural parent and the adoptive mother, whereby the latter was invested with a power to make a gift of her husband's property to her brother, were not binding upon the adopted son. This decision appears to have escaped the notice of the referring Bench. It has never been questioned in this Court nor I believe in any other Court in India and it is certainly not in conflict with the decisions of the Privy Council alluded to in the referring judgment: *Ramasawmi Aiyan* v. *Vencataramiyan* (8) and *Bhasbat Rabidat Singh* v. *Maharani Indar Kunwar* (6).

The learned Pleader for the plaintiff has, however, sought to justify the gift to his client by reference to certain texts which were acted upon in *Churaman Sahu* v. *Gopi Sahu* (9), in which it was held that it is competent to a Hindu widow governed by the *Mitakshara* law to make a valid gift of a reasonable portion of the immoveable property of her husband to her daughter on the occasion of the daughter's *gavna* ceremony (at which the marriage of the daughter would be completed and consummated) and that such a gift is binding on the reversionary heirs of her husband.

The texts in question are Manu, Book IX, verse 118:—"But to the maiden sisters, the brothers shall severally give portions out of their shares each out of his share one-fourth part. Those who refuse to give it will become outcastes", and Yajnyavalkya, verse 124: "Uninitiated sisters should have their ceremonies performed by those brothers who have already been initiated giving them a quarter of one's own share". It is to be observed that the verse of Manu is one of a group of verses (111 *et seq*) relating to partition.

I am unable to hold that the decision of the Calcutta High Court has any application to the present case where by reason of the adoption a brother would be in existence who could perform such duties as are imposed upon him by the texts in question. Nor can they apply to a case where the settlement of property is made upon the sister neither on the occasion of a partition nor on the occasion of her marriage.

For the above reasons, I would answer the amended question in the negative.

CHANDAVARKAR, J.—I concur.

BATCHELOR, J.—I concur.

RAO, J.—I agree.

(7) 8 Bom. L. R. 346.

(8) 6 I. A. 196; 5 C. L. R. 337; 2 M. 91.

(9) 37 C. 1; 13 C. W. N. 994; 1 Ind. Cas. 945; 10 C L. J. 544.

PRIVY COUNCIL.

APPEAL FROM THE CHIEF COURT OF PUNJAB.

November 26, 1912.

Present:—Lord Macnaghten, Lord Moulton, Sir John Edge and Mr. Ameer Ali.

THE COURT OF WARDS FOR THE PROPERTY OF MAKHDUM HASSAN BAKHSH—APPELLANT

versus

ILAHI BAKHSH AND OTHERS—RESPONDENTS.

Muhammadan Law—Wakf *by user*—*Punjab Land*

COURT OF WARDS *v.* ILAHI BAKHSH.

Revenue Act (XVII of 1887), s. 44—Record of Rights.

Where a graveyard existed from time immemorial, in which the Muhammadan community of Multan used to bury their dead, and in the Record of Rights of the last Settlement, the said graveyard was described as "in the possession of the Muhammadans, and as *ghair mumkin kabristan*:"

Held, (1) that the entry in the Record of Rights was conclusive under section 44 of the Punjab Land Revenue Act, 1887, and that the land in question, being a graveyard, was *wakf* by user, if not by dedication;

(2) that land unoccupied by graves within the area of the graveyard could not be held to be private property.

Appeal from a judgment and decree of the Chief Court of the Punjab, dated December 16th, 1907, and reversing that of the District Judge of Multan, dated April 15th, 1907. (See 78 P. L. R. 1908; 52 P. W. R. 1908).

Mr. *DeGruyther, K. C.*, (with him Mr. *O'Gorman*), on behalf of the Appellant, contended that he was the owner of the land in suit and that he exercised his right as such from time to time by granting leases, building a *Serai* and selling portions thereof. The Court of Wards, on his behalf, instituted proceedings for encroachments made on the land and recovered compensation from the managers of a Hindu temple.

Mr. *Grey*, on behalf of the Respondents, contended that the whole of the land in the Revenue papers was shown to be in possession of the Muslim community for use as a graveyard. There was a presumption that it was dedicated property and in consequence inalienable. It was used as such for hundreds of years.

Mr. *DeGruyther*, heard in reply.

JUDGMENT.

LORD MACNAGHTEN.—In the immediate neighbourhood of the city of Multan, there is a large tract of unculturable or uncultivated land generally known as the Mai Pak Daman or the Pak Daman graveyard. From time immemorial, it has been used by the Muhammadan community in Multan for the purpose of burying their dead. But there is no evidence to show when or how it was originally set apart for the purpose of a burial ground.

In the judgment of the Chief Court in this case, there occurs the following passage giving, as their Lordships think, a very probable account of the origin and early history of this graveyard:—

"Bahawal Haq, the famous saint, was born in the 12th Century of the Christian Era. He had a son, Sadr-ud-din, whose wife was called Mai Pak Daman. She was revered as a saint, and her body was buried in a shrine within the area in suit. No one can tell when the surrounding land was definitely set aside as *wakf*; but we can safely conjecture that, in the first instance, Musalmans began to bury their dead here and there in the waste land about her tomb, because of the desire to be buried near the body of a saint. There can be no doubt that for hundreds of years the land about her tomb has been used as a burial ground, and though there is no direct proof of dedication as *wakf*, we can safely conclude that long before 1858 it had become *wakf* at least by user."

The year 1858, referred to in the above passage, is the date of a representative public meeting of Muhammadans called by the authorities for the purpose of considering the question of Muhammadan graveyards for the city. At that meeting, a resolution was passed, apparently in accordance with the suggestion of the Government, to the effect that owners of *khangahs* or shrines should keep open graveyards in their own *khangahs*, that four old graveyards, of which Mai Pak Daman was one, should be kept open for the whole Muhammadan community, that three new graveyards should be provided, and that all other graveyards should be closed. The predecessor-in-title of the person, for whom the Court of Wards is now acting, took part in giving effect to this resolution.

The resolution was sanctioned by Government, and in 1867 a *robkar* was published giving notice that if any Muhammadan buried a corpse outside the authorised places, it would be taken up and buried in one of those places.

In the Record of Rights of the last Settlement, an area of land which comprises the land in this suit is entered as "in the possession of the Muhammadans," and is described *as kabristan* or *ghair-mumkin kabristan*, that is, "graveyard or unculturable land forming portion of a graveyard." In the ownership column, Makhdum Hussan Buksh, now represented by the Court of Wards, is entered as "owner." It would seem that he was properly entered as owner, being trustee and custodian of the shrine of the Saint Mai Pak Daman, and being or claiming to be the recognised head of the Muhammadan community in Multan.

In this state of things, the appellant, the

Court of Wards for the property of Makhdum Hassan Buksh, advertised for public sale a piece of ground lying within the area of the graveyard as described in the Settlement papers.

Thereupon, certain Muhammadan residents in Multan of different classes and various occupations combined together and brought this suit as co-plaintiffs, claiming an injunction to restrain the proposed sale, and also asking for a declaration that certain lands described in the Settlement Records as graveyard, and comprising an area considerably larger than that now in suit, was inalienable as *wakf*. It appeared in the course of the suit that on part of the land described as "graveyard" in the Settlement papers, there had been encroachments, that part had been acquired for public purposes, and that some lots had been, as it was alleged, sold by the Makhdum for his private purposes. So, in order to avoid all questions which might be raised with regard to land which had been so dealt with, the plaint was amended, and the area for which protection was claimed was limited to a piece of ground measuring 437 *kanals* and 4 *marlas* or something between 40 and 50 *bighas*.

The District Judge dismissed the suit with costs. On appeal, the Chief Court granted the relief asked for by the plaintiffs, but without costs. From this order of the Chief Court, the Court of Wards has appealed to His Majesty in Council.

The only substantial ground of appeal urged before the Board was that the area known as the Pak Daman graveyard was not one continuous burial ground, but merely an area of uncultivated ground in which here and there there were to be found graves or clusters of graves, and the defence set up was that vacant ground unoccupied by graves remained the private property of Mukhdum Hussan Buksh, and that the Court of Wards was bound or entitled to deal with it for the benefit of his estate without regard to the claim advanced by or on behalf of the Muhammadan community in Multan.

The Punjab Land Revenue Act, XVII of 1887, section 44, enacts that "an entry made in a Record of Rights in accordance with the law for the time being in force . . . shall be presumed to be true until the contrary is proved or a new entry is lawfully substituted therefor."

Their Lordships agree with the Chief Court in thinking that the land in suit forms part of a graveyard set apart for the Mussulman community, and that by user, if not by dedication, the land is *wakf*. The entry in the Record of Rights seems conclusive on the point. It is obvious that if it were held that within the area of the graveyard, land unoccupied or apparently unoccupied by graves was private property and at the disposal of the recorded owner, it would lead to endless disputes, and the whole purpose of the Government, in setting aside land as an open graveyard for the Muhammadan community in Multan, would be frustrated.

Their Lordships will, therefore, humbly advise His Majesty that the appeal should be dismissed.

The appellant will pay the costs of the appeal.

Solicitors for the Appellant: Messrs. *T. L. Wilson & Co.*

Solicitors for the Respondents: Messrs: *Ranken, Ford, Ford & Chester*.

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL No. 224 OF 1910.

August 20, 1912.

Present:—Mr. Justice Batchelor and Mr. Justice Rao.

MALGAUDA PARAGOWDA PATIL—APPELLANT

versus

BABAJI DATTU BHAKARE—RESPONDENT.

Hindu Law—Will—Construction—Implied prohibition to adopt—Widow's power in face of such prohibition—Vatan lands—Bombay Vatan Act (V of 1886), effect of.

A. died on the 13th March 1885, having made a Will dated the 9th of March of that year. He left a wife and two daughters. The Will provided that the ownership of the lands, most of which were *Vatan* lands, was to go to the daughters; the wife was not to make over the property to any body except to the daughters; the daughters had authority to make over their right of ownership to or to relinquish the same in favour of each other; or else should any occasion arise the right of one might go to the other only, but not to any body else. It also recited that the testator had not taken anybody in adoption. In 1886, Bombay Act V of 1886 (Vatan Act) came into operation, and the effect of section 2 of that Act was to postpone female members of the

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Vatan to male members in the matter of succession. The widow, thereupon, adopted the son of one of the daughters and the nephews of A. sued for a declaration that the adoption, being opposed to the terms of the Will, was null and void:

Held, that the adoption could not be upheld without giving the go-by to the testator's expressed wishes inasmuch as the Will had made a complete disposition of all the property in favour of the daughters, and there was no property left upon which an adoption could take effect.

Collector of Madura v. *Moothoo Ramalinga Sathupathy*, 12 M. I. A. 397; 1 B. L. R. 1 (P. C.); 10 W. R. 17 (P. C.), distinguished.

The Bombay Act V of 1886, is not retrospective in its operation.

Second appeal from the decision of the District Judge of Belgaum, in Appeal No. 53 of 1908, confirming that passed by the Subordinate Judge at Chikodi, in Civil Suit No. 571 of 1906.

Messrs. *Robertson* and *Jayakar*, (with him Mr. *C. A. Rele*), for the Appellants.

Mr. *Coyajee* (with him Mr. *S. R. Bakhle*), for Respondent No. 3.

JUDGMENT.—The suit giving rise to this appeal was instituted by the present appellants for a declaration that the adoption of the 1st defendant Babaji by the 2nd defendant, the widow of one Kalagauda, was null and void. The appellants claimed as nephews to be the reversionary heirs of Kalagauda. Kalagauda died on the 13th March 1885, having made a Will, dated the 9th of March of that year.

The only question between the parties is whether the lower Courts are right in holding that under the terms of that Will, there was no implied prohibition barring the widow from adopting the first defendant, who is the son of one of the testator's daughters. Both the Courts below appear to admit that there is to be collected from the Will an implied prohibition of one sort or another, but they are of opinion that in the special circumstances disclosed in this case, the effect of the adoption is to carry out either the provisions of the Will which Kalagauda did make or the provisions of the Will which he would have made had all the present facts been before him, and upon that footing, they have allowed the adoption to stand. The Will in question is Exhibit 59, and in it the testator recites that he has no male issue, but that he has a wife and two daughters living. By the first clause, he provides that the ownership of the lands, most of which were *Vatan* lands, "should, after me, go to the said daughters, Tani and Bhima, in the manner written below and remain with them in perpetuity." In the second clause, he gives his wife power to conduct the household, and to make proper arrangements in respect of any litigation that may ensue, but he says: "My wife has no authority to make over the property of our household to any body except to my daughters." The seventh clause is as follows: "My daughters have authority to make over their right of ownership to or to relinquish the same in favour of each other. Or else should any occasion arise, the right of one may go to the other only, but not to any body else. Nor have I taken any body in adoption."

In the year following the testator's decease, Bombay Act V of 1886 (Vatan Act) came into operation, and the effect of section 2 of that Act was to postpone female members of the Vatan to male members in the matter of the succession. This being so, the District Court is of opinion that the provisions which by his Will the testator intended to make were defeated by the subsequent legislation in 1886, and that the widow's adoption of the first defendant would be a means of checking this defeat of the testator's intentions, and giving effect to them so far as possible in the circumstances which had arisen. It is mainly upon this view of the case that the learned Judge has held that the adoption ought to be supported.

We think, in the first place, that this extraneous ground for invoking a specially favourable view of the adoption fails, inasmuch as whatever rights accrued to the daughters under this Will vested in them on the testator's death on the 13th March 1885, whereas Bombay Act V of 1886, which was not enacted till the subsequent year, is not retrospective in its operation: see *Rahimkhan* v. *Fatu Bibi* (1). But even if that ground could be successfully taken, we are not the less of opinion that the adoption cannot be supported. It seems to us that the only means of supporting it would be, to all intents and purposes, to make a new Will for the testator, and to say that that is a good Will, because in our judgment or our conjecture that is the sort of Will which the testator might be expected to make, if the facts now present to our minds had been present to his mind on the 9th of March 1885 when the Will was made. That, of course, is clearly not the way in which a

(1) 21 B. 118.

Will can be interpreted. As it stands, the Will makes a complete disposition of all the property in favour of the daughters. There is no property left upon which an adoption can take effect. The sentence in the seventh clause of the Will, which we have set out, to the effect that the testator has not taken any body in adoption, shows that it was present to his mind that any adoption made would *pro tanto* have the effect of running counter to the provisions of his Will. Not only was there a complete bequest of the whole estate to the daughters, but the widow was in terms prohibited from disposing of the property to anyone except the daughters. It is plain, therefore, that the adoption now in question cannot be upheld without giving the go-by to the testator's expressed wishes. For this reason, the adoption, in our opinion, is invalid

Reliance was placed by the respondents on the decision of the Privy Council in *Collector of Madura* v. *Mootoo Ramalinga Sathupathy* (2), upon which the learned Judge of the first Court mainly grounded his own decision. We think, however, that that case is no real warrant for the respondents' present position. That was a case where, two days before his death, a *zemindar* had made a petition or *arzi* to the Collector explaining his desire that his estate should go to his two daughters, who were then infants, and that his natural brother should manage the affairs of the *zemindari* until those infants should attain full age. After the death of the *zemindar*, the two daughters died and his widow then made an adoption. That adoption was impeached before their Lordships of the Privy Council on the ground that an implied prohibition against it should be collected from the terms of the *arzi*. This contention was overruled by their Lordships on the grounds which are explained at page 445 of the Report.

But there, the two daughters in whose favour the *arzi* had made provision, had died before the widow had adopted, so that when she had adopted, the most that could be said against her was that she adopted without formal approval, not that she had adopted so as to invade the rights of any persons then living. That indeed, as we understand it, is the main ground upon which their Lordships' judgment proceeded, for they say that "the widow had not claimed the power to adopt except on the happening of the contingency for which her husband omitted to provide". Here the adoption is made during the life-time of the daughters in whose favour the testator made his Will; the adoption runs counter to the testator's prohibition, though the state of the family had not altered between the testator's death and the prohibition; and the only contingency, if so it could be called, which the testator can be accused of having omitted to provide for, is the contingency of a piece of legislation, which neither he nor any other private individual could have foreseen. That, therefore, it seems to us, is a totally different circumstance from the one which existed and which influenced the judgment in the case before the Privy Council.

For these reasons, we are unable to adopt the view which found favour in the Courts below. We must reverse the decree under appeal, and, since only one issue has been decided in the Courts below, remand the suit for trial on its merits on the other issues.

The appellants must have their costs here and in the Courts below.

Decree reversed.

(2) 12 M. I. A. 397; 1 B. L. R. 1 (P. C.); 10 W. R. 17 (P. C.).

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 423 OF 1911.

September 23, 1912.

Present:—Mr. Justice Sadasiva Aiyar.

GOPALA IYENGAR—PETITIONER

versus

VENKATAKRISHNA IYENGAR AND OTHERS—RESPONDENTS.

Provincial Small Cause Courts Act (IX of 1887), s. 25—Power of interference, discretionary—Joint family—Pro-note in name of deceased member—Suit by surviving members.

The power of interference by the High Court under section 25 of Act IX of 1887 is only a discretionary power; where it appears that the decision of the lower Court has done substantial justice between the parties, the High Court is not bound to interfere.

Where a promissory-note is taken in the name of one member of a Hindu family, on the death of that member, the survivor can bring a suit on the promissory-note, though not on the principles of a family corporation but of a partnership.

GOPALA IYENGAR *v.* VENKATAKRISHNA IYENGAR.

Petition, under section 25 of Act IX of 1887, praying the High Court to revise the decree of the Court of the Subordinate Judge of Trichinopoly, in Second Civil Suit No. 1382 of 1910.

Mr. *O. Padmanabha Ayengar*, for the Petitioner.

Mr. *K. V. Krishnasami Iyer*, for the Respondents.

JUDGMENT.—The defendant is the petitioner in the revision. He executed a promissory-note in favour of one Venkatavaratha Iyengar (defendant's son-in-law) for Rs. 200 on 26th September 1908. Venkatavaratha Iyengar died in May 1909, leaving a widow and two paternal uncles (plaintiffs Nos. 1 and 2 in this suit). He was 30 years old at his death. Then his widow (defendant's daughter) brought Original Suit No. 292 of 1909, against her husband's paternal uncles (plaintiffs Nos. 1 and 2) for maintenance, evidently on the basis that her husband and his paternal uncles were undivided in interest and that she was entitled to maintenance as the widow of an undivided coparcener in a joint Hindu family owning joint family property. Though the present plaintiffs Nos. 1 and 2 (defendants therein) at first contested her claim on the ground that Venkatavaratha Iyengar and themselves did not own any joint family property (See Exhibit D), the present plaintiff afterwards consented to give defendant's daughter (the plaintiff in Original Suit No. 292 of 1909) maintenance as the widow of a person who was a member of a joint family property, the joint family members having consisted of at least himself and the deceased Venkatavaratha Iyengar.

The present suit was next brought by the plaintiffs Nos. 1 and 2 and by the 2nd plaintiff's sons (plaintiffs Nos. 3 and 4) for recovery of the promissory-note debt due by the defendant, treating the promissory-note amount as joint family funds which had belonged to the plaintiffs Nos. 1 and 2 and their deceased nephew, Venkatavaratha Iyengar and the plaintiffs Nos. 3 and 4 and which amount, the plaintiffs (as surviving co-parceners) were entitled tor ecover. Paragraph No. 8 of the plaint expressly says:—"As the suit debt was paid (advanced) from the family property and as the suit promissory-note was executed in the name of the family member *viz.*, the said Venkatavaratha Iyengar, succession certificate is not necessary."

The defendant, in his written statement (which he has not chosen to print for this Court's perusal), seems to have pleaded --

(*a*) that the promissory-note was altered after he had executed and delivered it to his son-in-law by the insertion of the figures as to rate of interest,

(*b*) that he had re-paid Rs. 125 to his son-in-law by performing some ceremonies at an expense of Rs. 125 at the son in-law's request,

(*c*) that the Rs. 200 lent under Exhibit C was his son-in-law's self-acquisition and that, therefore, the plaintiffs were not entitled to sue thereon. From the written statement, as read out to me by the petitioner's learned Vakil, I was unable to conclude that the defendant contended that the 1st plaintiff and the deceased Venkatavaratha Iyengar did not form a joint Hindu family and all that it seemed to contend on this point was that the money advanced on the promissory-note was the deceased's self-acquisition.

The learned Subordinate Judge found —

(*a*) that the promissory-note, before it was delivered to the 1st plaintiff by the defendant, contained the figures as to rate of interest and there was no subsequent alteration,

(*b*) that the defendant did not re-pay Rs. 125 to his son-in-law, though the defendant might have spent some money voluntarily in the interests of his own daughter in some incantations, and

(*c*) that Venkatavaratha Iyengar left no self-acquired property. I cannot go behind these findings of fact in revision.

The learned Vakil for the petitioner, however, strenuously contended that the 1st plaintiff's evidence shows (*a*) that the 2nd plaintiff has been living apart from the 1st plaintiff and the deceased Venkatavaratha Iyengar (and the latter's predeceased father), all along making separate self-acquisitions, there having existed no nucleus of ancestral property belonging to the three brothers (1st and 2nd plaintiffs and Venkatavaratha Iyengar's father),

(*b*) that the plaintiffs Nos. 2 to 4, therefore, could not sue as surviving members of a joint

family to which Venkatavaratha Iyengar belonged,

(c) that if Venkatavaratha Iyengar was the 1st plaintiff's *benamidar*, the 1st plaintiff cannot sue on the promissory-note and

(d) that if the money was the first plaintiff's self-acquisition, Venkatavaratha Iyengar must be deemed to have been the 1st plaintiff's *benamidar*.

If the defendant is entitled to raise the question that the plaintiffs and Venkatavaratha Iyengar did not form a joint Hindu family, I should be inclined to hold that there was some force in the above contentions. But I think that in the lower Court, the petitioner, while relying on the contention that the promissory-note money was Venkatavaratha Iyengar's own, did not raise the question that even if it was not his own, he and the plaintiffs did not form a joint family and he must be deemed to have been merely the first plaintiff's *benamidar*. The first plaintiff's evidence shows that the first plaintiff who had no child of his own treated Venkatavaratha Iyengar as the son of his own loins, and that he lived with Venkatavaratha Iyengar treating all his (1st plaintiff's) property as jointly owned by himself and Venkatavaratha Iyengar. It was on that footing that he agreed to give maintenance to Venkatavaratha Iyengar's widow. It may be that according to the dictum of Sir Bashyam Iyengar, J., in *Sudarsanam Maistri* v. *Narasimhulu Maistri* (1), the members of the branches of two alone out of several brothers cannot form a joint Hindu family with their joint earnings as joint family property with mutual rights of survivorship. Even this dictum has to be qualified by the decision of the Privy Council in *Venkayyamma Garu* v. *Venkatrama Nayyamma Bahadur Garu* (2) that daughter's sons, who are undivided brothers as regards their paternal property, inherit their maternal grandfather's property also as joint family property, though as regards the said paternal property, they might have other undivided co-parceners (as paternal uncles or step-brothers), who have no right in their maternal grandfather's property held jointly by themselves alone.

(1) 25 M. 149; 11 M. L. J. 335.
(2) 25 M. 678; 29 I. A. 156 (P. C.)

But I am satisfied from the evidence in this case that the promissory-note for Rs. 200 was obtained in Venkatavaratha Iyengar's name for the benefit of the 1st plaintiff and Venkatavaratha Iyengar jointly as a family partnership though not as a joint family corporation under the Hindu Law. One member of the said partnership having died, the other member (1st plaintiff) was, as surviving partner, entitled to collect the money due on it especially after he had satisfied the claims of his partner's widow and to obtain a decree thereon against the obligor for realizing the partnership assets. The defendant is, in my opinion, further not entitled to raise a question at the arguments in the High Court on revision which he did not raise or argue in the lower Court. No one of the fifteen grounds mentioned in the revision petition put in even in this Court directly raises the question argued before me that the 1st plaintiff and the late Venkatavaratha Iyengar did not form a joint Hindu family.

I am further of opinion that even if Venkatavaratha Iyengar was merely the 1st plaintiff's *benamidar*, the decree passed by the lower Court did substantial justice as between him and the defendant. The constitution of the plaintiffs Nos. 2 to 4 by the lower Court's decree as joint decree-holders with the 1st plaintiff is not objected to by the 1st plaintiff himself. The power of interference under section 25 of the Provincial Small Cause Courts Act (IX of 1837) is a discretionary power, not to be used unless there has been a failure of justice. [*Poona City Municipality* v. *Ramji Raghunath* (3)]. I, therefore, decline to interfere and dismiss the revision petition with costs.

Petition dismissed.

(3) 21 B. 250.

BADRI PERSHAD v. CIVIL NAZIR, AMBALA.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 901 OF 1909.

December 11, 1912.

Present:—Mr. Justice Rattigan and Mr. Justice Beadon.

BADRI PERSHAD MINOR THROUGH ATMA RAM—DEFENDANT—APPELLANT

versus

THE CIVIL NAZIR OF AMBALA, PLAINTIFF, AND RAM JAS MAL, INSOLVENT —RESPONDENTS.

Civil Procedure Code (Act XIV of 1882), *ss.* 351, 356, 503—*Civil Procedure Code (Act V of* 1908), *O. XL, r.* 1 (*d*)—*Provincial Insolvency Act (III of* 1907), *s.* 20 (*d*) —*Receiver's power to sue.*

A Receiver, appointed under section 351 of the Civil Procedure Code of 1882, has no *locus standi* to institute a suit, even with the previous sanction of the Court which appointed him Receiver.

As a general rule, a Receiver is a person appointed by the Court to receive and there is no vesting of any cause of action in him.

The power to sue or the liability to be sued is not *necessarily* incidental to the general powers of a Receiver, who has the right to institute or defend a suit only with the express permission of the Court.

Second appeal from the order of the Divisional Judge, Ambala Division, dated the 8th April 1909, affirming that of the Subordinate Judge, Ambala, dated the 30th October 1908, decreeing plaintiff's claim.

Mr. *Beechey*, and Lala *Durga Das*, for the Appellant.

Mr. *Gokal Chand Nurang*, for the Respondents.

JUDGMENT.—The plaintiff in this suit is the Civil Nazir of the Court of the District Judge, Ambala. On the 28th November 1905, he was appointed under section 351, Civil Procedure Code, 1882, Receiver of the property belonging to Asa Ram and Ramjas Mal, insolvents. In January 1907, plaintiff, with the previous sanction of the District Judge, instituted the present suit, in which he claims to be entitled to recover certain lands which defendant, Badri Pershad, alleges had been mortgaged to him for consideration by the said Asa Ram and Ramjas Mal on the 9th September 1900.

A number of legal questions are involved in the case and have been dealt with (not altogether satisfactorily) in the judgments of the lower Courts. The latter have concurred in granting plaintiff a decree and the defendant has appealed to this Court.

Here, again, the questions referred to above have been raised and argued at some length but we find it unnecessary to deal with them as we are clear that defendant's objection must prevail that plaintiff, as a Receiver appointed under section 351 of the Code of 1882, had no power to institute a suit, even with the previous sanction of the Court which appointed him Receiver. The powers of a Receiver of an insolvent's property are set forth in section 356 of the Code, and the right of instituting or defending suits, which a Court is empowered to grant to a Receiver under section 503, is not included therein. Section 356 apparently contemplates a simple state of things. The insolvent hands over the whole of his property to the receiver, and the Receiver "receives" that property and proceeds to distribute it among the creditors. Practically, this constitutes the sum total of the powers of a Receiver under the section, and as a general rule, a "Receiver is a person appointed by the Court to 'receive' and there is no vesting of any cause of action in him." [Kerr on Receivers, 1900, page 199; see also *Ram Lochan Sircar* v *Hogg* (1)].

Moreover, that the power to sue or the liability to be sued is not *necessarily* incidental to the general powers of a Receiver, is, we think, clear from the provisions of not only section 503 of the Code of 1882, but also of section 20 of the Provincial Insolvency Act, 1907, inasmuch as it is only with the express permission of the Court that in either case a Receiver has the right to institute or defend a suit [see *Drobomoyee Gupta* v. *C. T. Davis* (2), *William Robert Fink* v. *Maharaj Bahadur Singh* (3), *A. B. Miller* v. *Ram Ranjan Chakravati* (4), *Debendra Narain Roy* v. *Ramtaran Banerjee* (5), *Jagat Tarini Dasi* v. *Nobo Gopal Chaki* (6)]. In *Ex parte Sacker* (7), Fry, L. J. observed:—

"If any debt is due by Sacker to the plaintiff or to the defendant Company, the

(1) 10 W. R. 430.
(2) 14 C. 323 at pp. 339, 341.
(3) 25 C. 642; 2 C. W. N. 469.
(4) 10 C. 1014.
(5) 30 C. 599; 7 C. W. N. 766.
(6) 34 C. 305 at pp. 315, 317; 5 C. L. J. 270.
(7) 22 Q. B. D. 179 at p. 185; 58 L. J. Q. B. 4; 60 L. T. 344; 37 W. R. 204.

Receiver is only appointed to receive it; there is no vesting in him of any cause of action vested in them. Whatever cause of action they had, remains vested in them. It has been suggested that the Receiver could have maintained an action, either at law or in equity, against Sacker to enforce the payment of this sum of money. In my opinion, he could not. * * * * * There is no debt of any kind due from Sacker to the Receiver; consequently, he is not a good petitioning creditor. * * * * * As a general rule, a Receiver cannot maintain an action to compel obedience to an order for delivery of goods or the payment of money to him by a party to the action. There may, no doubt, be exceptional cases in which a Receiver can bring an action in his own name; when, for instance, he is the holder of a bill of exchange. So, too, if he is possessed of chattels as Receiver, and these chattels are unlawfully detained from him, he may well be able to maintain an action to recover them as the person in possession of them quite independently of the fact that he is a Receiver. And there may be other cases in which, *having an independent cause of action the fact that he is Receiver does not disqualify him from suing. But in such cases, he does not sue as Receiver.*"

The defendant has throughout contended that the present plaintiff had no *locus standi* and this point has been urged again before us. In our opinion, the contention must prevail and we accordingly accept the appeal and dismiss the plaintiff's suit.

As regards the question of costs, we find that the Courts are agreed in holding that the mortgage in favour of the defendant was a fictitious transaction and though this point is not before us for determination, in view of our decision on the law point, we cannot overlook the concurrent finding when dealing with this question of costs. We accordingly direct that the parties shall bear their own costs throughout.

Appeal accepted.

MADRAS HIGH COURT.

ORIGINAL CIVIL APPEAL No. 88 OF 1912.

December 2, 1912.

Present:—Sir Arnold White, Kt., Chief Justice, and Mr. Justice Oldfield.

LODD GOVINDOSS—APPELLANT

versus

RAMDOSS VISHNUDOSS—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XXIII, not applicable to execution proceedings, O. XXI, r. 2—Powers of executing Court on application of judgment-creditor to enquire into terms of compromise.

Order XXIII, Civil Procedure Code, does not apply to execution proceedings.

Order XXI, rule 2 only authorises the recognition by the executing Court of payment or adjustment. An inquiry into the terms of an alleged compromise cannot be made on the application of the judgment-creditor under Order XXI, rule 2 and there is no jurisdiction in the Judge to deal with such matter on such application.

Neither the fact that in the first instance the creditor asked for an order of inquiry into the terms of the compromise nor the fact that the Judge adjourned the summons for evidence as to the alleged compromise, can give the Judge jurisdiction.

The counter affidavit of the judgment-debtor cannot be recognised as an application under Order XXI, rule 2.

Appeal from the judgment of the Honourable Mr. Justice Bakewell, dated the 13th day of November 1912, in the exercise of the Ordinary Original Civil Jurisdiction of the High Court.

In the matter of the Indian Arbitration Act, 1899, and in the arbitration between Lodd Govindoss Krishnadoss of Madras and Vishun Doss Chatarbuja Doss of Mysore.

JUDGMENT.—This case comes before us in a somewhat curious form. It is an appeal by the judgment-debtor against an order of Mr. Justice Bakewell, dismissing an application by the judgment-creditor's alleged legal representative for an order in the terms of an alleged compromise, which modified the terms of a decree which had been obtained by the judgment-creditor. Mr. Justice Bakewell dismissed the application on the ground that Order XXIII did not apply to execution proceedings, (See rule 4). We agree with Mr. Justice Bakewell. Mr. Justice Bakewell also referred to Order XXI, rule 2 and he held, with regard to this rule, that, as it relates only to payment or adjustment of a decree and a record thereof being made by the Court, it appeared to negative the recognition by the executing Court of anything less than the payment or adjustment.

LODD GOVINDOSS v. RAMDOSS.

Before us the argument has turned upon the construction of Order XXI, rule 2 (1) and it has been contended, on behalf of the judgment-debtor, that Mr. Justice Bakewell was wrong in the circumstances of this case in declining to direct an inquiry as to the terms of the alleged compromise which, under the Judge's summons taken out by the judgment-creditor, the Court was asked to record as an adjustment under Order XXI, rule 2 (1). When the Judge's summons came on an earlier occasion before Mr. Justice Bakewell, application was made for an adjournment in order that oral evidence might be taken on the question of the compromise. We are told that this application was made by both parties. Mr. Justice Bakewell's note does not show whether the application was made by the judgment-creditor or on behalf of both parties. But for the purposes of the question to be decided, it seems to us immaterial whether the application was a joint application or was made by the judgment-creditor on his own behalf. Now it is contended on behalf of the judgment-debtor that, in view of this application, the judgment-creditor is not now entitled to say:—"I will take the benefit of Mr. Justice Bakewell's order dismissing the application and will not press for an inquiry as to the terms of the compromise." It was also contended that Mr. Justice Bakewell was wrong in not inquiring into the terms of the alleged compromise. It is common ground that, when the summons eventually came on before Mr. Justice Bakewell, the parties were at issue as to what were the terms of an alleged compromise. The judgment-creditor was willing that the adjustment should be recorded if it embodied the compromise according to his version; the judgment-debtor was willing that the adjustment should be recorded if it embodied the terms of the compromise according to the judgment-debtor's version. In this state of things, we do not think that the judgment-debtor is entitled to ask the learned Judge to go into the question of what the terms of the compromise in fact were. Mr. Seshachariar on behalf of the judgment-debtor has called our attention to various authorities; but no case has been cited to us where an order has been made for an inquiry as to what were the terms of an alleged compromise on the application of the judgment-creditor under Order XXI, rule 2. The cases cited would seem to be cases where the judgment-creditor had applied for execution and the judgment-debtor has asked for an inquiry as to the terms of the compromise upon which he relies by way of answer to the application for execution. That, of course, is a very different case from this. The fact that in the first instance the creditor asked for an order that the terms of the compromise might be inquired into, cannot, of course, give the learned Judge jurisdiction to deal with the matter, if, on the true construction of Order XXI, rule 2 (1), he had no jurisdiction; and the fact that the learned Judge adjourned the summons for evidence to be taken as to the alleged compromise does not, of course, give him jurisdiction. We are asked on behalf of the judgment-debtor to treat his affidavit as a substantive application under Order XXI, rule 2 and we have been referred to the case of *Alathoor Budr-ud-deen* v. *Golam Moideen* (1), where in a proceeding under the old section 258, the Court was asked to treat the counter-petition of a judgment-debtor as an application to compel the judgment-creditors to certify the adjustment. The learned Judges say:—"We might be inclined to accede to this request if there was anything before us to show that the counter-petition was put in within the time allowed to the judgment-debtors by the Limitation Act; but we do not feel disposed to grant the indulgence to the judgment-debtor of treating his counter-affidavit as a substantive application under Order XXI, rule 2 (2)." The observation of the learned Judges in *Alathoor Budr-ud-deen* v. *Gulam Moideen* (1) has reference to the facts of that particular case. To treat the affidavit as an application is to ignore the express language of Order XXI, rule 2 (2), which requires a notice to show cause against recording satisfaction of the decree. The judgment-debtor is still in time and can take action, if he thinks fit. We are of opinion that the appeal fails and must be dismissed with costs. C. M. P. No. 2493 of 1912 is also dismissed with costs.

Petition dismissed.

(1) (1911) 2 M. W. N. 473; 10 M. L. T. 396; 12 Ind. Cas. 562.

NARAYANA AIYAR *v.* ANAI AIYAR.

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 829 OF 1911.

November 11, 1912.

Present:—Sir Ralph Benson, KT., Judge, and Mr. Justice Sundara Aiyar.

NARAYANA AIYAR AND ANOTHER—PLAINTIFFS—PETITIONERS

versus

ANAI AIYAR *alias* MAHADEVA AIYAR—DEFENDANT—RESPONDENT.

Will—Construction—Legacy, vesting of—Possession—Decree, form of—Legatees suing for interest on money bequeathed.

A Hindu lady made a Will in favour of her two minor great-grandsons. Under the Will, the interest on the two mortgages bequeathed, accruing subsequent to the death of the testatrix until both the legatees should attain majority, was to be taken by them, and their father was expressly disinherited; no intermediate estate was created in favour of any one else till the minor legatees attained age, nor was there any gift over in case of the minors dying without attaining majority:

Held, (1) that these facts were indications that the amount due on the mortgages was intended to vest in the legatees immediately on the death of the testatrix; that the expression in the Will that the legatee should take the principal and the interest accruing after the testatrix's death on the younger attaining majority referred only to the time when they were to take possession of the legacy;

(2) that in a suit for interest by the minor legatees, a decree for the money due should be passed but the amount, when realized from defendant, should be kept in Court deposit or invested by the Court in Government securities till the younger legatee attained majority.

Petition, under section 25 of Act IX of 1887, praying the High Court to revise the decree of the Court of the Subordinate Judge of Tanjore, in Second Civil Suit No. 475 of 1911.

Mr. *V. Viswanatha Sastri*, for the Petitioners.

Mr. *K. Jagannatha Aiyar*, for the Respondent.

JUDGMENT.—The question in this case relates to the construction of a Will made by a Hindu lady. It was apparently not drafted by any professional lawyer and its terms are not happily expressed. The suit was instituted by her two minor great-grandsons (sons of her grandson), whom she undoubtedly intended to benefit by the dispositions contained in the Will, for rent due on a rental instrument executed by the defendant for a piece of land which he had usufructuarily mortgaged to the testatrix. No Letters of Administration with the Will annexed were taken out by any one and the suit is instituted by the plaintiffs as beneficiaries under the Will. It has been dismissed by the lower Court on the ground that the plaintiffs obtained no rights under the Will until the attainment of the age of majority by both of them. The substantial question for decision is whether this construction of the Will is right. Its terms are as follows:—* * * * After my death (1), Minor Narayana Ayyan aged 3 years and (2) Venkatarama Ayyan aged 1 year, my great-grandsons and sons of the eldest wife of Muthurama Ayyan, the adopted son of Muthusamy Ayyan, my son, these two, after the two above mentioned minors have become majors, shall take in equal portions the principal Rs. 1,000 and the balance of interest due, deducting the interest paid towards the documents as long as I live. If one of them die while the other is a minor, the other who survives shall take after the said minors have become majors without any objection the principal and interest that may be due after my death as above mentioned. No body has right to demand the said amounts either at the time of the minority of the said minors or at the time when one has become major.

As I have given up by means of this Will the said amounts to be taken by the two minors after they have become majors at their pleasure, as mentioned above, the said Muthurama Ayyan, the father of the said minors and the adopted grandson of mine, has no right after my death either to the said amount or to its interest. Thus I have executed this Will with firmness. * * * *

It will be observed that the interest on the two mortgages bequeathed under the Will accruing subsequent to the death of the testatrix until both the legatees should attain age is to be taken by them. Their father is expressly disinherited by the testatrix. No intermediate estate is created in favour of any one else till the minor legatees attain age.

These facts are indications that the amount was intended to vest in the legatees immediately on the death of the testatrix. The absence of any gift over in case of the minors dying without attaining majority is also an indication against the construction that the vesting should be postponed until their majority, the presumption being that the

testatrix did not intend to die intestate. On the whole, we are of opinion that the expression in the Will that the legatees should *take* the principal and the interest accruing (after the testatrix's death) on the younger attaining majority refers only to the time when they were to take possession of the legacy and that the gift was intended to take effect immediately. We do not think that the donor intended to keep her estate in abeyance until both her great-grand-children should attain majority. We do not consider it necessary to refer to English cases as to vesting of legacies which are of highly technical character and cannot be applied without much caution to conveyances executed without professional aid in this country. The vesting of legacies charged upon real estate is governed in England by rules derived from the Common Law, while the vesting of bequests of personality including chattels real is governed by rules derived from the Civil Law. The respondent's Vakil relies on *Gordhandas* v. *Bai Rimcoo erbai* (1), but there were several reasons in that case (see pages 467 and 468) for holding that the estate was intended to be kept in abeyance for a time. We must hold that the plaintiffs obtained a vested interest on the death of the testatrix. It is, however, clear that under the Will. they are not entitled to obtain possession of the interest on the amounts bequeathed until the younger of them attains majority. The 1st plaintiff became a major after the institution of the suit but the 2nd plaintiff is still a minor. The Will did not appoint any trustee or executor and there is no administrator entitled to receive and keep possession of the interest until the attainment of majority by the 2nd plaintiff. The Subordinate Judge's decree must be reversed. The plaintiffs will have a decree for the amount sued for but the amount when realized from defendant will be kept in Court deposit until the second plaintiff attains majority. The plaintiffs may apply to the Court for the investment of the money in Government promissory-notes. The defendant will pay the plaintiffs' costs in both Courts.

Decree reversed.

(1) 26 B. 449; 3 Bom. L. R. 857.

PRIVY COUNCIL.

APPEAL FROM THE HIGH COURT AT BOMBAY.

November 26, 1912.

Present:—Lord Macnaghten, Lord Moulton, Sir John Edge and Mr. Ameer Ali.

AHMEDBHOY HABIB BHOY—APPELLANT

versus

THE BOMBAY FIRE AND MARINE INSURANCE CO., LTD.,—RESPONDENTS.

Fire Insurance—Damage—Liability of Company—Actual damage.

The Insurance Companies take possession of the damaged premises in order to minimise the damage in their own interests. When they have taken possession of the premises and done what in their opinion was wisest to minimise the damage, they cannot say that actual damage is not the natural and direct consequence of the fire.

Appeal from the decision of the High Court at Bombay in an arbitration proceeding, reversing the decision of a Judge of the same Court. (See 1 Ind. Cas. 14).

Mr. *Atkins, K. C.*, and Mr. *Lowndes*, for the Appellant, contended that the Court of Appeal had no power to make a decree in the form drawn up and that there was no appeal from the decision of the first Court of which order was not drawn up.

Sir *C. A. Cupps* and Mr. *McCardie*, for the Respondents, contended that the High Court was quite right in directing the arbitrators who had no power to exceed their jurisdiction and enlarge the scope of the arbitration.

Mr. *Atkins*, replied.

JUDGMENT.

LORD MOULTON.—This appeal relates to certain arbitration proceedings instituted for the purpose of ascertaining the amount due to the appellant under fire policies taken out by him with the respondent Company and 18 other Companies upon a cotton mill in Bombay known as Victory Mill.

The facts of the case are very simple and may be briefly stated as follows:—A fire broke out in the Victory Mill on the 14th October 1906, and did very extensive damage. Immediately after the fire, the appellant gave notice of his claim to the Insurance Companies, and they took possession of the premises under powers reserved to them in that behalf and retained possession for a considerable period for salvage purposes during which time they sold and realised certain salvaged property. Possession of the premises was ultimately given

back to the appellant, who thereupon made out the amount of his claim under the policy. The Companies disputed the amount of his claim, and in accordance with the terms of the policies, the matter was referred in each case to arbitration, but as the policies were substantially in the same form, a joint inquiry was held before the arbitrators, at which all the Companies were represented by one Counsel. Its object was to ascertain once for all the total amount of the loss from which the share to be borne by the respective Companies could immediately be deduced.

In these arbitration proceedings, the present appellant tendered evidence to prove that the machinery was seriously injured not only by the fire, but by the effect of the water that had been used to extinguish the fire. This evidence showed that the injury to the machinery by the presence of the water was in its nature progressive, *i.e.*, that it had been seriously increased by the length of time during which the water had been allowed to lie on the machinery. Counsel for the Companies objected to the admission of this latter evidence. He admitted that damage done by the water employed to extinguish the fire, came within the loss insured by the policy, but he raised the contention (to use his own words), "that the liability for damage to property ceased the moment the fire was extinguished."

The question of the admission of this evidence was formally argued before the arbitrators and they decided that they would allow the evidence to be given. Thereupon the whole of the Companies petitioned the High Court to revoke the submissions to arbitration on the ground that the arbitrators had exceeded their jurisdiction in admitting the evidence. The petition came on for hearing before Davar, J., on the 11th January 1903. The facts were not in dispute. In the argument on the hearing, Counsel for the Insurance Companies apparently treated the evidence that the injury to the machinery from the presence of the water had increased during the time that had elapsed between the fire and the delivery up of possession by the Companies as being evidence that could relate solely to what was termed "a tortious act" on the part of the Insurance Companies, and they contended that no such question was referred to the arbitrators. On the 23rd January 1903, judgment was delivered. The learned Judge made no order on the petition and directed the petitioners to pay the costs of the present appellant in the petition. The main ground of the judgment was that by admitting the evidence the arbitrators had decided nothing, and that there was no cause to interfere with their action.

From this decision, the present respondent appealed to the High Court sitting in appeal from its original civil jurisdiction. The appeal was heard by Chandavarkar and Batchelor, JJ., and on the 7th December 1903, judgment was delivered allowing the appeal. The main ground of the judgment is expressed by Batchelor, J., as follows:—

"For whereas this contract refers only to loss by fire, those damages would arise from a totally different origin, an origin which it seems to me is wholly distinct and separable from the fire, namely, a neglect by the Companies of some duty imposed on them after the loss by fire and water had become an accomplished fact."

The order made by the High Court was of a very unusual kind; the only operative part was that it set aside the order of Davar, J., and directed the present appellant to pay the costs of the petition and appeal. This was accompanied by an expression of the view of the Court on the point of law involved to which more particular reference will be made later on. But no order was made revoking the submission, the Court evidently realizing that their expression of opinion would be accepted by the arbitrators as authoritative guidance in the matter and that there was no reason to fear their not acting in accordance with it in the future conduct of the arbitration.

From this order, the present appeal is brought. It raises, therefore, the plain and simple issue whether the loss due to fire and water under such a policy is to be determined at the moment the fire is extinguished or when the Companies give up possession of the premises to the owner after exercising the powers given to them by the policy for the purpose of enabling them to minimise the damage. It is, however, scarcely necessary that their Lord-

ships should formally negative the contention of the Companies in this respect for it is so obviously unreasonable that the eminent Counsel who appeared for them on the appeal did not attempt to support it. They confined their argument to contending that although the Insurance Companies were, undoubtedly, liable for the damage done by the presence of the water subsequently to the fire during the time that the premises were in their possession, the judgment appealed from was correct in law because it did not pronounce to the contrary but only decided that no claims based on breach of duty by the Companies had been referred to the arbitrators. Their Lordships are of opinion that this does not rightly represent the effect of the judgment or of the order made thereon. The effective portion of that order is a declaration of the opinion of the Court in the following words:—

"This Appellate Court is of the opinion that the jurisdiction of the said arbitrators extended only to the dispute relating to loss or damage from fire under the terms of the policy of insurance in each case and not to the question of any loss or damage alleged to have arisen from the neglect of the Insurance Companies, who are parties to the above-mentioned arbitration, to take care of the machinery of the respondent after the fire mentioned in the petition of the petitioners above named. . . . . had been extinguished and the Insurance Companies had entered upon possession under clause 11 of the Policy of Insurance mentioned in the said petition."

Taken in connection with the contentions of the parties, it is clear that the High Court intended by this expression of opinion to direct the arbitrators that the loss must be estimated from the condition of the machinery, etc., at the moment when the fire was extinguished. Had the present appellant permitted this order of the High Court to remain unappealed against, the arbitrators would have been bound to estimate the damages upon that erroneous footing.

The fundamental error in the contention of the present respondents seems to their Lordships to have arisen from a misapprehension of the position of an Insurance Company taking and holding possession of premises damaged by a fire under the provisions of the policy in that behalf. The provisions in virtue of which it does so are for the purpose of enabling it to minimise the damage. Inasmuch as it has to bear the loss, there is no one so directly interested in doing everything that is wise for the purpose of making the best of the situation. It does so in its own interest, not because it is under a duty to the assured. Its powers are of the nature of a privilege to do that which is most for its own benefit under the circumstances so as to reduce the loss. In the present case, therefore, there is no question of tort on the part of the Companies. They may have thought that it was not worth while to expend money in drying the machinery. In this view, they may have been right or wrong but they unquestionably had full power to take the course which in fact they did take. But when they have thus taken possession of the premises and done what in their opinion was wisest to minimise the damage, they cannot say that the actual damage is not the natural and direct consequence of the fire.

Their Lordships are, therefore, of opinion that the High Court ought to have affirmed the order of Davar, J., dismissing the petition, and they will, therefore, humbly advise His Majesty that the appeal be allowed and that the order of Davar, J., be restored and that the present respondent be directed to pay the costs of the appeal to the High Court and of this appeal.

There have been various irregularities in procedure in connection with the various stages of the petition. But it is not necessary to refer to them in this judgment because at the hearing of the appeal, these irregularities were waived by the appellant on the terms assented to by the respondents, that the General Accident Fire and Life Assurance Corporation Limited should be taken to be a respondent to the appeal so far as liability for costs is concerned.

Solicitors for the Appellant: Messrs. *T. L. Wilson & Co.*

Solicitors for the Respondents: Messrs. *Cameron, Kemm & Co.*

MADRAS HIGH COURT.

CIVIL MISCELLANEOUS APPEAL No. 117 OF 1911.

November 15, 1912.

Present:—Sir Ralph Benson, KT., Judge, and Mr. Justice Sundara Aiyar.

R. M. A. R. ARUNA CHELLA CHETTIAR —PLAINTIFF—APPELLANT

versus

V. V. M. MUTHIAH CHETTIAR AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 16 cl. (d)—Declaration that mortgage is invalid—Mortgaged property situate beyond local limits of Court.

A suit for a declaration that the mortgage of immoveable property is invalid as against plaintiff is governed by clause (*d*) of section 16 of the Code of Civil Procedure. A Court, within the limits of whose jurisdiction the property affected by the mortgage is not situate, has no jurisdiction to try the suit.

Appeal from the order of the Subordinate Judge, Ramnad, in Original Suit No. 121 of 1910.

Messrs. *T. Rangachariar*, *C. S. Venkatachari* and *A. Srinivasa Aiyangar*, for the Appellant.

Messrs. *T. Narasimha Aiyangar*, *C. V. Anantakrishna Aiyar*, and *P. Gangadhara Aiyar*, for the Respondents.

JUDGMENT.—For the purpose of deciding this appeal, it is sufficient to refer to the 3rd prayer in the plaint in which the plaintiff asks for a declaration that the mortgages executed in favour of the defendants Nos. 5 to 8 are invalid as against the plaintiff. As the properties affected by the mortgages are admittedly situated beyond the jurisdiction of the Sub-Court, it could have no jurisdiction to take cognizance of the prayer, because it clearly asks the Court to determine whether defendants Nos. 5 to 8 have an interest in immoveable property. The proviso to section 16, Civil Procedure Code, has no application to such a case, as the relief is not one that can be rendered to the plaintiff by the personal obedience of the defendants. *Benode Behari Bose* v. *Nistarini Dassi* (1) is not in point. That suit was for administration in the High Court and was governed by the Letters Patent. The Privy Council held that the suit was not one for land beyond the original jurisdiction of the High Court. This suit clearly comes within clause (*d*) of section 16, Civil Procedure Code. We dismiss the appeal with costs. We allow the memo. of objections and direct the plaintiff to pay the defendant's costs in the lower Court also. He will also pay the costs of the memo. of objections.

Appeal dismissed.

(1) 33 C. 180 at p. 191; 15 M. L. J. 331; 9 C. W. N. 961; 2 C.L.J. 189; 7 Bom. L. R. 887(P.C.); 32 I. A. 193.

PRIVY COUNCIL.

APPEAL FROM THE HIGH COURT AT CALCUTTA.

November 26, 1912.

Present:—Lord Macnaghten, Lord Moulton, Sir John Edge and Mr. Ameer Ali.

AZIMA BIBI—APPELLANT

versus

MUNSHI SHAMALANAND—RESPONDENT.

Muhammadan Law—Custom—Muhammadan family adopting Hindu worship—Females, rights of—Estoppel—Representation by males.

A Muhammadan family, governed by Muhammadan Law, adopted the Hindu religion in matters of worship.

There was no evidence of any custom in the family by which the Muhammadan Law in respect of descent of property had been altered or varied:

Held, (1) that the family did not cease to be governed by Muhammadan Law in matters of succession;

(2) that the females succeeded to proprietary interest in accordance with that law.

In the absence of any proof or suggestion that *parda nashin* ladies of a family have misled, by word or conduct, any alienee from the male members, the mere fact that the ladies left the management of the property in the hands of males is insufficient to show that the male members represented the females or that the latter are estopped.

Appeal from a judgment and decree of the High Court at Calcutta, dated the 6th of April 1906, varying a judgment and decree of the District Judge of Arrah, dated the 23rd of December 1903.

Mr. *Ross*, *K. C.*, for the Appellant, contended that the High Court gave its judgment with reference to a case not raised by the pleadings. The bond was not binding on the appellant who had not deceived the respondent in any way.

Ramcoomar Koondoo v. *McQueen* (1) was referred to.

JUDGMENT.

LORD MACNAGHTEN.—This appeal was heard *ex parte*.

The appellants are the female members

(1) 18 W. R. 166; 11 B. L. R. 46; Sup. Vol. I. A. 49.

of a Muhammadan family which, in matters of worship, have adopted the Hindu religion. There is no evidence that there is any custom in the family by which the Muhammadan Law in regard to the descent of property has been altered or varied.

The respondent is a Pleader of some standing. He took a mortgage of ancestral property from the male members of the family. He was under the impression that the Hindu Law of descent prevailed in the family, and that the female members had no proprietary interest. He made no inquiry of any of the female members or of their husbands. They were *purdah nishin* ladies and naturally left the management of the property in the hands of the males.

The respondent brought this suit to enforce his security against the family property, making both the males and the females parties. The District Judge gave him a decree against the males but dismissed the suit against the females with costs. On appeal, the High Court passed a decree against the females as well as against the males, and ordered the appellants to pay the costs of the appeal to the High Court.

The learned Judges of the High Court held that the male members "represented" the females in the transaction because the females had not actively interfered with the property, and it appeared that in other transactions, the male members of the family had dealt with the family property without the active concurrence of the females. There was no proof nor, indeed, was there any suggestion, at least in the evidence, that the appellants or any of them had misled the respondent, either by word or by conduct.

In their Lordships' opinion, the decree of the High Court is against all principle and authority.

Their Lordships will, therefore, humbly advise His Majesty that the decree of the High Court should be discharged with costs and that the decree of the District Judge should be restored.

The respondent will pay the costs of the appeal.

Appeal decreed.

Solicitors for the Appellants: Messrs. *T. L. Wilson & Co.*

MADRAS HIGH COURT.

APPEAL FROM ORDER No. 269 OF 1911.

November 13, 1912.

Present:—Sir Ralph Benson, KT., Judge, and Mr. Justice Sundara Aiyar.

RAJA KUMARA VENKATA PERUMAL RAJU BAHADUR VARU RAJAH OF KARVETNGAR, MINOR BY GUARDIAN W. A. VARDACHARIAR—APPELLANT

versus

AUDIKESAVALU REDDI AND OTHERS —RESPONDENTS.

Limitation—Mortgage decree for sale—Execution—Time when limitation begins to run.

Limitation for the execution of a decree for sale in a suit on a mortgage, runs from the date when the first decree or decree *nisi* for sale is made absolute.

Appeal from the order of the District Court of North Arcot, in Civil Execution Petition No. 84 of 1910, in Original Suit No. 10 of 1890.

Mr. *L. A. Govindaraghava Aiyar*, for the Appellant.

Messrs. *C. V. Anantakrishna Aiyar* and *K. C. Desikachariar*, for the Respondents.

JUDGMENT.—The decree in plaintiff's favour was made absolute only on the 1st March 1899. The present application was put in within 12 years from that date. According to the decision of the Privy Council in *Ashfaq Hussain* v. *Gauri Sahai* (1), limitation for the execution of a decree for sale in a suit on a mortgage, would run only from the date when the first decree or decree *nisi* for sale is made absolute. This view was adopted by this Court in *Yemani Chinna Seshaya* v. *Varanasi Pepaya* (2). The application is, therefore, not barred. According to the terms of the decree, the plaintiff is entitled to proceed in execution against other properties of the judgment-debtor.

We dismiss the appeal with costs.

Appeal dismissed.

(1) 33 A. 264; 9 Ind. Cas. 975; 15 C. W. N. 370; 21 M. L. J. 1140; 8 A. L. J. 332; 13 C. L. J. 351; 9 M. L. T. 380; 13 Bom. L. R. 367; 4 Bur. L. T. 121 (P. C.).

(2) 15 Ind. Cas. 732.

INDAR SAHAI *v.* SHIAM BAHADUR.

PRIVY COUNCIL.

APPEAL FROM THE HIGH COURT AT ALLAHABAD.

November 26, 1912.

Present:—Lord Macnaghten, Lord Moulton, Sir John Edge and Mr. Ameer Ali.

Munshi INDAR SAHAI—DEFENDANT—APPELLANT

versus

Kunwar SHIAM BAHADUR AND OTHERS—PLAINTIFFS—RESPONDENTS.

Hindu Law—Joint family—Self-acquired property.

Property granted to a person by the Government as a reward for his services is self-acquired property.

Property acquired by a member of a Hindu family becomes the property of the joint family if it is thrown into the common stock, and the income of the whole of the property is devoted to the expenditure of the family, one account being kept of the income from the self-acquired and the ancestral property.

Consolidated appeals from two judgments and decrees of the Allahabad High Court, dated December 15th, 1909, one reversing a judgment and decree, dated April 20th, 1905, and the other affirming a judgment and decree, dated August 10th, 1905, of the Subordinate Judge of Bareilly.

Sir *E. Richards, K. C.*, and Mr. *Ross, K. C.*, on behalf of the Appellant (Defendant), contended that the consent of the members of the family to the execution of the Will of Jiwan Sahai in favour of Lado was proved. The property in question was self-acquired, being a grant by the Government and although the income had got mixed up, it was never thrown into the common stock. Reference was made to *Lal Bahadur* v. *Kanhaiya Lal* (1).

Mr. *DeGruyther, K. C.*, (with him Mr. *Dube*), on behalf of the Respondents, contended that the Will in question was not genuine, nor was Jiwan Sahai competent to make it.

Sir *E. Richards* replied.

JUDGMENT.

SIR JOHN EDGE.—The appellant, Munshi Indar Sahai, was, with one Madan Mohan Lal deceased, a defendant in a suit which was brought in 1904 in the Court of the Subordinate Judge of Bareilly and related to shares in *Mauza* Partapur, two other villages, and a house and shops in the City of Bareilly. The appellant was also sole defendant in a suit which was brought in 1905 against him, as manager of a temple, in the Court of the Subordinate Judge of Bareilly, and related to a moiety of *Mauza* Nawadia Bahmanpuri. The suits were tried by different Subordinate Judges. The suit of 1904 was dismissed by the Subordinate Judge, and on appeal his decision was set aside by the High Court at Allahabad, and the High Court gave the plaintiffs in that suit a decree. From that decree of the High Court, one of these consolidated appeals has been brought. In the suit of 1905, the Subordinate Judge gave the plaintiffs in that suit a decree which was affirmed by the decree of the High Court on appeal. From the latter decree of the High Court, the other of these consolidated appeals has been brought.

The common ancestor of the plaintiffs-respondents and the defendant-appellant was Munshi Jiwan Sahai. Jiwan Sahai had three sons, namely, Ram Sahai, who died in 1888; Tirbeni Sahai, who died childless in 1883, leaving a widow *Musammat* Lado, who died in 1904; and Indar Sahai, who is the defendant-appellant. From Ram Sahai, the plaintiffs-respondents descended in the male line. Jiwan Sahai died on the 10th September 1893. Jiwan Sahai and his sons, Ram Sahai, Tirbeni Sahai, and Indar Sahai, had constituted a joint Hindu family governed by the Law of the *Mitakshara*, and at the time of the death of Jiwan Sahai, he, his surviving son, Indar Sahai, and the sons and grandsons of Ram Sahai, who were then living, constituted the joint Hindu family.

On the 15th May 1893, Jiwan Sahai made a Will by which he purported to give to *Musammat* Lado, the widow of his deceased son, Tirbeni Sahai, the villages to which the suits respectively relate, and an interest for her life in the house and shops in the City of Bareilly, with a direction that *Musammat* Lado should dedicate *Mauza* Nawadia Bahmanpuri to the *Thakurdwara* of the god Krishna in *Mohalla* Darzi Chauk. In one of the suits, the Subordinate Judge found that Jiwan Sahai had not made that Will, but the High Court found that Jiwan Sahai had in fact made the Will. With that finding of the High Court, their Lordships agree. The validity of Jiwan Sahai's Will has been, however, on other grounds contested. On behalf of the plain-

(1) 34 I. A. 65; 29 A. 244; 11 C. W. N. 417; 5 C. L. J. 340; 4 A. L. J. 227; 2 M. L. T. 147; 17 M. L. J. 228; 9 Bom. L. R. 597.

tiffs-respondents, it has been contended that the property dealt with by the Will was the property of the joint Hindu family, which Jiwan Sahai had no power to dispose of by his Will, and that the Will was not made by Jiwan Sahai with the consent of the other members of the joint family, and was, consequently, inoperative. On behalf of the defendant-appellant, Indar Sahai, it has been contended that the villages, Nawadia Bahmanpuri and Partapur, were self-acquired property of Jiwan Sahai, and never became the property of the joint Hindu family, and further that the Will was made by Jiwan Sahai with the consent of the other members of the joint family. It is now common ground that the property which Jiwan Sahai purported to dispose of by his Will other than the villages Nawadia Bahmanpuri and Partapur was the property of the joint family.

The villages Nawadia Bahmanpuri and Partapur were granted by the Government to Jiwan Sahai as a reward for his services in the Indian Mutiny of 1857, and, undoubtedly, were obtained by him as self-acquired property. It was found by the Subordinate Judge of Bareilly, on a remand which was ordered by the High Court, that Jiwan Sahai had been the head and managing member of the joint Hindu family, and that he kept one account of the income of his ancestral and self-acquired property, and used to treat the income of both kinds of property as one amalgamated fund. The accounts which had been kept by Jiwan Sahai were examined by a Commissioner and the High Court found that:—

"It appears from these accounts that the income of all the property, ancestral and self-acquired, was blended together in one general account. No distinction was made between the income derived from the different classes of property and the whole of the income was thrown into one common stock and was devoted to the expenditure of the whole of the joint family of which Jiwan Sahai, his sons, grandsons, and great-grandsons were members. The self-acquired property, therefore, became the property of the joint family. There is nothing to indicate that Jiwan Sahai wished to or did treat the property acquired by him as his separate property. The oral evidence adduced by the defendants on the point is unsatisfactory and is negatived by the evidence afforded by the accounts to which we have referred."

Their Lordships agree with the conclusion of the High Court that the property which had been acquired by Jiwan Sahai as his self-acquired property had become the property of the joint family.

It remains to be considered whether or not the defendant-appellant, Indar Sahai, established his contention that the Will of Jiwan Sahai of the 15th May 1893 was made by him with the consent of the other members of the joint family. That issue was upon him. In one suit, the Subordinate Judge had found that the Will had been made with the consent of the family. In the other suit, the Subordinate Judge had found that the Will was a forgery. The High Court found that there had been no consent. Their Lordships consider that the oral evidence which was given to prove consent was of the most unsatisfactory and unreliable description. After the suits had gone on appeal to the High Court and after the High Court had made its order of remand, the defendant-appellant, on the 15th of January 1903, for the first time produced a document, dated the 8th May 1893, which purported to be a *razamandinama*, a deed of consent, made by or on behalf of the plaintiffs-respondents and the defendant-appellant Indar Sahai. The genuineness of that document was denied on behalf of the plaintiffs, and Shiam Bahadur, one of the plaintiffs, by whom it was said to have been written and by whom it purports to have been signed, swore that it was not written by him and was not signed by him. The High Court considered that the document was not genuine. As to it, the High Court said:—

"The suspicious circumstances under which it was produced, the absence of any mention of it in the proceedings held in this and the connected suit before issues, were referred by us to the Court below, the absence of any reference to it in the Will of Jiwan Sahai, specially when the Will was not attested by the plaintiffs and Indar Sahai, lead us to think that the deed of consent is not genuine, and to hold that it is at least a doubtful document."

Their Lordships regard the document, dated the 8th May 1893, with the gravest suspicion. Their Lordships do not draw from the fact

that the property in question in these suits was not dealt with on the partition between the plaintiffs and the defendant-appellant, Indar Sahai, after the death of Jiwan Sahai, an inference that the Will of Jiwan Sahai was made with the consent of the family. The omission to include that property in the partition was probably owing to the reluctance of the members of the family to interfere during *Musammat* Lado's life-time with what were certainly the wishes of their ancestor, Jiwan Sahai. It is also to be observed that *Musammat* Lado was entitled to maintenance. Upon her death, these suits were brought. For similar reasons, their Lordships do not infer from the entries in the Revenue papers that the family had consented to the making of the Will. The whole tenor of the Will seems to their Lordships to negative the contention that the family had consented to its being made. Their Lordships agree with the opinion of the High Court that had the making of the Will been assented to by the members of the joint family, the fact that they consented would have been mentioned in the body of the Will, and their signatures to it would have been obtained as attesting witnesses. Their Lordships find that the Will of Jiwan Sahai was not made with the consent of the members of the joint family, and that the Will was inoperative.

Their Lordships will accordingly humbly advise His Majesty that these consolidated appeals should be dismissed, and the decrees of the High Court be affirmed. The defendant-appellant must pay the costs of these appeals.

Appeal dismissed.

Solicitors for the Appellant: Messrs. *T. L. Wilson, & Co.*

Solicitors for the Respondents: Messrs. *Barrow, Rogres & Nevill.*

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 555 OF 1909.

November 13, 1912.

Present:—Mr. Justice Sadasiva Aiyar.

RAJAGOPALA PANDARITHAR, MINOR REPRESENTED BY HIS NEXT FRIEND ANNI AMMAL—PLAINTIFF—PETITIONER

versus

MUTHU KUMARA CHETTIAR—DEFENDANT—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. IX, r. 12—Next friend's disobedience—Party to suit—Order for personal appearance—Power of Court.

It is not correct to say that the Court has no power to order a party to appear in person except when empowered by specific sections found in the Civil Procedure Code. The Court has such power whenever it considers that the interests of justice require any party to appear in person at any stage of the case.

The Court, however, has no power, under Order IX, rule 12, to dismiss a minor's suit for default because of the disobedience of his next friend. The next friend is not a party to the suit, and can be treated as such only for purposes of answering interrogatories or for saddling him with costs.

Petition, under section 115 of Act V of 1908, praying the High Court to revise the order of the Court of the District Munsif of Tanjore, in Original Suit No. 65 of 1908.

Messrs. *S. Srinivasa Aiyangar, T. V. Gopalasawmi Mudaliar* and *G. Krishnasawmy Aiyer*, for the Petitioner.

Messrs. *T. R. Venkatarama Sastri* and *G. S. Ramachandra Aiyar*, for the Respondent.

JUDGMENT.—The District Munsif dismissed the suit for default under Order IX, rule 12, because the minor plaintiff's next friend did not appear in person when ordered to do so.

I do not agree with the petitioner's Vakil that the Court has no power to order a party to appear in person except when empowered by specific sections found in the Civil Procedure Code. I think the Court must have such power, whenever it considers that the interests of justice require any party to appear in person at any stage of the case.

But the Court has no power under Order IX, rule 12, to dismiss a minor's suit for default because of the disobedience of his next friend. The next friend is not a party to the suit [see *Collector of Trichinopoly* v. *Sivaramakrishna Sastrigal* (1)], though for purposes of answering interrogatories or for

(1) 23 M. 73 at p. 81.

saddling him with costs, he might be treated as a party. He should not be treated as a party in order to visit his disobedience to the Court's orders upon the minor plaintiff and so as to prevent the minor plaintiff from appearing further in the suit through the Vakil already appointed for him or through some other next friend who might be appointed after removing the disobedient next friend.

I, therefore, set aside the Munsif's order dismissing the suit for default and direct the suit to be restored to file and disposed of according to law. Costs to be costs in the cause.

Order set aside;
Case remanded.

PRIVY COUNCIL.

APPEAL FROM THE HIGH COURT AT CALCUTTA.

November 12, 1912.

Present:—Lord Macnaghten, Lord Moulton, Sir John Edge and Mr. Ameer Ali.

BABUI BACHA KUMAR—APPELLANT

versus

BABUI SURAJ KALA KUMAR—RESPONDENT.

Will—Probate granted—Will admitted and acted upon—Subsequent application for revocation—Probate and Administration Act (V of 1881), s. 50.

A., the sole heiress of a testator, applied through her attorney for Probate of the Will.

The Probate was granted and the Will was acted upon for some years.

Some years after the grant of Probate, *A.* applied for revocation of the Probate on the ground that the Will was forged:

Held, that having admitted the genuineness of the Will and taken advantage of it, *A.* could not get the Probate revoked.

Appeal from a judgment and decree of the High Court at Calcutta, dated January 29th 1908, affirming that of the District Judge of Saran, dated February 10th, 1905.

One Chatturbhuj Dat Pandit, who died on April 6th, 1897, made his Will two days before his death. Bacha Kumar, the sole heiress of the testator, applied through her attorney for Probate of the said Will in the Court of the District Judge. A *wakalatnama* was executed by the same lady in which she recited the Will and gave authority to a certain person to appear for her in Probate proceedings and manage the property. On May 20th, Probate was granted

and the Will having been proved, was acted on for some years. At the expiration of that time, the said Bacha Kumar applied for the revocation of Probate on the ground that the Will was forged and so were the other documents. Although there were concurrent findings of both the District Court and the High Court, she was allowed leave to appeal to His Majesty on the ground that an important question of law was involved in it.

Sir *E. Richards, K. C.*, on behalf of the Appellant, contended that the appellant was not estopped from contesting the genuineness of the Will, which was in fact not a genuine Will.

Mr. *DeGruyther K. C.*, who appeared for the Respondent, was not called upon to reply.

JUDGMENT.

LORD MACNAGHTEN.—In this case, their Lordships think there is no ground for disturbing the judgment of the High Court. After four years, after having admitted the genuineness of this document and after having taken advantage of it, this lady comes forward with a tissue of falsehoods. So far as their Lordships can see, she comes without anything more than a mere suggestion of fraud, and she asks that that question may be tried.

Their Lordships think the High Court was perfectly right, and they will humbly advise His Majesty that this appeal should be dismissed with costs.

Appeal dismissed.

Solicitors for the Appellant: Messrs. *T. L. Wilson & Co.*

Solicitors for the Respondent: Messrs. *Watkins* and *Hunter*.

MADRAS HIGH COURT.

CIVIL MISCELLANEOUS PETITION No. 2334 OF 1912.

November 13, 1912.

Present:—Sir Arnold White, KT., Chief Justice, and Mr. Justice Sankaran Nair.

N. P. L. N. K. R. KANNIAPPAN CHETTI —PETITIONER—APPELLANT

versus

P. R. MANIKAVASAGAM CHETTI —RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XLI,

SECRETARY OF STATE *v.* BASAWA SINGH.

rr. 5, 6, 12—*Court to which application for stay of sale should be made.*

In view of the alteration of the language in Order XLI, rule 6 (2), which re-produces the old section 546, it is clear that the Legislature intended that the application for stay of an order for sale of immoveable property should be made only to the Court which made the order.

Civil miscellaneous petition for stay of sale in execution of decree of the High Court in its Ordinary Original Civil Jurisdiction in Original Suit No. 160 of 1911.

Mr. *C. E. Odgers*, instructed by Messrs. *Grant and Greatorex*, for the Petitioner.

Mr. *A. Krishnasami Aiyar* for Mr. *C. P. Ramaswami Aiyar*, for the Respondent.

ORDER.—In this case, the notice of motion asks for an order "that the sale of the appellant's immoveable properties advertised for the 11th November 1912 in the Court of the Sub-Judge of Ramnad at Madura be stayed till the further orders of this Court and that all proceedings in execution of the decree in Original Suit No. 160 of 1911 dated the 20th September 1911 be stayed against the appellant pending the disposal of this appeal and for such other orders as this Hon'ble Court may deem proper and necessary in the circumstances of this case and for an order that the costs of this application be costs in the appeal."

A preliminary objection has been taken that under rules 12, 6 (2), the application should be made to the Court which made the order for sale, *i.e.*, in this instance, to the Sub-Judge's Court at Ramnad.

Mr. Odgers has contended that there is concurrent jurisdiction in the Subordinate Judge's Court and in this Court and he has referred to the English Rules of the Supreme Court Order LVIII, rules 16 and 17. But the English Rules expressly provide for concurrent jurisdiction and no question could arise thereunder. The question for us is, did the Legislature intend, while giving the Appellate Court the general power conferred by Order XLI, rule 5, to make special provision that an application for stay of an order for sale of immoveable property should be made only to the Court which made the order?

In view of the alteration of the language in Order XLI, rules 6 (2), which re-produces the old section 546, it seems clear that the Legislature intended that the application should be made only to the Court which made the order. There were doubts as to whether the Appellate Court could make an order for stay of an order for the sale of immoveable property (see *Tribeni Sahu* v. *Bhagwat Bux* (1) and the language of the enactment would appear to have been altered to remove these doubts and to make it clear that the application must be made to the Court which made the order for sale.

We think the preliminary objection is good and we must uphold it. We must dismiss the application for the stay of the order for sale for the reasons above stated and we must also dismiss the general application to stay proceedings in execution of the decree as it is not shown that there are any proceedings other than those under the order for sale. The costs of this application will be costs in the appeal.

Appeal dismissed.

(1) 34 C. 1037; 11 C. W. N. 1030; 6 C. L. J. 298.

PUNJAB CHIEF COURT.

FIRST CIVIL APPEAL No. 1036 OF 1910.

December 14, 1912.

Present:—Sir Arthur Reid, Kt., Chief Judge, and Mr. Justice Robertson.

THE SECRETARY OF STATE FOR INDIA —APPELLANT

versus

BASAWA SINGH AND OTHERS—RESPONDENTS.

Land Acquisition Act (I of 1894), s. 24, fifthly—Agricultural land acquired for Mandi—*Compensation how determined—Proof—Sale of land requiring sanction of Deputy Commissioner—Appeal by Secretary of State against Court's award—Court-fee—Court Fees Act (VII of 1870), s. 8, Sch. II, Art.* 17 (4).

Where agricultural land is acquired for a *Mandi*, the compensation should be assessed at the amount which similar land in the neighbourhood is likley to fetch for purposes of agriculture. The purpose for which the land is required should not influence the award of compensation.

The fact that a shop-keeper is willing to pay a large price for a shop in a *Mandi*, or so near a *Mandi* as to enable him to enjoy the benefit enjoyed by the proprietors of the shops in the *Mandi*, in the event of his being fortunate enough to receive sanction for the purchase under the Alienation of Land Act, should not be considered in assessing the value for the purposes of the Land Acquisition Act unless it is shown that the sanction would be granted for the purchase.

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The evidence of witnesses, who merely give opinions as to the value of land or express their willingness to purchase it, should be excluded in determining the amount of compensation.

Where a District Board acquired land at a high price by private purchase for the enlargement of a *Mandi* in order to obviate the delay caused by proceedings under the Land Acquisition Act, the fact should not be taken into consideration in assessing the value of other land subsequently acquired through Government.

Section 8 of the Court Fees Act is applicable only to appeals by persons claiming compensation. An appeal by the Secretary of State against the award of the Court requires a Court-fee of Rs. 10 only under Article 17 (4), Schedule II of the Act.

First appeal from the order of the Divisional Judge, Hissar, dated 3rd May 1910, awarding Rs. 11,740 as compensation for acquisition of land.

The Hon'ble Mr. *Muhammad Shafi*, for the Appellant.

Mr. *Raushan Lal*, for the Respondents.

JUDGMENT.—This is an appeal by the Secretary of State against an award by the Divisional Judge, Hissar, under the Land Acquisition Act. The area of the land in suit is 29 *bighas* 7 *biswas*. The Collector awarded Rs. 100 per *bigha* plus 15 per cent. for forcible acquisition and interest at 6 per cent. per annum from the date of taking possession to the date of the award, the total sum awarded being Rs. 3,778-3-1. This amount has been increased by the Divisional Judge to Rs. 11,740 at the rate of Rs. 400 per *bigha* inclusive of 15 per cent. for forcible acquisition.

One of the questions for consideration is the interpretation of section 24, *fifthly*, of the Land Acquisition Act, I of 1894, which runs as follows:—"The Court shall not take into consideration any increase to the value of the land acquired likely to accrue from the use to which it will be put when acquired. The purpose of the acquisition was the erection of a dispensary, a rest house, accommodation for travellers and other buildings which will in the main be unremunerative, in connection with a *Mandi*, which has been established at Dabwali in the Sirsa Sub-Division of the Hissar District as an agricultural centre to facilitate the sale of grain by the *zemindars* of the neighbourhood. In 1902, the desirability of establishing a *Mandi* at Dabwali was considered and in 1904, 26 *bighas* of land were acquired by the District Board at the rates of Rs. 8 and Rs. 10 a *bigha*, these rates being accepted by the owners. The greater part of the land acquired was sold by auction to shop-keepers on the 9th and 10th October 1904 and realized Rs. 23,980, the profit being expended on the development of the *Mandi*, which developed so rapidly that in 1906 the District Board acquired an additional area of about 24 *bighas* by private purchase, the prices paid being at the rate of Rs. 600 per *bigha*. This rate was apparently fixed to obviate the delay caused by proceedings under the Land Acquisition Act, as the necessity for the enlargement of the *Mandi* was very urgent and it appears that it was anticipated that the enhanced cost would be amply covered by auction sales to shop-keepers and traders This anticipation was justified, the land acquired realizing about Rs. 2,000 per *bigha* at auction sale in place of about Rs. 900 per *bigha* realized at the auction sales of 1904. In the present case, the sum of Rs. 100 per *bigha* was assessed by the Collector because it was originally fixed by the Revenue Assistant without objection by the District Board and in his opinion amply covered any increased value over that assessed in 1904 due to the fact that the establishment of a *Mandi* had provided a market at hand for the disposal of agricultural produce and had, to a certain extent, resulted in the cultivation of more remunerative crops, such as vegetables.

It is, in our opinion, unnecessary to refer to the report of K. B. Mian Abid Hussain, Assistant Collector of the 1st grade with powers of a Collector under the Land Acquisition Act, dated the 3rd August 1909. The rate awarded by him was Rs. 600 per *bigha* and was mainly based upon the private acquisition by the District Board above referred to. The land acquired was before acquisition agricultural and could not be alienated to a non-agriculturist without the sanction of the Deputy Commissioner. No private sale of such land in the neighbourhood to a non-agriculturist with the sanction of the Deputy Commissioner has been established, and sanction is extremely improbable, because it would not be desirable to allow other shop-keepers to set up a rival *Mandi* in close proximity to that established by the District Board. The learned Divisional Judge has very properly rejected the evidence of witnesses who merely gave opinion as to the value of land or expressed their will-

ingness to purchase it, but he has also excluded all evidence of the prices of land prior to the establishment of the *Mandi* because in those days there was no possibility of land in the neighbourhood being used for commercial pursuits, and has taken into consideration prices of plots of land inside the *Mandi* since its establishment. Those prices were obviously due to an increase in value accruing from the use to which the acquirer, *i. e.*, the District Board, had put the land acquired.

The documents printed at pages 10 and 11 of the paper book and purporting to be unregistered sale-deeds, reciting a price of about Rs. 600 per *bigha*, were executed in October 1907, more than six months after the notification of acquisition, and the sales were admittedly not sanctioned by the Revenue Authorities. These documents are, consequently, of no value as evidence of the market-value. The Divisional Judge has admitted this and adds that "The rate of Rs. 600 per *bigha* has, therefore, to be reduced to arrive at the proper market-value of the land. What the exact reduction should be is a matter of difficulty and has to be determined in a more or less arbitrary manner. Certain it is that it should not be a very large one for the demand in respect of land in the neighbourhood of the *Mandi* is, undoubtedly, genuine and the amount offered by the District Board is in no way in keeping with the earnestness of that demand. It seems to me that two-thirds of the rate of Rs. 600 per *bigha* would be a fair and proper rate to fix having regard to all the circumstances of the case and I accordingly find the market-value of the land at the rate of Rs. 400 per *bigha* inclusive of the 15 per cent. to be allowed by way of compulsory acquisition under the Act."

In our opinion, this passage of the judgment loses sight of section 24, *fifthly*, of the Land Acquisition Act. The Divisional Judge has been influenced by the fact that the land in suit is required for the *Mandi*, although on this occasion not for a remunerative purpose. The fact that a shop-keeper is willing to pay a large price for a shop in a *Mandi* or so near a *Mandi* as to enable him to enjoy the benefit enjoyed by the proprietors of the shops in the *Mandi*, in the event of his being fortunate enough to receive sanction for the purchase should not, in our opinion, be considered in assessing the value, for the purposes of the Land Acquisition Act, of land acquired in the neighbourhood of the *Mandi*, until it is shown that sanction would be granted for the purchase. In this case, no attempt has been made to show this and the Collector was, in our opinion, justified in treating the land in suit as agricultural land, and in assessing the price at the amount which land in the neighbourhood was likely to fetch for purposes of agriculture. The price assessed, Rs. 100 per *bigha*, is far larger than would have been assessed had the District Board objected to its magnitude and the Collector has recorded cogent reasons for the opinion that it was more than ample.

For these reasons, we decree the appeal and reduce the amount payable for the land in suit to Rs. 100 per *bigha* plus 15 per cent. for forcible acquisition and 6 per cent. interest from the date of the acquisition or taking possession to the date of the Collector's award, *i.e.*, Rs. 3,778-3-1. The respondents will pay the appellant's costs in this Court, including the Court-fee of Rs. 10, which is adequate under Article 17 (4) of the second Schedule to the Court Fees Act, section 8 of the Act being applicable only to appeals by persons claiming compensation.

Appeal allowed.

PRIVY COUNCIL.

APPEAL FROM THE HIGH COURT AT ALLAHABAD.

November 26, 1912.

Present:—Lord Macnaghten, Lord Moulton, Sir John Edge and Mr. Ameer Ali.

Kunwar RAGHUBIR SINGH—APPELLANT

versus

Musammat MOTI KUNWAR—RESPONDENT

AND

Kunwar SATI SINGH—APPELLANT

versus

Musammat MOTI KUNWAR—RESPONDENT

Hindu Law—Partition—Enjoyment in specified shares—Agreement.

The co-parceners of a joint Hindu family, being in posesssion of defined shares of family property, entered into a written agreement by which they consented

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to hold the family property in separate, defined and specific shares.

This agreement was acted upon for a considerable number of years:

Held, (1) that the family property must be deemed to have been partitioned from the date of the agreement, although there was no actual division by metes and bounds;

(2) that from that date, the status of the family ceased to be joint.

Appovier v. *Rama Subba Aiyan*, 11 M. I. A. 75; 8 W. R. (P. C.) 1, *Balkishen Das* v. *Ram Narain Sahu*, 30 I. A. 139; 7 C. W. N. 578; 5 Bom. L. R. 46; 30 C. 738; *Parbati* v. *Naunihal Singh*, 36 I. A. 71; 10 C. L. J. 121; 6 A. L. J. 597; 13 C. W. N. 983; 19 M. L. J. 517; 11 Bom. L. R. 878; 31 A. 412; 3 Ind. Cas. 195 (P. C.); 5 M.L.T. 427, followed.

Consolidated Appeals by an order in Council, from a judgment and two decrees of the High Court at Allahabad, dated November 24th, 1908, one reversing a judgment and decree of the Subordinate Judge of Mianpuri, dated September 12th, 1907 and the other affirming a judgment and decree of the Assistant Collector of Etawah, dated June 2nd, 1904.

Mr. *De Gruyther*, *K. C.*, and Mr. *Dube*, on behalf of the Appellants, contended that *Musammat* Moti Kunwar had deposed before the Tahsildar of Auraiya in 1893 that all were joint.

[LORD MOULTON:—There is no further evidence beyond certified copy. You cannot put in deposition in evidence because statements in record are intentional or otherwise].

[LORD MACNAGHTEN:—It is a case of complete contradiction. You say she did it, but she says she did not].

[MR. AMEER ALI:—Your point is that this document is supposed to have been executed by her, although she did not know the nature of it].

Rewa Prasad Sukal v. *Deo Dutt Ram* (1); *Balkishen Das* v. *Ram Narain Sahu* (2); *Parbati* v. *Naunihal Singh* (3); *Hoolash Kooer* v. *Kassee Proshad* (4); *Gajendar Singh* v. *Sardar Singh* (5); Mayne's Hindu Law, paragraph 495, 7th Edition, were referred to.

(1) 27 I. A. 39; 27 C. 515.
(2) 30 I. A. 139; 7 C. W. N. 578; 5 Bom.L.R. 46; 30 C. 738.
(3) 36 I. A. 71; 10 C. L. J. 121; 6 A. L. J. 597; 13 C. W. N. 983; 19 M. L. J. 517; 11 Bom.L.R. 878; 31 A. 412 (P. C.); 3 Ind. Cas. 195; 5 M. L. T. 427.
(4) 7 C. 369.
(5) 18 A. 176 at 182.

Mr. *Ross*, *K. C.*, (with him Mr. *O'Gorman*), on behalf of the Respondent, contended that Baldeo Singh was proved to have become separated Hindu prior to his death. *Parbati* v. *Naunihal Singh* (3), was referred to.

Mr. *De Gruyther* replied.

JUDGMENT.

LORD MACNAGHTEN.—These are consolidated appeals from a judgment and two decrees of the High Court of Allahabad pronounced in favour of the respondent, *Musammat* Moti Kunwar.

In the Court of the Assistant Collector of Etawah, Moti Kunwar, widow of Baldeo Singh, who died in 1895, succeeded in making good her claim to arrears in respect of a specific share of property which, undoubtedly, at one time formed part of the joint property of an undivided Hindu family to which her husband belonged. Thereupon, the appellants, who alleged that Baldeo Singh was not separated at the time of his death, brought a suit in the Court of the Subordinate Judge of Mainpuri and obtained a declaration that they were the absolute owners of the property claimed by Moti Kunwar and that she had no right of ownership therein but merely a right to maintenance. There was an appeal to the High Court by Moti Kunwar against the decree of the Subordinate Judge and an appeal by the present appellants against the order of the Assistant Collector. The two appeals were consolidated. The High Court reversed the decree of the Subordinate Judge and dismissed the suit of the present appellants, as well as their appeal against the order of the Assistant Collector.

The whole controversy depends upon the question whether Baldeo Singh was separate in title and interest at the time of his death.

In 1871, Madan Mohan Singh, who was a member of the undivided family, separated and received his share. For the purpose of this transaction and in settlement of all disputes "relating to the *zemindari*, the household articles, and the money-lending business, etc.," an agreement was executed on the 19th of December 1871 by Baldeo Singh, Lalta Parshad, the adopted son of a deceased member of the undivided family, and Madan Mohan Singh. On the 10th of October 1873, another agreement was executed between and by Baldeo Singh, Lalta Parshad, and

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Madan Mohan Singh. After declaring that the executants, along with Raghunath Singh and Sati Parshad, were sharers in the vilages specified below, the agreement proceeded as follows:

"Now we have already come to terms and according to the shares given below, we have been in possession and enjoyment of our respective shares. As regards it, we have with our mutual consent entered into an agreement according to the terms given below.

"The same share in the property which is in the possession of a particular person as given below, shall be considered to be the property of that very person who is in possession thereof. If any of us brings any suit in Civil or Revenue Court to the effect that his share is less or he is a loser, it shall be considered to be false in every Court. By virtue of this agreement, no person shall be competent to bring any claim in any Court in respect of any portion of the property other than the property detailed below."

Then after some provisions which it is not necessary to set out, there followed a specification of the villages belonging to the family and the shares in which those villages were thereafter to be held. The agreement was registered on the same day. From that time, the property has been entered in the register in accordance with the arrangement contained in the agreement. And on the death of Baldeo Singh, his share was entered in the name of his widow, the respondent Moti Kunwar.

From the terms of the agreement of 1873, the learned Judges of the High Court rightly, as it appears to their Lordships, "gather that the members of the family were in separate possession of defined shares of the family property before the date of its execution" and they also gather from it "that Raghunath Singh as well as Sati Parshad," who was then a minor, "so far as the latter could assent to an arrangement, had agreed to the allotment of shares specified in the instrument." The learned Judges further point out that the *khewats* of two of the villages specified in the agreement of 1873 which were in evidence show that at the close of 1872 the entry of names was altered and the names of Lalta Parshad, Sati Parshad, Raghunath Singh, Baldeo Singh, and Madan Mohan Singh were entered separately in respect of their separate sepecific shares.

As regards the share of Raghunath who was not a party to the agreement of 1873, the partition appears to have been acceptad and acted upon by him up to the time of his death which occurred in 1879. On his death, the name of his widow was recorded in his place and she was appointed *lambardar* of the village which had been allotted to him. On her death, the names of Baldeo Singh, Lalta Parshad, and Sati Parshad were entered in her place, not jointly, but in respect of specific shares.

Sati Parshad, as already stated, was a minor at the date of the agreement of 1873, but it appears that on attaining majority, he made no objection to it. He seems to have recognised the partition and acted upon it until Moti Kunwar applied for complete partition in the Revenue Court.

The contention on the part of the appellants was (1) that the agreement of 1873 was a partition only as regards the share of Madan Mohan Singh, and that the other members of the family remained joint, or (2) that the other members re-united either immediately or shortly afterwards. There seems to be no foundation for the latter contention, and indeed it was only faintly put forward. Re union is a question of fact, and there is not a scrap of evidence to show that any members of the family re-united or even contemplated re union.

In support of their principal contention, the appellants put in a mass of parol evidence which was contradicted by parol evidence on the other side. The learned Judges of the High Court thought the parol evidence vague, unsatisfactory and inconclusive.

The High Court also rejected, and in their Lordships' opinion rightly rejected, a petition of Baldeo Singh himself, in which he alleged that Raghunath's widow was entered as owner solely for her consolation. This petition was in answer to an application by the widow to remove him from the office of *sarbarahkar* and is irreconcilable with an earlier petition presented by him, in which he distinctly admitted that he paid to the widow the annual profits of her share, and that the agreement of 1873 had been acted upon.

The High Court also rejected as unworthy of consideration a document which was referred to as proving that Moti Kunwar

herself admitted that the property registered in her name was joint family property. This document purports to be a certified copy of a deposition made by Moti Kunwar in another suit which was not even put to her in cross-examination although she averred that she had never made an admission to that effect.

The High Court also rejected as inconclusive certain accounts which purported to show that the expenses of the marriage of Baldeo Singh's daughter and his funeral expenses were paid out of joint family property.

In conclusion, the learned Judges say that it was sufficient for them that an agreement was committed to writing, which was clear and definite in its terms, and they add that that agreement has been shown to have been acted upon up to the present time.

Their Lordships agree in the result at which the High Court arrived. Having regard to the agreement of 1873, they think that the case is concluded by authority. The result is entirely in accordance with the principle laid down by this Board in the judgment delivered by Lord Westbury in *Apporier* v. *Rama Subba Aiyan* (7) and in the more recent cases of *Balkishen Das* v. *Ram Narain Sahu* (3) and *Parbati* v. *Naunihal Singh* (4).

Their Lordships will, therefore, humbly advise His Majesty that this appeal should be dismissed.

The appellants will pay the costs of the appeal.

Solicitors for the Appellants: Messrs. *Barrow, Rogers* and *Nevill.*

Solicitors for the Respondents: Messrs. *Ranken Ford, Ford* and *Chester.*

Appeal dismissed.

(7) 11 M. I. A. 75; 8 W. R. (P. C.) 1.

S. N. DAR, B. A. LL. B.
Vakil High Court,
SRINAGAR (Kashmir)

MADRAS HIGH COURT.
FULL BENCH.

SECOND CIVIL APPEAL No 477 OF 1911.

October 14, 1912.

Present:—Sir Ralph Benson, KT., Offg. Chief Justice, Mr. Justice Sankaran Nair and Mr. Justice Sundara Aiyar.

THEKKUMKATTIL KRISHNAN NAIR AND OTHERS—APPELLANTS

versus

THEKKUMKATTIL DAMODARAN NAIR AND OTHERS—RESPONDENTS.

Malabar Law and Usage—Self-acquisitions of a female member of tarwad, *whether devolve on* tarwad *or her* tavazhi.

The self-acquisitions of a female member of a Marumakkattayam *tarwad*, on her death, do not lapse to the *tarwad* of which she dies a member, but descend to her *tavazhi, i. e.*, to her issue, if she has any, and, if not, then to the *tavazhi* to which she would, in that case, belong according to the Customary Law of Malabar.

Ummanga v. *Appadorai Patter*, 34 M. 387; 5 Ind. Cas. 671; 20 M. L. J. 268; (1910) 1 M. W. N. 195 and *Govindan Nair* v. *Sankaran Nair*, 32 M. 351; 6 M. L T. 106, (F. B.); 2 Ind. Cas. 183; 19 M. L. J. 350 considered.

The Sivaganga case, 9 M. I. A. 546; *Ryrappan Nambiar* v. *Kelu Kurup*, 4 M. 150; *Alami* v. *Komu*, 12 M. 126; *Achutan Nayar* v. *Cheriotti Nayar*, 22 M. 9; *Kallat Kunju Menon* v. *Palat Erracha Menon*, 2 M. H. C. R. 162; *Illiki Pakramar* v. *Kutti Kunhamed*, 17 M. 69 *Varadiperumal Udaiyan* v. *Aradanari Udaiyan*, 1 M.H. C. R. 412, referred to.

Second appeal against the decree of the Court of the Subordinate Judge of South Malabar at Palghat, in Appeal Suit No. 516 of 1910, preferred against that of the Court of the District Munsif of Palghat, in Original Suit No. 43 of 1910.

This second appeal coming on for hearing on Wednesday the 14th day of August, before Sundara Aiyar and Sadasiva Aiyar, JJ., the Court made the following

ORDER OF REFERENCE TO A FULL BENCH.

The properties, the subject-matter of this suit, belonged to one Narayani Ammah, a member of a Nair *tarwad* following the Marumakkattayam law, as her self-acquisition. On her death, defendants Nos. 1 to 8, some of the members of her *tavazhi*, applied for a succession certificate authorizing them to collect some debts due to her and an order was passed granting them a certificate. This suit was instituted by the members of the

tarwad to which Narayani Ammah belonged for a declaration that they were the heirs of Narayani Ammah entitled to the certificate and for a decree setting aside the order passed on the petition for the succession certificate and the certificate, if any, actually obtained by defendants Nos. 1 to 8. Their case is that on the death of Narayani Ammah, her self-acquisitions lapsed to the whole *tarwad* and were not inherited by the members of her *tavazhi*. These members are described by the District Munsif as being her mother, brothers, sisters and sisters' children. The plaintiffs are more distant relatives. The District Munsif, relying on the decision of a Division Bench of this Court in *Govindan Nair* v. *Sankaran Nair* (1), held that Narayani Ammah's properties were inherited by the members of her *tavazhi* as being nearer heirs than the other members of the *tarwad*. On appeal, the Subordinate Judge affirmed the District Munsif's judgment. He says: "Whatever may have been the Archaic law of Malabar, as administered by the Courts in Malabar in years gone by, it is beyond question that the custom of the country in recent times in South Malabar has recognized the *tavazhi* of a female member as the lawful heir to her self-acquired property. The old theory of Marumakkattayam inheritance is distinctly in accordance with this present-day consciousness of the Malayali community and this is clear from the writings of early British observers of Malabar institutions and from the opinions expressed by competent authorities who have had to judicially declare the principles of Malabar law. This custom of inheritance by the *tavazhi* to the self-acquired property of a female member has met with judicial recognition in South Malabar and is in accordance with the true theory of Malabar law and consonant to reason and principle. This rule has not been broken in upon by the Full Bench ruling in *Govindan Nair* v. *Sankaran Nair* (1), so far as succession to the self-acquired property of a female is concerned. In the case of property acquired by a female, her *tavazhi* means, in case she dies issueless, her mother and her mother's descendants in the female line. So long as there are members of this description in her *tavazhi*, the succession cannot devolve upon the *tarwad*." The plaintiffs have preferred this second appeal. Mr. Anantakrishna Aiyar admits that the decision in *Govindan Nair* v. *Sankaran Nair* (1) is against him, but he has brought to our notice a judgment of another Division Bench of this Court reported in *Ummanga* v. *Appadorai Patter* (2), where it was held that the self-acquired property of a female member of a Marumakkattayam *tarwad* would lapse to the whole *tarwad* on her death. The contest there was between the *tarwad* and the sons of the female member. The decision in *Ummanga* v. *Appadorai Patter* (2), though reported later, was really the earlier decision in point of time. Sankaran Nair, J., was a party to both judgments. But the learned Chief Justice, who was a party to *Ummanga* v. *Appadorai Patter* (2), adhered to the view in *Govindan Nair* v. *Sankaran Nair* (1), so far as the self-acquisition of a male member was concerned and was apparently prepared to do so with regard to the acquisitions of a female member also. The question whether the self-acquisition of a female would lapse to the whole *tarwad* or descend only to her nearest heirs was not referred to the Full Bench in *Govindan Nair* v. *Sankaran Nair* (1). With regard, therefore, to the self-acquisition of a female there is a direct conflict of view between *Ummanga* v. *Appadorai Patter* (2) and *Govindan Nair* v. *Sankaran Nair* (1). We consider it desirable, therefore, to have an authoritative pronouncement on the question whether the self-acquisitions of a female member of a Marumakkattayam *tarwad* would on her death lapse to the *tarwad* of which she dies a member, or whether they would descend to her nearest heirs or her *tavazhi*. We accordingly refer the question for the opinion of a Full Bench.

Mr. *C. V. Ananthakrishna Iyer*, for the Appellants.

Mr. *C. Madhavan Nair*, for the Respondents.

This second appeal coming on for hearing on Thursday the 19th day of September 1912, upon perusing the order of reference and upon hearing the arguments and the

(1) 32 M. 351; 6 M. L. T. 106 (F. B.); 2 Ind. Cas. 83; 19 M. L. J. 350.

(2) 34 M. 387; 5 Ind. Cas. 671; 20 M. L. J. 268; (1910) 1 M. W. N. 195.

appeal having stood over for consideration till this day, the Court expressed the following

OPINION.

BENSON, OFFG. C. J.—The question referred for our decision is:—"whether the self-acquisition of a female member of a Marumakkattayam *tawird* would, on her death, lapse to the *taward* of which she dies a member, or whether they would descend to her nearest heirs or her *tavazhi*."

I have no doubt but that, according to the Customary or Common Law of Malabar, such self-acquisitions descend to her *tavazhi*. That was the Customary Law, as I understood it, when I was District Judge of that District for several years before I became a Judge of this Court. That there is abundant evidence to support that view is clear from the order of reference to the Full Bench in the case of *Govindan Nair* v. *Sankaran Nair* (1). It is, however, contended before us that the majority of the Full Bench in that case held that the case-law of this Court since *Kallati Kunju Menon* v. *Palat Erracha Menan* (3) shows that the self-acquisitions of a male lapse to his *tarwad*, and do not pass by inheritance to his nearest heirs, and that the decision, though it does not in terms apply to the self-acquisitions of females, yet is based on reasoning applicable to both alike, and that we should hold that the self-acquisitions of a female lapse to her *tarwad* in preference to descending to her *tavazhi* or heirs.

I cannot accede to this contention. In the suit out of which the reference arose, there was a question as to the descent of the self-acquisitions of a female, as well as of a male, but the order of reference was limited to the self-acquisitions of a male, and the referring Judges, notwithstanding the decision of the Full Bench, decided that the self-acquisitions of the female in that suit descended to her own children and did not lapse to the *tarwad*. It is, therefore, clear that the learned Judges in that case did not regard the decision of the Full Bench as involving a decision that the self-acquisitions of a female on her death lapse to her *tarwad*. No case has been quoted to us, nor am I aware of a single case, in which it has been directly ruled that the self-acquisitions of a female pass to her *tarwad* in preference to her *tavazhi*. The *dictum* in the case reported in *Ummanga* v. *Appadorai Patter* (2) was, I have no doubt, intended to apply only to the self-acquisitions of males, as is shown by the fact that it purports to state the result of the "decisions," and the decided cases refer only to the self-acquisitions of males.

Even in the case of the self-acquisitions of a male, it may well be doubted whether the Customary or Common Law of Malabar requires them to pass to his *tarwad* in preference to his *tavazhi*. But, assuming, as held by the Full Bench in *Govindan Nair* v. *Sankaran Nair* (1), that it is now too late to give effect to the true Customary Law in the case of males in face of the decisions since 1864, there is certainly no reason to apply a similar rule to the self-acquisitions of females, which are not dealt with by the decisions, in opposition to what I think is the well established Customary Law. It may be added that since the decision of *Katama Netchriar* v. *Rajah of Sivaganga* (4) the application of the principle of that decision to the Malabar cases reported in *Ryrappan Nambiar* v. *Kelu Kurup* (5), *Alami* v. *Komu* (6) and *Achutan Nayar* v. *Cheriotti Nayar* (7), it has become logically impossible to hold that the members of a *tarwad* succeed to the self-acquisitions of one of its members on his or her death by virtue of survivorship. If they succeed, it can only be as heirs of the deceased, and it would be strange if the more distant relatives included in the *tarwad* should succeed equally as heirs with the issue and other near heirs of the deceased.

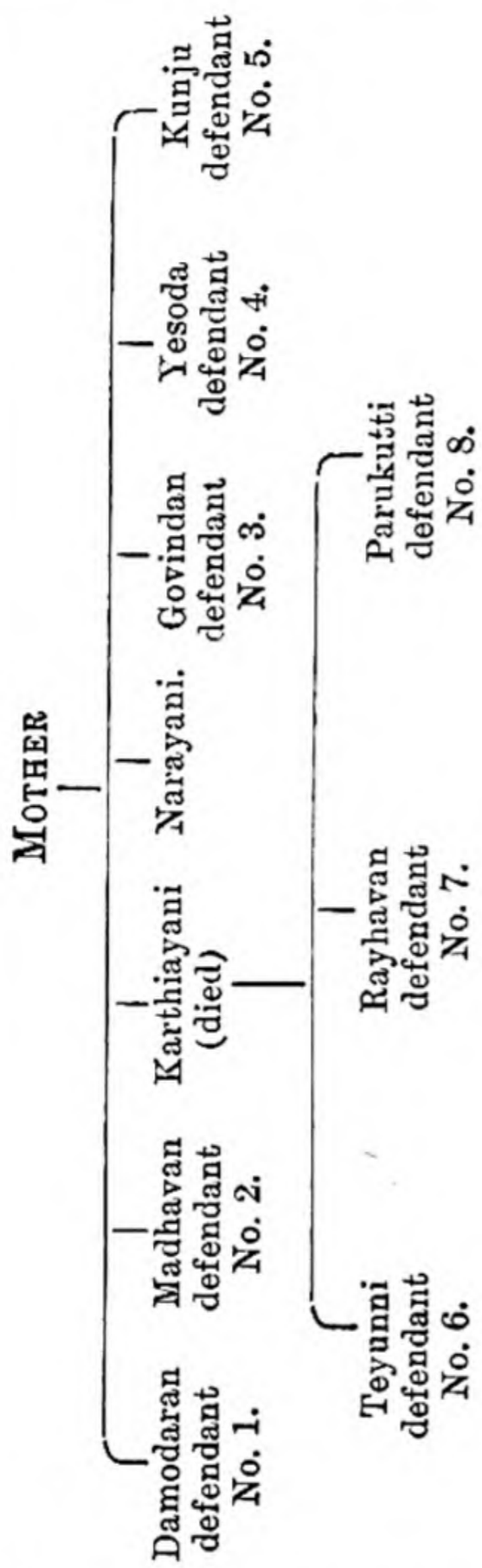
My answer to the reference is that the self-acquisitions of a female member of a Marumakkattayam *tarwad* on her death do not lapse to the *tarwad* of which she dies a member, but descend to her *tavazhi* *i.e.*, to her issue, if she has any, and, if not, then to the *tavazhi* to which she would, in that case, belong according to the Customary Law of Malabar.

SANKARAN NAIR, J.—One Narayani Ammah, a member of a Marumakkattayam *tarwad*, died without issue leaving certain separate or self-acquired properties. On behalf of the

(3) 2 M. H. C. R. 162.

(4) 9 M. I. A. 539 at p. 543.
(5) 4 M. 150.
(6) 12 M. 126.
(7) 22 M. 9.

tarwad, certain members thereof sued the defendants Nos. 1 to 8, the brothers, sisters, and sisters' children of Narayani for a declaration of their title.



The question referred to the Full Bench for decision is, whether the self-acquisitions of a female member of a *tarwad* "would on her death lapse to the *tarwad* of which she dies a member or whether they would descend to her *nearest heirs* or her *tavazhi*." The '*tarwad*' is composed of those whose names are given above, and also of the other parties to the suit, who are related to them in the female line through a common female ancestress. If we hold that the properties would lapse to the *tarwad*, all the members including defendants Nos. 1 to 8 take jointly.

A '*tavazhi*' means a woman and her descendants in the female line. There may be many *tavazhis*, therefore, in a *tarwad*. A female without issue or a male belongs to the *tavazhi* consisting of his or her mother and the mother's descendants in the female line; and when it is said that the property of that person descends to his or her *tavazhi*, it is meant that it devolves on this body of persons. When a female has descendants, they all together form the *tavazhi* of which she is the root and her property devolves on them as her *tavazhi*. Thus if Narayani had any issue, she and her descendants, would have formed a *tavazhi*. But Narayani left no issue and the next group or *tavazhi* to which she belonged as distinct from the other members of her *tarwad* is that composed of her mother and all her (*i. e.*, the mother's) descendants in the female line. The mother in this case is dead and her descendants defendants Nos. 1 to 8 accordingly claim Narayani's property as her *tavazhi*. The reference also suggests whether the nearest heirs take. This, if intended to refer to a class of heirs other than the *tavazhi*, may raise another question. If the nearer in blood takes the property, then the defendants Nos. 6, 7 and 8 whose mother is dead may be excluded, though they would take as members of the *tavazhi*. The case before the referring Bench does not raise the question, as the claim of the *tarwad*, the plaintiff in the suit, must be dismissed if any of the defendants are entitled to the property either as a member of the *tavazhi* or as being nearer in blood to the exclusion of the *tarwad*. In the case reported in *Govindan Nair* v. *Sankaran Nair* (1), Miller, J. and myself had to consider the question of succession to the property of a deceased male and also of a female. With reference to the former, we had before us a number of decisions which assumed or decided that it lapsed to the *tarwad*; and as we were of opinion that those decisions ought not to be followed, we referred the question to a Full Bench for decision. But in the case of a female, we felt no such difficulty. We had no doubt what the usage was. The question being one of Customary Law, not whether a custom has been proved in derogation of the ordinary law, the Courts were bound to give effect to it though no evidence had been given in the case of the usage.

Only two cases have been referred to in

which the question of succession to the property of a deceased female was discussed. In the first case, a Subordinate Judge of great experience, Mr. Gopalan Nair, refused to apply what is believed to be the ordinary rule laid down by Holloway, J., to the case of succession to females and upheld the claim of the children to the mother's property. He said:—

"In well-conducted Nair *tarwads* in Malabar where the Marumakkattayam law of inheritance obtains in all its purity and integrity, a female's property which is usually acquired by her more or less with funds derived from her parents or husband goes to her own children and I have never heard of a single instance in which a good *karnavan* has ever asserted the *tarwad's* rights to property of this character. Mr. K. R. Krishna Menon, than whom there is no better authority on Malabar law, has always maintained that a female's property would descend to her own children and not to the *tarwad* and the oft-quoted authority on the other side is the decision in *Kallati Kunju Menon* v. *Palat Erracha Menon* (3), where the question was as to the self acquisition of a deceased *male* and not a *female*" Appeal No. 125 of 1885. The High Court did not lay down any general rule in that case but held that the Muhammadan Law governed the self-acquisition of a member of that family. I am not aware of any case in which it has been held that the self-acquisitions of a female lapsed to or were inherited by her *tarwad*. The other case referred to by the appellant's Pleader is not in point. The question there was whether in cases of Moplas following Marumakkattayam law, the devolution of self-acquired property was according to the Muhammadan Law. The question was whether the Marumakkattayam law or the Muhammadan Law was applicable to a species of property left by a member of a Muhammadan Marumakkattayam *tarwad*. The question as to the descent of the property of a *female* under the Marumakkattayam law was neither raised nor allowed to be argued in the High Court [*Illikka Pakramar* v. *Kutti Kunhamed*(8)]. The judgment of the District Judge in that case shows, however, the prevalence of the practice of the succession of her children to a female's property. I am not aware of any case in which the property of a deceased female was decreed in favour of the *tarwad*. Such at any rate was not and is not the legal consciousness of the people as stated by Mr. Gopalan Nair and I think he is quite right.

Is there any reason why we should not decide so? Miller, J., and myself considered that the reasons, which required a reference to the Full Bench in the case of succession to a male's property, did not preclude us from acting on our opinion in the case of succession to the property of a deceased female, and we did so, even after receiving the decision of the Full Bench. The learned Judges refer to a judgment of the Chief Justice and myself decided before the question was considered by the Full Bench. The question of succession to the property of a male or female was not then before us for decision and it was not argued before us. Further the dictum was pronounced as regards the general law though it happened that the property in question was that of a deceased female.

Assuming that the Customary Law is as laid down by the Full Bench so far as the devolution of the property of a male is concerned, there is no reason why we should apply that rule to the property of a female when the usage is otherwise. I am also satisfied that such is the law also.

Mr. Justice Strange says in his Manual that self-acquired moveable property—which alone was considered by him heritable property—descends "in the case of females to their issue, male and female." Both Strange and Holloway, JJ., spoke from personal knowledge of the Customary Law of the country.

Many reasons may be easily suggested for this difference; according to the theory of the Malabar Law, the property is vested only in females. (See Strange's Manual, Article 401). The result was that the divisions of *tarwad* properties in old days was according to *tavazhis* (Strange's Manual, Article 389). In decrees for partition, the Courts set apart properties for males when they left or divided from the *tarwad* only for their use and on their deaths the decrees directed that the shares should lapse to their family, though there was no such restriction in the case of females who received their share. See the cases referred to and discussed, Aliyasantana Law by Krishna Rao, page 104. Itis possible to suggest that, therefore, a male may not have been recognized as a source of inherit-

(8) 17 M. 69.

ance when he had a *tarwad*. I assume that the Full Bench accepted Mr. Justice Holloway's view that the *property lapsed* to the *tarwad*. For to recognize the *tarwad* as *heir* would lead to the result that the property of a male who has no *tarwad* should escheat to the Crown though he may have divided brothers, sisters and mother. Again, the devolution of a person's property on his or her issue is generic to all systems of law though sex and seniority may have been grounds of preference. The succession of a widow in Hindu Law is no exception as the widow is for this purpose treated as a part of the person of the husband. The Malabar Law is no exception, as in the case of males, the law does not recognize their issue. Females usually acquire property by gifts from husbands, fathers or favourite brother or uncle. Such property is intended for her and her children.

I should not be understood as suggesting that for these reasons the laws of inheritance are not the same for males and females. My reasons for the other conclusion are given in the order of reference to the Full Bench and in the dissenting judgment of Miller, J., with which I agree. But if the law is rightly declared by Holloway, J., and by the Full Bench, it is possible to suggest the above reasons for this difference in the Customary Law of succession.

I adhere, therefore, to our judgment in *Govindan Nair* v. *Sankaran Nair* (1), so far as succession to a female's property is concerned and hold that the children and other descendants, if any, of a female succeed to her property as members of her *tavazhi*.

This involves the conclusion that in their absence, the *tavazhi* to which she would then belong, *i.e.*, her mother and the descendants of her mother, succeed to her. The mother of Narayani is dead. Therefore, defendants Nos. 1 to 8 succeed to her property.

My reply to the reference is that the self-acquisitions of a female do not lapse to her *tarwad* but they descend to her *tavazhi*; if she has issue, the *tavazhi* is composed of that issue: if she has no issue, her mother and her descendants form her *tavazhi*.

SUNDARA AIYAR, J.—The question referred to the Full Bench is whether the self-acquisitions of a female member of a Marumakkattayam *tarwad* would on her death lapse to the *tarwad* of which she dies a member or whether they would descend to her nearest heirs or her *tavazhi*. *In Govindan Nair* v. *Sankaran Nair* (1), two out of the three Judges constituting the Full Bench expressed the opinion that the self-acquisitions of a male member must lapse on his death to the *tarwad*. The Judges who made the reference, Miller and Sankaran Nair, JJ., were of a contrary opinion and held that they should descend to the immediate heirs of the acquirer. Miller, J., adhered to his opinion as a member of the Full Bench. Mr. C. V. Anantakrishna Iyer contends that no difference can be made between the acquisitions, of a male member and of a female member, that the *ratio decidendi* in the Full Bench case is equally applicable to the acquisitions of a female and that we are, therefore, now bound to hold that the self-acquisitions of a female must also lapse to the *tarwad*. In the case which was referred to the Full Bench, the learned Judges, Miller and Sankaran Nair, JJ., had to decide also the question of the descent of the self-acquisitions of a female. They did not refer that question to the Full Bench but decided that a woman's self-acquisitions would go to her own children. The learned Chief Justice in his judgment expressly states that the question referred was limited to the self-acquisitions of males but he refers to the pronouncement of himself and Sankaran Nair, J, in an earlier case subsequently reported, *Ummanga* v. *Appadorai Patter* (2), that the self-acquisitions of a female would lapse to the *tarwad*. The judgment of Abdur Rahim, J., is not based on any considerations peculiar to a male and his reasoning would apparently be equally applicable to the self-acquisitions of a female. The question is, are we bound to extend the rule laid down in *Govindan Nair* v. *Sankaran Nair* (1) to the self-acquisitions of a female? If the decision is to be regarded as based on the usage governing the followers of the Marumakkattayam law, then there is no reason for extending the decision beyond the circumstances in which the rule was laid down. There may be a custom that the self-acquisitions of males would lapse to the whole *tarwad* while the custom with regard to the self-acquisitions of females may be that they would descend to their own children. The children of males have no rights in the property of the *tarwad* and if the custom had its origin in a desire to benefit children, the motive would not operate in the case of a male's self-acquisi-

tions. But whatever the motive may be, the operation of a custom cannot be extended by analogy. The particular custom applicable to any set of circumstances must be proved. If, on the other hand, the basis of the Full Bench decision is not custom but a rule of law, then the appellants would be entitled to contend that the principle laid down must be applied though the facts may be different. The argument cannot be accepted to the extent that a principle enunciated with respect to certain circumstances must always be carried out to its logical conclusion and applied to all analogous circumstances for, in the language of Lord Halsbury, law is not always logical. It stops short of logical conclusions where it is necessary to do justice in a different state of things. Though the principle applicable may appear to be the same, the rule of law to be laid down must depend on the interests of the community at large and the demands of justice in varying circumstances; and logical deduction must yield to what justice, equity and good conscience require. Between the male and female members in a Marumakkatayam *tarwad*, there is this important distinction; that the female is the stock of descent while the male is not. Whether this could be a ground on which the nearer heirs of a male could be denied preferential rights of inheritance while they are accorded to the nearer heirs of a female, is questionable. Besides, females generally acquire property by gifts from their husbands or their nearest relations in the *tarwad* and the object of such gifts would ordinarily be not to benefit the donee alone but her children also. But again, it is questionable whether this should be a ground for giving rights of inheritance to a female's children which the nearest heirs of a male do not possess in acquisitions belonging to him. I confess that if the Full Bench judgment is to be regarded as based on a rule of law, I can find no sufficient reason for making a distinction between the acquisitions of a male and those of a female. If nearness of kinship is a ground of preference in the one case, it would seem that it ought to be equally so in the other. If the judgment, however, of the Full Bench, supposing it to proceed on a rule of law and not on custom, proceeded on an incorrect view of the Marumakkattayam law as contended for by the respondents, then we are not bound to extend it beyond the actual circumstances of that case, and to apply it to the self-acquisitions of a female. The judgment of the learned Chief Justice is based solely on the rule of *stare decisis*; it is not clear whether he regarded the rule to be laid down as depending on usage or on law apart from usage. Probably he adopted the latter view. Abdur Rahim, J., apparently regarded the question as one of Customary Law for he observes "Marumakkattayam law to which the question pertains is entirely Customary Law," and refers to the observations of this Court in *Wannathan Randile Chiruthai* v. *Keyakadath Pydel Kurup* (9), that "if Malabar Law is a branch of Hindu Law, it is one put out or separated from the parent stem before the present form of Hindu Law existed," and to the observations of the Privy Council in *Raman Menon* v. *Raman Menon* (10) that "there are no sacred writings among the Nairs having legal authority and their law is wholly based on the usages of the people." The learned Judge apparently regards the pronouncement of Scotland, C. J., and Holloway, J., in *Kollati Kunju Menon* v. *Palat Erracha Menon* (3) that all acquisitions of any member of a family lapse on the death of the acquirer to the family, as a decision on the usage prevailing amongst the followers of the Marumakkattayam law. He regards it as a rule of inheritance based on usage. If, as held by the learned Judge, the usage has, in numerous decisions extending over a long period, been held to be that the self-acquisitions of a member must lapse to the *tarwad*, then I agree that the case is one to which the principle of *stare decisis* should be applied and that any change in the law must be left to the Legislature. If, on the other hand, the decision in *Kallati Kunju Menon* v. *Palat Erracha Menon* (3) was not a pronouncement on the existing usage but on the view of the Judges who decided the case as to the rule of law applicable and their view as to the proper rule was erroneous, then the question whether the rule of *stare decisis* should be applied would depend on whether the habits of the people have been subsequently moulded on the rule laid down in that judgment and

(9) 6 M. H. C. R. 194.
(10) 24 M. 73 at p. 80.

whether justice requires that those habits and the vested rights acquired on the faith of the rule laid down by the Court should not be disturbed after the lapse of a long time. The first matter for decision, therefore, is whether *Kallati Kunju Menon* v. *Palat Erracha Menon* (3) held that the usage of Marumakkatayis was that the self-acquisitions of a member of a *tarwad* lapsed to the whole *tarwad*. The dispute in the particular case was between the *karnavan* of the *tarwad* of the deceased acquirer and the children of the acquirer who alleged that during his life-time he had alienated it to them. The alienation was held to be valid. The learned Judges observed that it was unquestionable law that the acquirer was fully entitled to hold, encumber and dispose in his life-time of his self-acquisitions and his right to alienate was held to be "unquestionably in accordance with usage, for in all the reckless litigation of Malabar, one member of the Court (*i. e.*, Holloway, J.) with judicial experience of several years does not remember an instance of a *karnavan* attempting to get into his own hands the self-acquired property of a junior member." That was the only question that arose in the case. But the decision of it is preceded in the judgment of the learned Judges by a *dictum* with regard to devolution of the property after the death of the acquirer. They say:—"It is unquestionably the law in Malabar that all the acquisitions of any member of a family undisposed of at his death form part of the family property, that they do not go to the nephews of the acquirer but fall, as all other property does, to the management of the eldest surviving male." That is not stated to be the usage of the people or to be in accordance with the usage. On the other hand, it is perfectly clear to my mind that Holloway, J., did not consider it to be in accordance with the usage. In *Kamaran* v. *Ryru*, he observed as Judge of Tellicherry that it was a prevalent fallacy in Malabar that the immediate heirs of the acquirer were held entitled to inherit the acquisitions and the learned Judge deplored the actual law as fruitful in mischief. The learned Judge held about the same time in *Varadiperumal Udaiyan* v. *Aradanari Udaiyan* (11) that the self-acquired property of a Hindu co-parcener governed by the *Mitakshara* law would also lapse by survivorship to all his co-parceners and would not be inherited by his own heirs. There was, no doubt, a stage in the development of the law of joint families when all property acquired by any member of the family was taken to be for the benefit of the whole family. At first, the acquirer was not held entitled to have any higher rights over it than any other member of his family. According to the *Mitakshara* law, he was at one time entitled to a double share in that property; subsequently he was permitted to dispose of it at his pleasure during his life-time but probably the right of testamentary disposition ignoring the rights of the co-parceners was not at first recognized. But a stage was reached later on when the right of inheritance was taken to vest in the heirs of the acquirer, and his co-parceners were held not entitled to take it by survivorship. The Privy Council held in the *Sivaganga* case (4) that in a *Mitakshara* family, the right of succession depended on the nature of the property and not on the status of the acquirer as to whether he was a member of an undivided family or a separate member. Is there any reason to suppose that the same stage of law had not been reached in 1864 when *Kallati Kunju Menon* v. *Palat Erracha Menon* (3) was decided, amongst the followers of the Marumakkattayam law in Malabar? There is absolutely no reason for holding that it had not been reached. The rule of descent to the man's own heir was applied by the Privy Council in the *Mitakshara* law not only to cases where he was a separated individual, but also where he was living in commensality with his co-parceners. All the evidence of usage that we possess in Malabar is in favour of the view that the prevalent rule of descent in Marumakkattayam law was the same as what was laid down in the *Mitakshara* law by the Privy Council in the *Sivaganga* case (4). Mr. Cook, Mr. Strange and Mr. Holloway himself have recorded the fact. Mr. Logan, the author of the Manual of Malabar Law, is another witness to the usage of the people. Mr. Wigram, no doubt, was of opinion that the rule laid down in *Kallati Kunju Menon* v. *Palat Erracha Menon* (3) was "undoubtedly in accordance with ancient usage which regarded the family as an indissoluble unit and took no thought of

(11) 1 M. H. C. R. 412.

the individuals composing that unit" and he regarded the practice of inheritance to the nearer heirs of the acquirer as of recent growth. See Moore's Malabar Law and Custom, page 176. But that learned Judge refers to no authority in support of his conception as to the actual usage in Malabar. His opinion was probably based on what he regarded "must have been the usage" as the family was regarded as "an indissoluble unit and took no thought of the individuals composing it." That is a theory applicable alike to Hindus governed by the *Mitakshara* and by the Marumakkattayam law. In *Alami* v. *Komu* (6), it was found that the practice of making Wills relating to self-acquired property had come into vogue as early as the beginning of the past century. It is very unlikely at that very early time that the right of testamentary disposition would have been recognized if the property of the testator would not otherwise descend to his own heirs. The only evidence of usage as far as I am aware is that self-acquisitions should descend to the immediate heirs of the acquirer and the decision in *Kallati Kunju Menon* v. *Palat Erracha Menon* (3), far from being based on usage, was based on the theory of the Marumakkattayam law which one at least of the learned Judges who decided it knew to be contrary to the prevailing usage; and usage was referred to only in support of the view that the acquirer could during his life dispose of his acquisitions at his pleasure. Regarding that judgment, then, as based on the theory of the Marumakkattayam law of property, was it a correct exposition of the law? If, as observed by Abdur Rahim, J., Marumakkattayam system is Customary Law, then the judgment must be held to be wrong as it was not based on the usage but was contrary to it. If, on the other hand, it was not based on usage but upon the theory of lapse applicable to all property acquired by a member of an undivided family, then it was equally wrong as shown by the judgment of the Privy Council in the *Sivaganga* case (4). I myself have no doubt as already observed that the learned Judges based it on the theory of joint family property. Their view was that the *tarwad* had an inchoate right in the acquisitions of a member which should, therefore, lapse to them by survivorship on the acquirer's death. After the decision in the *Sivaganga* case (4), the judgment can be no longer held to be right. It has been held in subsequent decisions that Scotland, C. J., and Holloway, J., based their judgment on the right of survivorship. This was the view taken of it in *Ryrappan Nambiar* v. *Kelu Kurup* (5), *Alami* v. *Komu* (6) and *Achutan Nayar* v. *Cheriotti Nayar* (7) as well as in other cases. In the first of these cases, it was held that divided kinsmen had no right to object to a Will made by the last survivor of a *tarwad* as they had no right of survivorship. In the second case it was held that the *Sivaganga* case (4) showed that there was no survivorship with regard to the self-acquired property of a member and that, therefore, when the property lapses to the *tarwad*, they must take it subject to his debts. The question did not arise there as to whether it would descend to the immediate heirs of the acquirer or to the *tarwad*. In the 3rd case, it was held overruling an earlier decision that an acquirer could dispose by Will of his self-acquisitions and the absence of the right of survivorship as shown by the *Sivaganga* case (4) was again referred to. The language of the judgment in *Kallati Kunju Menon* v. *Palat Erracha Menon* (3) is itself quite clear on the point. It was observed by Abdur Rahim, J., in the Full Bench case:—"No doubt, the use of the words 'lapse' and 'survivorship' points to a stage in the growth of the Marumakkattayam system when the *tarwad* had an interest in the self-acquired property of one of its members but I do not find it difficult to conceive that though this may serve to explain its origin, the rule in favour of succession by the *tarwad* may have survived the state of things which gave rise to it." I entirely agree that a rule may survive the reason which gave rise to it. But did it survive as a matter of usage in this case? I think not, for there is absolutely no evidence that it did. As a rule of law, the proposition is wrong as shown by the judgment of the Privy Council. I would respectfully observe that the Malabar Law is really only a school of Hindu law. It is true that there are no sacred writings which are authoritatively binding on the

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followers of the Marumakkattayam system but the Marumakkatayis are, undoubtedly, a class of Hindus whose system of holding property is similar to that of other Hindus and who have a system of heirs of their own as other Hindus have. There are, no doubt, two essential differences between the *Mitakshara* law and the Marumakkattayam law; *first* with regard to the rule of inheritance and *secondly*, that a co-parcener is not entitled to a compulsory right of partition. But the same principle would be applicable to Marumakkattayam law and to Hindu Law in deducing the consequences flowing from the joint holding of property. Such holding, if it would not affect the succession to the self-acquired property of a *Mitakshara* Hindu, should no more affect the rule applicable to the self acquisitions of a Marumakkatayi. At any rate, such a distinction could be supported only by the actual usage of the people. The effect of the Privy Council decision was perceived by the Court in the cases already referred to, *viz.*, *Ryrappan Nambiar* v. *Kelu Kurup* (5), *Alumi* v. *Komu* (6) and *Achutan Nayar* v. *Cheriotti Nayar* (7). But with regard to the self-acquisitions of a male, the consequences of the judgment of the Privy Council were apparently not clearly apprehended. No doubt, the rule laid down in *Kallati Kunju Menon* v. *Palat Erracha Menon* (3) was limited and its logical consequences denied as pointed out in the judgment of Sankaran Nair, J., in the order of reference in the Full Bench case. No case actually arose between the *tarwad* and the immediate heirs of an acquirer in which the dictum in *Kallati Kunju Menon* v. *Palat Erracha Menon*(3) was affirmed. Several Subordinate Judges, followers of the Marumakkattayam law, denied the correctness of the dictum. The High Court, no doubt, has affirmed the dictum in subsequent *obiter dicta*. The question arose directly for decision only in the case of a Muhammadan family in *Illikka Pakramar* v. *Kutti Kunhamed* (8), but all that was decided there was that Moplah families in North Malabar governed by the Marumakkattayam law would be governed by the rule of lapse of self-acquired property to the *tarwad*, it being assumed that this was the rule applicable to Hindu Marumakkattayis. It was decided more than a quarter of a Century ago that amongst the followers of the Alyasantana Law in South Canara, the incidents of which are in all essential respects the same as those of the Marumakkattayam law, the succession to the self-acquisitions of a member was to his own heirs and not to the *tarwad*, the decision being based on the usage prevailing amongst the people. The same decision has been recently arrived at with regard to the self-acquisitions of a member of a Nambudri family, the law of the Nambudris also disallowing compulsory partition as the Marumakkattayam law does. The Travancore High Court and the Cochin Chief Court have also held that according to the Marumakkattayam law the rule laid down in *Kallati Kunju Menon* v. *Palat Erracha Menon* (3) is wrong [see *Saktai Kerulan* v. *Sakthi Sakthi* (12)].

It is not denied, and it was not denied in the course of the arguments in the Full Bench case, that a Marumakkattayi has his own heirs other than the *tarwad*. Suppose for instance all the members of a Marumakkattayam *tarwad* become divided from each other at the same time and one of them subsequently dies, who is the heir to the property of the deceased? There is no *tarwad* to which it could lapse. It is impossible to contend that every person who was a co-parcener of the deceased would be equally entitled to the property. That would be completely ignoring the rule established from time immemorial that a man's own nearest heirs are entitled to succeed to the property. The rule was recognized in the translation of the Mahabharata by the well-known Tunjat Ezhuttachan, the father of Malayalam literature. It was recognised by Mr. Cook and Mr. Strange. Nobody in Malabar has ever had any doubt about it. It is indeed not denied in the judgment of Abdur Rahim, J., in *Govindan Nair* v. *Sankaran Nair* (1). That learned Judge apparently adopts the view that there are two lines of heirs according as the deceased was the member of an undivided *tarwad* or not, a proposition which was negatived with respect to the *Mitakshara* law by the Privy Council and not supported by usage as observed by Messrs. Cook, Strange and Holloway. I am not impressed with the

(12) 24 Travancore L. R. 102; 1 Cochin L. R. 137.

argument that there would be difficulties in giving effect to the succession of the nearest heirs or the *tavazhi* of an acquirer. It is contended that the *tavazhi* does not include the mother of the acquirer though she must be held to be nearer than the descendants of the sisters and perhaps even than the brothers and sisters themselves. But the definition of a *tavazhi* does not exclude the mother herself whose descendants including the acquirer form the *tavazhi* along with herself. In the enumeration of heirs by Mr. Stange in his Manual of Hindu law, the mother is, no doubt, mentioned after the brothers and sisters and the issue of sisters. But in the Keralavakasakramam by a native writer in Travancore the mother is included along with the brothers and sisters. I do not think that the Judges who made the reference in the Full Bench case intended to exclude the mother from the *tavazhi* of the acquirer though the descendants alone are named. It does not appear whether the mother was alive in that case. My examination of the decisions has led me to the conclusion that the rule laid down in the dictum in *Kallati Kunju Menon* v. *Palat Erracha Menon* (3) was wrong as a proposition of law deduced from the Marumakkattayam system, that it was recognized at the time of its pronouncement as contrary to the prevailing usage, that the application of the rule has been restricted and departed from in subsequent decisions, that its incorrectness has been shown by the decision of the Privy Council in the *Sivaganga* case (4) and recognised in several decisions of this Court and that it has never been affirmed directly in any subsequent case where a competition arose between the nearest heirs of the acquirer and his *tarwad*. The referring order in the Full Bench case shows that notwithstanding the *dicta* of the High Court, the usage of the people has not been altered that as a matter of custom it is the immediate heirs of the acquirer that succeed to his property at his death. In these circumstances, I am of opinion that there is no scope for the application of the doctrine of *stare decisis*. The case is a curious one in which the people have followed their Customary Law for a period of about half a Century notwithstanding the attempt of the High Court to modify it. They have succeeded in inducing the Court to depart from the principle in several respects. I do not think that we should hesitate to pronounce a judgment which would be in accordance with both law and custom. I think for these reasons that the decision in the Full Bench case in *Govindan Nair* v. *Sankaran Nair* (1) cannot be applied to the self-acquisitions of a female member of a *tarwad*. My answer to the question referred to the Full Bench is that the self-acquisitions of a female would descend to her nearest heirs under the Marumakkattayam law.

BOMBAY HIGH COURT.

FIRST CIVIL APPEAL No. 25 OF 1912.

September 17, 1912.

Present:—Mr. Justice Batchelor and Mr. Justice Rao.

GIRDHARLAL HARIVALLABHDAS —APPELLANT

versus

NARANLAL NAROTTANDAS—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 92—Public charitable trust—Trustee setting up his private right—Plaint—Nature of suit how determined.

The plaintiff's case was that the defendant was a trustee of a particular *Mandir*, the *Mandir* itself being public charitable property, that the defendant, both by setting up adverse title of his own and in other ways, had been guilty of breach of trust, and that, therefore, the defendant should be removed from his possession and the Court's direction should be given as to the administration of the trust. The defendant claimed that the property was his own private property:

Held, that the suit fell within the scope of section 92 of the Code of Civil Procedure, and the mere circumstance that the defendant set up in himself a private title adverse to the trust would constitute a breach of trust.

The character of a suit is primarily to be ascertained by a reference to the pleadings, and is not dependent upon the plaintiff's success at the trial.

First appeal from the decision of the District Judge of Ahmedabad, in Suit No. 20 of 1909.

Mr. *L. A. Shah*, for the Appellants.

M. *K. N. Koyajee*, for the Respondents.

JUDGMENT.—This is an appeal from a decree made by the District Judge of Ahmedabad who has dismissed the plaintiffs' suit with costs. The suit purported to be a suit filed under section 92 of the Civil Procedure Code with the permission of the

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Collector. The plaint, which is somewhat diffuse in its references to the history of the property, may be summarised as containing averments that the whole of the property referred to is public charitable property of the Vaishnavs; that the defendants, of whom the second is the wife of the first, were mere *pujaris*, or as is expressly stated, trustees appointed by the Vaishnavs for the worship of the idol; that the defendant, that is to say, the real defendant, the husband, although a trustee, did not properly look after and take care of the *Mandir*, that he refused to show the income of the *Mandir* to the Vaishnavs interested. Misconducting himself in this and other ways, say the plaintiffs, he does not discharge his duties as a *pujari* and trustee, and he has thereby committed and commits breach of trust. The plaint goes on to say that when remonstrated with on this misconduct, the defendant refused to acknowledge his responsibility to anybody, but gave a reply to the following effect: "I am the independent owner of the *Mandir* and all the immoveable and moveable property appertaining to the *Mandir*, and the Vaishnav people have no right whatever, and I have full right to make such use of the *Mandir* and all the immoveable and moveable property appertaining to the *Mandir* as I may think proper, inasmuch as the *Mandir*, and the property appertaining to the *Mandir*, belong to me by right of independent ownership and the same are not public charitable property." The prayers were that the defendants should be removed from their possession and *vahivat* of the *Mandir*; that the said property should be given in trust, and other persons should be appointed as *Vahivatdars*, that is to say, trustees and other fit and proper persons should be appointed as *pujaris*; that an account should be taken from the defendants; and that a scheme should be framed for the administration of the trust. This in substance is the character of the plaintiffs' suit, and the first question which arises is whether it properly falls under section 92 of the Civil Procedure Code. The learned Judge below was of opinion that it was outside the section and that the plaintiffs' proper remedy would have been by an ordinary ejection suit in some form or other in the ordinary Court. The Judge based this opinion upon the ground that the plaintiffs' case, as developed in the evidence, was that the principal Vaishnavs of the locality were the owners and managers of the *Mandir* and were themselves trustees on behalf of the community, while the defendant was merely their servant, whom they had a right to appoint and dismiss at pleasure. It appears to us that the learned Judge in looking beyond the plaint to the evidence of the witnesses for the ascertainment of the nature of the suit was in error, and that he attached undue importance to the evidence which upon this point was given. The character of the suit is primarily to be ascertained by a reference to the pleadings and is not dependent upon the plaintiffs' success at the trial; moreover, the mere use of the English word "trustee" by the Gujarati witnesses is not a circumstance of any real importance in deciding the real nature of the suit.

Section 92 of the Civil Procedure Code provides for a suit in the case of any alleged breach of a public charitable trust or in the case where the direction of the ourt is deemed necessary for the administration of any such trust. And we cannot doubt that, properly regarded, this suit falls directly within the purview of the section. As we have shown by reference to the terms of the plaint, the plaintiffs' case was that the defendant was a trustee of this *Mandir*, the *Mandir* itself being public charitable property; that the defendant, both by setting up an adverse title of his own and in other ways, had been guilty of breaches of his trust; and that, therefore, the defendant should be removed from his possession and the Court's direction should be given as to the administration of the trust. Such a suit is, in our view, strictly within the limits of section 92. And in truth this particular suit is of a very familiar type and follows a very familiar course. The type of the suit is not altered by the circumstances that, as usual in this class of litigation in India, the plaintiffs, like the defendants, have been guilty of exaggeration. Stripped, however, of this form of decoration, the real controversy in the suit is perfectly plain. It is a controversy between the plaintiffs, interested Vaishnav worshippers, who allege that this temple is public charitable property, and the *pujari* defendant who claims that the property is his own private property. That is the point upon which, as the pleadings show, the real dispute

turned and the decision of the Court was required. It is, in our opinion, a mistake to read the plaint as if it alleged that other people, in the position of the supervisors, were trustees of the temple and that the defendants were not the trustees. On the contrary, according to the plaint, the defendants were in possession of the trust property, and were in receipt of the income accruing to it; and the plaintiffs' clearly expressed case is that in relation to this *Mandir*, the defendant's position was that of a trustee. If that is so, then apart altogether from the question whether supervision had been exercised over him in the past, or whether he had refused to show his accounts, or committed any other act of misconduct, the mere circumstance that he set up in himself a private title adverse to the trust would constitute a breach of trust; see *Damodar Bhataji* v. *Bhat Bhogilal* (1) and *Chintaman Bajaji Dev* v. *Dhondo Ganesh Dev* (2); such a denial of his trust and the consequent need of the Court's directions with regard to the administration of the property amply suffice for the application of section 92.

The suit then was properly brought under that section, and the question which arises, the only substantial question between the parties, is whether the plaintiffs have succeeded in showing that the property is public charitable property. As we have indicated, it must be conceded that the plaintiffs upon this point have exaggerated the truth in their assertion that in the past *pujaris* like the defendant have been formally appointed by direction of the Vaishnavs. These formal appointments, as we know, are not the custom in India, but the absence of them by no means indicates that the property involved is other than public property. In the same way, the circumstance that the *pujariship* has gone down uniformly by inheritance or grant is also a circumstance of singularly little significance in a country where every office tends to become hereditary. It is common knowledge that in India parties on both sides acquiesce in this slipshod state of affairs until some act is done or some claim made which makes it essential to have their rights formally determined.

These then are circumstances which, as it, seems to us, touch but the fringe of the case. The real question is whether there is evidence to show that the *Mandir* has with the approval of the *pujaris* been treated as public charitable property. Upon this part of the case, the plaintiffs assert that for several years including the period between 1876 and 1884 the *pujari* was one Ranchod Keshavram. According to the plaintiffs, he admittedly held as a mere worshipper and acknowledged that the property of the *Mandir* was in the Vaishnavs. These acknowledgments of Ranchod's being indisputable, the defendants in their written statement are driven to an attempt to suppress the intervention of Ranchod Keshavram, and to allege that the *Mandir* belonged to Ranchod's wife Sankli who, by a deed of gift, transferred it to the defendants' predecessor-in title, Bai Javer. We say a deed of gift because by the defendants' *purshis* Exhibit 51 it is admitted that the gift was recorded in a written instrument. No such instrument is, however, produced by the defendants, and the evidence makes it quite clear that the real *pujari* was Ranchod Keshavram himself, and his admissions go a long way to establish the plaintiffs' case. These admissions are to be found in Ranchod's Will made in 1881, or three years before his death. The Will is registered and admittedly is a genuine document. In the course of it, Ranchod speaks of the *Mandir* in suit as "belonging by right of ownership to the Vaishnavs which appertains to my *vahivat* and in which I perform worship etc., and one house appertaining to the said *Mandir*." He repeats the same words in later passages of the Will, and it is clear that his contention was that, although he had an indefeasible right to perform the worship of deity, the property in the *Mandir* was in Vaishnavs.

The learned District Judge upon this piece of evidence has observed that "it is inconclusive without there being very much more information than we possess as to the conditions under which Ranchod made that statement." "It would seem," says the learned Judge, "that at the time when he made it, he had no particular interest in the property." We have some difficulty in following the learned Judge here, because it is admitted before us that as late as 1876, Ranchod was the *pujari*, and that

(1) 22 B. 493.
(2) 15 B. 612.

there is no evidence whatever that his possession underwent any change between that date and the date of his making his Will in 1881. We must, therefore, infer that at the date of the Will, Ranchod had a very direct personal interest in this property and in the *pujariship*, and his statements disclaiming all right to the property of the *Mandir* are statements against his interest, and, therefore, the more worthy of acceptance.

Two witnesses were called on behalf of the defendant to say that at some undetermined time prior to his death, Ranchod became insane; but we are unable to attach any importance to this statement coming from interested witnesses, since we have the undisputed fact that Probate of Ranchod's Will was granted.

In Exhibit 64, we have a further piece of evidence consisting of the 1st defendant's own statement made to the *Mamlatdar* on the occasion when the Collector was instituting an inquiry for the purpose of ascertaining whether he should consent to the filing of this suit under section 92. In this statement made in April 1903, the first defendant admits, what he takes great pains to deny in the written statement to this suit, that his title comes to him by devise from Ranchod Keshavram. If that is so, the defendant's title can stand no higher than that of his devisor, and upon that footing having regard to Ranchod's Will it is manifest that the defendant would be a mere trustee. He has sought to escape from the effects of this statement by the allegation that the statement was made in a hurry and without due consideration, but we are unable to accept that allegation.

Next, we have the evidence furnished by extracts from the City Survey which go back to a period about 1870. The first of these extracts is Exhibit 104, which refers to the house and temple in suit. The house is described as belonging to Ranchod Keshavram who, as we have seen, was the *pujari* at that date, and the temple is described as Ranchod's *Mandir*. By an entry made on the 31st December 1876, it is noted that an order has been passed for this number being entered as *waqf* property. The word '*waqf*' without more clearly denotes, in our opinion, public charitable property. A similar extract for the year 1876 is supplied by Exhibit 105. There the property is entered as Ranchodji's *Mandir* per Manager Ranchodji Keshavji, and in another column we read that the Manager has charge of this shrine. Not only, therefore, have we the word '*waqf*' but we have the allusion to the Manager, in place of any mention of an owner, to support the inference that this property was then regarded as public charitable property. In 1870 and 1872, the Municipal receipts Exhibits 13 and 14 were issued in the name of Ranchod Keshavram as Manager. In this context, it may also be observed that though unquestionably some *sanad* must have been issued by the Survey authorities to the defendants as Managers in possession of the *Mandir*, yet no such *sanad* has been produced.

Further, the evidence shows that repairs were made to the property in 1890 and were made by subscriptions among the Vaishnav community. No doubt, this fact in itself is by no means conclusive, since the evidence shows that public subscriptions are also invited for the repair of private places of worship; but so far as it goes, the fact suggests an inference in favour of the plaintiffs, and that is the more obvious from the keenness with which the defendant sought to deny that public subscriptions were used for these repairs (see paragraph 10 of the written statement). The evidence, however, leaves no doubt that public subscriptions were so devoted.

Then we have the admitted fact that from 1890 onwards, a substantial part of the moveable property belonging to this *Mandir*, namely, ornaments worth about Rs. 500 have remained in the plaintiffs' possession; but if this *Mandir* were the private property of the defendants, no reason appears and no reason has been suggested to us to explain why this property should be in the possession of outsiders with no interest in it. We find also upon the evidence that the temple is shown always to have been kept open to the public for worship at all usual and reasonable hours, and there is no suggestion that any member of the Vaishnav public was ever excluded or sought to be excluded.

Upon this evidence, which is not in any manner met or contradicted by the evi-

dence called on behalf of the defendants, we are satisfied that the plaintiffs have succeeded in proving the main proposition, for the establishment of which this suit was brought, the proposition, namely, that the *Mandir* is public charitable property, and is not, as the defendants claim, the defendants' private property. We think a declaration must be made to this effect in the plaintiffs' favour. There is, in our opinion, no evidence at the present stage which would justify the removal of the defendants from their present office, and upon that part of the case, therefore, the plaintiffs cannot succeed. At the same time, we think that some scheme, of however simple a character, should be devised in order to impose an effective control upon these *pujaris* who have been treating the property as if it were their own and who manifestly stand in need of some supervision. The District Judge, however, will be in a better position than we can occupy to frame such a scheme and we remand the suit to him for the purpose of doing so.

The result is that we must reverse the District Judge's decree and in its place substitute a decree declaring that the property in suit is public charitable property, and for the rest remand the case to the District Judge for the framing of a suitable scheme.

The plaintiffs-appellants must have their costs throughout.

Decree reversed.

ALLAHABAD HIGH COURT.

FIRST APPEAL FROM ORDER No. 47 OF 1912.

October 28, 1912.

Present: —Mr. Justice Tudball and Mr. Justice Rafique.

MUNSHI LAL AND ANOTHER—APPELLANTS

versus

RAM NARAIN—RESPONDENT.

Execution—Auction sale—When becomes complete—Application to set aside sale by deposit of purchase money—Limitation.

In execution of a decree, certain property was put up for sale on 22nd August 1911. The sale officer, however, did not make a declaration on that date as to who was the purchaser but referred to the Civil Court for certain information. On receipt of the information, on 28th August 1911, he allowed the person whose bid was the highest to deposit one-fourth of the price. The sale was confirmed *ex parte* on 23rd September. The Civil Courts were closed from the 24th September to 26th October. The judgment-debtor deposited the amount of the decree *plus* five per cent. of the purchase money on the 26th of October and applied to have the sale set aside:

Held, (1) that the auction sale was concluded on 28th August, and; therefore, the application to set aside the sale was not barred by limitation;

(2) that the Court was not precluded by the *ex parte* order of confirmation from accepting the deposit and setting aside the sale.

The mere making of the last bid does not conclude a sale. For the conclusion of a sale, it is necessary for the sale officer to accept the final bid and to make a declaration as to who is the purchaser and to order him to pay over 25 per cent. of the purchase-money.

First appeal from an order of the first Additional Subordinate Judge of Meerut.

Mr. *M. L. Agarwala*, for the Appellants.

Messrs. *J. N. Chaudhri* and *Sarat Chandra Chaudhri*, for the Respondent.

JUDGMENT.—The circumstances, out of which the present appeal has arisen, are as follows:—Certain property was put up for sale in execution of two decrees, one of which was for Rs. 11,521 and the other was for Rs. 2,521. Apparently, when the decrees were sent to the Collector for execution, there was an error in the *rubkar* sent and Rs. 1,521 was shown as the amount due under the one decree instead of Rs. 11,521. The property was duly notified for sale, and on the 22nd of August, it was put up for sale. Ram Narain was the highest bidder who bid up to Rs. 6,400. The sale officer, as his order of 22nd August shows, seeing that the total amount apparently due under the decrees was Rs. 3,673, was of opinion that it was unnecessary to sell the whole of this property, and made up his mind to sell it in two lots of one-half each. It is equally clear from his order of the same date that the decree-holder at once informed him that the amount due under the one decree was Rs. 11,521 and not Rs. 1,521. The sale officer made up his mind to verify this statement from the Civil Court, and in his order of 22nd August, he distinctly states that he does not conclude the sale "*ekhtetam-i-nilam manzur nahin kia ja sakta*," and he postponed the matter till he received information. On the 28th of August, he received information that the correct amount due under the decree was Rs. 11,521. He accordingly noted this in

his order which distinctly states that he concludes the sale as it is unnecessary to sell the property afresh in two lots. On that same date, he received from Ram Narain the one-fourth deposit which it is necessary to make under Order XXI, rule 84 of the Code of Civil Procedure. On the 23rd of September, on an *ex parte* application, the Civil Court confirmed the sale. From the 24th of September till the 26th of October, the Court closed for vacation. On the 26th of October, the judgment-debtor deposited the amount of the decree *plus* 5 pen cent. of the purchase-money as required under Order XXI, rule 89, and he asked that the sale should be set aside. The learned Subordinate Judge refused to set aside the sale, being of opinion that it was impossible for him to do so after he had once confirmed the sale. The judgment-debtor comes here in appeal, and it is urged, we must admit, with considerable force, that the auction sale was not concluded until the 28th of August, that the deposit made on the 26th of October was a deposit made within time, *i. e.*, within thirty days of the sale, omitting the vacation, and that the learned Subordinate Judge was not debarred from setting aside the sale merely because he had, on the 23rd of September, by an *ex parte* order, confirmed it. It is contended on behalf of the respondent that the sale in the present instance took place on the 22nd of August, and that if the judgment-debtor wished to make a deposit, he was bound to do so before the 22nd of September. In our opinion, in view of what took place on the 22nd of August and the lengthy order passed by the sale officer on that date, and the action that he took in the meantime, and his order of the 28th of August, it is quite clear that the sale was not concluded until August the 28th. We cannot accept the contention that directly a bid is made, the sale is concluded. In his order of 22nd August, the sale officer distinctly and in very clear language stated that he did not conclude the sale, that the final bid was not there, and that it was his intention to split up the property in lots and put up the same afresh. Under Order XXI, rule 84, a person who is declared to be the purchaser at a sale has to, immediately after such declaration, make a deposit of 25 per cent. on the amount of his purchase-money to the officer conducting the sale. It is, therefore, quite clear that for the conclusion of a sale, it is necessary for the sale officer to accept the final bid and to make a declaration as to who is the purchaser and to order that purchaser to forthwith pay over 25 per cent. of the purchase-money. It is clear that if such deposit is not made immediately, it is open to the sale officer to continue the sale afresh, and such auction-purchaser, who fails to make the deposit, is liable for the difference between the amount of his own bid and that of the final bid which may be accepted by the sale officer. Our attention has been called to a ruling in *Chowdhury Kesri Sahai* v. *Geani Roy* (1). It is of no assistance whatsoever to us in the present case, nor was the point (which now arises) before the Court at the hearing of that case. It seems to us that the matter is simply one for the exercise of a little common sense. The mere making of the last bid does not conclude the sale, and, in our opinion, in the present case the sale was concluded on the 28th of August, which is evidenced by the fact that on that date, the sale officer declared Ram Narain to be the purchaser and made him pay 25 per cent. of the deposit under Order II, rule 84. It is equally clear that the judgment-debtor could not have made a deposit and applied to have the sale set aside prior to August 28th. In this view, it is quite clear that the deposit made on the 26th of October by the appellant was made within time. The learned Subordinate Judge was not precluded by reason of his order of 23rd September from accepting this deposit and setting aside the sale. An *ex parte* order passed on that date could not deprive the present appellant of his rights under the law, and it was the Subordinate Judge's duty to set aside the sale. We, therefore, admit the appeal, and set aside the order of the Court below. The sale of the 28th of August 1911, will be set aside. The appellants will have their costs in both Courts.

Appeal allowed.

(1) 29 C. 626.

BOMBAY HIGH COURT.
CRIMINAL REVISION APPLICATION No. 281 OF 1912.
September 27, 1912.
Present:—Mr. Justice Batchelor and Mr. Justice Rao.
EMPEROR—PROSECUTOR
versus
VISHNU BALKRISHNA RAM—ACCUSED.

Criminal Procedure Code (Act V of 1898), ss. 123, 397—"Undergoing sentence of imprisonment"—Person committed to prison for failure to furnish security—Subsequent sentence of theft for imprisonment—Postponement of sentence—Practice.

When a person is committed to prison under section 123, Criminal Procedure Code, for failure to give security, he is not "undergoing a sentence of imprisonment" within the meaning of section 397.

Therefore, a subsequent sentence of imprisonment passed on the person in regard to theft cannot be postponed till after the expiry of the imprisonment under section 123, Criminal Procedure Code

Criminal application for revision from an order passed by the Sub-Divisional Magistrate, first class, at Malegaon.

Mr. *L. A. Shah*, Acting Government Pleader, for the Crown.

JUDGMENT.—This is an application in revision made to us by the Government of Bombay, and the accused was convicted under section 379, Indian Penal Code, and was sentenced to six months' rigorous imprisonment. The Magistrate ordered that the sentence was "to take effect from the date of expiry of the accused's present sentence." That phrase, as explained in the warrant, meant "the sentence which the accused was undergoing for failing to find security for good behaviour under section 123, Criminal Procedure Code."

The whole question before us is whether the Magistrate was entitled to defer the sentence in regard to the theft until after the expiry of the imprisonment which the accused was suffering owing to his inability to find security. Upon this question, we have unfortunately not had the advantage of argument from the accused's point of view. But the learned Government Pleader has laid the whole case before us and has drawn our attention to the various authorities on both sides. It is a little remarkable that on such an apparently simple question, there should be such a sharp difference of judicial opinion. In that state of the case, however, and seeing that we have had no argument from one side, we think that our best course is to state our own opinion as tersely as may be. Our opinion is that the correct view has been taken by this Court in *Emperor* v. *Arjun Ambo* (1), *Emperor* v. *Kanji Joysingh* (2) and *Emperor* v. *Durga Bahirav* (3), that is to say, in our construction of the Code, when a person is committed to prison under section 123 for failure to give security, he is not undergoing a sentence of imprisonment within the meaning of section 397. We think that the authorities, which we have referred to, constitute a sufficiently uniform *cursus curiæ* to preclude the necessity of any further reference, though we do not overlook that a somewhat divergent view was taken in 1895 by Mr. Justice Jardine and Mr. Justice Ranade in *Queen-Empress* v. *Pandu Khandu* (4). It is represented to us that possibly some embarrassment has been caused in the Courts below by the order which was passed in *Emperor* v. *Dongraya Gangaram Bhil* (5), to which order one of us was a party. It should, therefore, be explained that in that case this Court returned the papers without making any order for the reason that the ground, upon which an order was sought by the District Magistrate of East Khandesh, was the existence of a certain Government Resolution which, in the opinion of this Court, was irrelevant to the purpose then in hand. There is nothing in the order passed upon that reference which conflicts with the view which we have now expressed as to the meaning of sections 123 and 397 of the Criminal Procedure Code. We observe that this is the view which has found acceptance in the Madras High Court: see *Emperor* v. *Muthukumaran* (6) and *Joghi Kannigan* v. *Emperor* (7) and it is, in our judgment, the view which must at present be adhered to by the Courts subordinate to this Court.

The result will be that the application succeeds and the Magistrate's order directing

(1) 12 Bom. L. R. 129; 5 Ind. Cas. 861; 11 Cr. L. J. 271; 34 B. 326.
(2) 5 Bom. L. R. 26.
(3) 6 Bom. L. R. 1098; 1 Cr. L. J. 1114.
(4) (1885) Unrep. Cr. C. 774.
(5) Cr. Ref. No. 91 of 1911 (Unrep).
(6) 27 M. 525.
(7) 31 M. 515; 4 M. L. T. 223; 8 Cr. L. J. 402.

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that the sentence of imprisonment in regard to the theft should be postponed till after the expiry of the imprisonment being suffered under section 123, Criminal Procedure Code, must be set aside. The substantive sentence of imprisonment under section 379, Indian Penal Code, must take effect from the time at which it was passed.

Order set aside.

MADRAS HIGH COURT.

CRIMINAL APPEAL No. 119 OF 1912.

November 21, 1912.

Present:—Sir Ralph Benson, KT., Judge, and Mr. Justice Sundara Aiyar.

THE PUBLIC PROSECUTOR—APPELLANT

versus

SADANANDA PATNAIK—RESPONDENT.

Criminal Procedure Code (Act V of 1898)—Ganjam Collectorate—Division into Agency District and non-Agency District—Sessions Court—Agent—Deputy Magistrate—General Deputy Magistrate—Jurisdiction.

For Magisterial as well as for Judicial and Revenue Administration, the old Ganjam Collectorate was long ago divided into an Agency District and a non-Agency District. The Magistrates of the Agency District are not, as such, in any way subordinate to the Sessions Court of the non-Agency Sessions Division of Ganjam, nor does the fact that the same person is a first class Sub-Divisional Magistrate in both Districts, make him subordinate to the Sessions Court of the Ganjam Sessions Division in regard to the Magistrate's jurisdiction in the Agency District. The Agency District is also a Sessions Division, the Sessions Judge of which is the Agent himself.

'Deputy Magistrate' and 'General Deputy Magistrate' are titles unknown to the Code of Criminal Procedure.

An offence was committed within the limits of the Ganjam Agency tracts. The case was transferred by the Agent to the first class Magistrate of Gumsoor Sub-Division, who had local criminal jurisdiction over certain Agency as well as certain non-Agency tracts.

The Sessions Judge of the Ganjam Sessions Division set aside the conviction recorded by the Magistrate:

Held, (1) that the Magistrate tried the case as a Magistrate of the Agency tracts;

(2) that the proper forum of appeal was the Agent and not the Sessions Judge of Ganjam Division.

Appeal, under section 417 of the Code of Criminal Procedure, from the judgment of acquittal passed on the accused in the Criminal Appeal No. 13 of 1911, by the Sessions Court of Ganjam Agency, in C. C. No. 2 of 1911 on the file of the Deputy Magistrate of Gumsoor Division.

Mr. *T. V. Seshagiri Aiyar, Amicus Curiæ.*

Mr. *C. F. Napier*, Public Prosecutor, for the Appellant.

JUDGMENT.—The facts of this case, so far as they are necessary to state for the purposes of this appeal, are as follows:—

One Sadananda Patnaik was convicted by the first class Magistrate of the Gumsoor Sub Division, Ganjam, of an offence punishable under section 161, Indian Penal Code. On appeal, the Sessions Judge of the Ganjam Sessions Division acquitted him. Against this acquittal, the Public Prosecutor appeals on behalf of Government on the ground that the Sessions Judge of the Ganjam Sessions Division had no jurisdiction to entertain the appeal. The offence was committed at Baliguda which is in the Ganjam Agency tracts. The case was transferred by the Agent to and was tried by the 1st class Magistrate of the Gumsoor Sub-Division who had local criminal jurisdiction over certain Agency tracts as well as over certain non-Agency tracts. The argument for the appellant is that the Agent transferred the case to the first class Magistrate for trial in his capacity as a first class Magistrate of the Agency, not as a first class Magistrate of the non-Agency portion of his Sub-Division, and that an appeal lies from his decision as an Agency Magistrate to the Agent as Sessions Judge of the Agency tracts but not to the Sessions Judge of the Ganjam Sessions Division.

We think that this contention must be upheld. By section 3 of Act XXIV of 1839, the administration of Civil and Criminal justice and the collection of revenue in certain specified tracts, (which for convenience may be called the Agency tracts), which were at that time included in the District (*i. e.*, the revenue District) of Ganjam, were vested in the Collector of Ganjam, and it was ordered that his powers in these matters should be exercised by him as agent to the Governor of Fort Saint George who was given power (section 4) to make rules for the guidance of the Agent and his subordinate officers and also (section 8) to alter the limits of the Agency tracts.

By Notification dated 28th July 1843, (see page 165 of Vol. I, Madras Local Rules

and Orders), issued under the authority of section 1 of Act VII of 1843, the then existing Civil and Criminal Courts throughout the Presidency of Madras (with certain exceptions) were abolished and new Courts called Zillah Courts were established (section 3) presided over by a Civil and Sessions Judge of a Zillah. The general scheme (section 6) provided for a Zillah Court for each Collectorate, but in regard to the Collectorate of the Ganjam, it was provided that the jurisdiction of the Zillah and Sessions Court at Chicacole (a town in the Ganjam Collectorate) should extend over such parts of the Collectorate of Ganjam as have not by Act XXIV of 1839 been withdrawn from the operation of the general regulation.

Under the power given by section 4 of the Act of 1839, certain rules for the administration of justice and the collection of Revenue in the Agency tracts were promulgated (see page 232 of Vol. I, Madras Local Rules and Orders). In 1861, the first Code of Criminal Procedure was passed (Act XXV of 1861). It enacted (section 14) that "the words 'Magistrate of the District' shall mean the chief officer charged with the executive administration of a District in criminal matters by whatever designation such officer is called" and also (section 18) that the local jurisdiction of the Magistrate of a District, shall, for the purposes of this Act, be deemed a "District" and the local jurisdiction in a particular part of a District vested in a Magistrate other than the Magistrate of the District shall be deemed "a Division of a District." The Code came into force in the non-Agency portion of Ganjam on the 1st January 1862. From that date, the Agency portion and the non-Agency portion must be regarded as separate Districts for the purposes of the Code of Criminal Procedure. By Notifications dated 29th January and 17th February 1862, under section 445 of this Code, its operation was extended to the Agency tracts of Ganjam and Vizagapatam respectively. By Notification dated the 6th January 1863 (See page 239 of Vol. I, Madras Local Rules and Orders), so much of the rules framed under Act XXIV of 1839 as related to criminal justice was cancelled and the 'Agent in Ganjam' was in the Agency tracts "authorised to exercise the powers of a Sessions Judge in addition to those belonging to a Magistrate of a District under the Code of Criminal Procedure." The result of these various enactments, notifications and rules was that the old Collectorate of Ganjam was divided for the purposes of administration into two areas, *viz.*, the Agency tracts and the non-Agency (or Regulation) tracts. Different sets of laws and regulation or rules were in force in these two tracts, though for convenience the same officers were usually appointed to administer the laws and conduct the administration in both tracts simultaneously. The person who was Collector exercised the chief revenue functions as Collector in the non-Agency tracts, and as Agent of the Governor in the Agency tracts and he was also District Magistrate of both areas. Each area was for Magisterial purposes a separate District just as each area was a separate Sessions Division in one of which (the Agency tracts) the Collector, in his capacity as Agent, was also Sessions Judge, while in the other (*i.e.*, the non-Agency tracts), there was a separate Zillah and the Sessions Judge sitting at Chicacole. It is unnecessary to refer to the Criminal Procedure Codes of 1872 and 1882. By section 6 of the Scheduled Districts Act, 1874, the Local Government was authorized from time to time:

(*a*) to appoint officers to administer *inter alia* Criminal Justice in the Scheduled Districts which included the Agency tracts of Ganjam,

(*b*) to regulate the procedure of such officer, and

(*c*) to direct by what authority any jurisdiction should be exercised, and by section 7 of the Act all these existing rules prescribed by the Governor-General in Council or the Local Government for the guidance of officers appointed for any of the purposes mentioned in section 6 were continued in force, and all existing officers were deemed to have been appointed under section 6.

By Notification dated 4th July 1898, issued under section 3 of the Act of 1874, the Criminal Procedure Code of 1898 was declared to be in force in the Agency tracts of Ganjam (See pages 64 to 66, Vol. I, Madras

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Local Rules and Orders). By section 7 (3) of that Code, the then existing Sessions Divisions and Districts were continued and by section 8 (2) all the then existing Sub-Divisions, which are now usually put under the charge of a Magistrate, shall be deemed to have been made under this Code.

We thus see, as already stated, that for Magisterial as well as for Judicial and Revenue Administration, the old Ganjam Collectorate was long ago divided into an Agency District and a non-Agency District and the Agency District is also a Sessions Division, the Sessions Judge of which is the Agent himself. The non-Agency District is, for the purposes of the Code of Criminal Procedure, quite distinct from the Agency District, though the same person is the District Magistrate of both. In the same way, the Gumsoor Sub-Division, consisting as it does of a part of the Agency District and of a part of the non-Agency District, must, for the purposes of the Code, be regarded as consisting of two Sub-Divisions, though the same first class Magistrate has jurisdiction in both. When the District Magistrate transferred the present case from the Agency Magistrate in whose local jurisdiction it originated, he could only do so as District Magistrate of the Agency District, and he must be held to have transferred it to the Gumsoor Sub-Divisional Magistrate as Sub-Divisional Magistrate of the Sub-Division in the Agency District though this does not specifically appear in the order of transfer. The Sub-Divisional Magistrate, however, appears to have been conscious of the true position, since he numbered the case as "Agency Calendar Case 2 of 1911," and it may also be noted that the Agency Magistrate in whose jurisdiction the case arose, in asking the District Magistrate to transfer the case, asked him to transfer it to the "Agency Deputy Magistrate, Russelkonda," that is, in other words, to the Sub-Divisional Magistrate of Gumsoor, (whose head-quarters are at Russelkonda) in his capacity as a first class Sub-Divisional Magistrate of the Agency District. The Magistrates of the Agency District are not, as such, in any way, subordinate to the Sessions Court of the non-Agency Sessions Division of Ganjam; nor does the fact that the same person is a first class Sub-Divisional Magistrate in both Districts, make him subordinate to the Sessions Court of the Ganjam Sessions Division in regard to the Magistrate's jurisdiction in the Agency District. The decision in *Valia Ambu Podaval* v. *The Emperor* (1), relied by the Sessions Judge in the present case, is not in point since it expressly provided on the footing that, notwithstanding the language of section 7 of the Criminal Procedure Code, there were in that case two Sessions Divisions in the same District. We must, therefore, hold that the Sessions Judge in the present case had no jurisdiction to hear the appeal which should have been made not to him, but to the Agent. We must allow the appeal and set aside the acquittal. On the merits, however, we think the decision of the Sessions Judge was right and the Public Prosecutor has not thought it necessary to argue in support of the conviction. As a Court of revision, we set aside the conviction by the Magistrate.

We may add that it would be well if the District and the Sub-Divisional Magistrates in the Agency and the non-Agency Districts of Ganjam, would, in future, bear in mind their several capacities with reference to the language of the Code of Criminal Procedure and indicate clearly on the face of their proceedings the capacity in which they act from time to time.

In the present case, the first class Magistrate of the Gumsoor Sub-Division is referred to by the Special Assistant Agent as "the Agency Deputy Magistrate Russelkonda," by the District Magistrate as the "General Deputy Magistrate, Gumsoor" and by the Magistrate himself as the "Deputy Magistrate, Gumsoor Division"—"Deputy Magistrate" and "General Deputy Magistrate;" these, we may point out are titles unknown to the Code of Criminal Procedure.

It would also be well if the distinction between the Agency and non-Agency Districts in the Judicial use of the term is borne in mind in the Notifications of Government.

(1) 30 M. 136; 16 M. L. J. 444; 1 M. L. T. 402; 4 Cr. L. J. 443.

EMPEROR v. NAGA TIMA.

BOMBAY HIGH COURT.

[CRIMINAL REFERENCE No. 80 OF 1912.
September 16, 1912.
Present:—Mr. Justice Batchelor and Mr. Justice Rao.

EMPEROR—OPPONENT
versus
NAGA TIMA—ACCUSED.

Workmen's Breach of Contract Act (XIII of 1859)—Strict interpretation—Employer—Broker or middleman not entitled to proceed.

The Workmen's Breach of Contract Act is a statute which calls for strict interpretation.

A person who is not an employer of labour or a master but is a mere broker or middleman for the purpose of supplying labour to the employer or master, is not entitled to take proceedings as an employer against a workman under the Act.

Reference made by the Sessions Judge of Thana on the following

GROUNDS.—The agreement does not at all fall within the provisions or the spirit of Act XIII of 1859. Having regard to the admissions of the complainant and his witnesses, it is clear that Vithu Malhari was in no sense an employer or master or a person acting on behalf of such employer or master.

(2.) There was no specific work to be done which could be defined. (3) There is nothing to ascertain when the work could be considered to have been completed. (4) In fact, the agreement was to bind down the defendant and his men for nearly two years and prevent them from accepting any one else's work under the threat of criminal prosecution under the Act. In other words, the liberty of the accused and his men was purchased for the stipulated period for the paltry advance of Rs. 200, which could be paid off in 2½ months by their wages. This is slavery in another form. (5) The agreement is extortionate and is such as cannot be enforced under the Specific Relief Act. (6) The arrangement was really to pay off the advance as a debt out of the wages earned. (7) The Magistrate's order fixing the time of seven days to pay the money and requiring security for the same to be given is illegal (*Imperator* v. *Bhau Bhimaji*, Criminal Ruling of 1888, dated 24th July). (8) The order of the Magistrate awarding Rs. 63 and odd to complainant and refusing to show the account books to the defence Pleader is wrong and unjustifiable.

(B) As regards the 1st, 2nd and 3rd grounds, I beg to observe that the complainant, Vithu Malhari, had no work to be done on which the labourers could be employed. No specific work was in contemplation of the parties beyond the speculation that the Railway Company or contractors may require labour and that there would be demand for such labour at unknown places. The agreement distinctly shows this. The complainant is merely a commission agent, and makes profits as such from these bargains. At the time Rs. 200 were advanced to accused, he also advanced Rs. 800 to four other persons. The complainant has stated as follows:—"I supply men to Jan Shet and he supplies them to any persons he likes. I hand over my men to Jan Shet. I take advance of money from Jan Mahamad and then advance to labourers. I get one anna commission from Jan Shet, *i. e.*, I take twelve annas a pair from him and pay eleven annas a pair to the labourers." Though the complainant denies it, it seems that he sent the men to places beyond those mentioned in the agreement. He has, however, admitted that Jan Shet sent the men to Pallanji. Pallanji's work was at Khopoli which is not covered by the agreement and it is said that the accused refused to work there. Though the complainant denies having sent the men to Matunga, which is not covered by the written agreement, his *karkun* or rather Jan's *karkun* has admitted that the men were sent to Matunga. He has also admitted that the men worked at Thana for thirty days. Thana is also not covered by the agreement. All this evidence shows that there was not only no specific work to be done but it was not even certain where the work could be found. The preamble to the Act is clear on the point. It contemplates advance received on account of work which the workman has contracted to perform. Section 2 of the Act contemplates the existence of the work and its completion. In the present case, there is no work which could be completed. As long as the Railway exists and the contractor gets the contract, the work cannot be said to be completed. Only the period during which work is to be performed is mentioned. As it cannot be ascertained that a particular work was to be performed and it cannot at all events be ever ascertained whether it is complete or not, the case cannot be said to come under the Act and the Magis-

trate had no jurisdiction to entertain the complaint. This view is supported by the ruling in *In the matter of Anusoori Sanyasi* (1), where their Lordships have observed:—"Section 2 of the Act empowers the Magistrate, at the option of the complainant, either to order that the money advanced be re-paid, or the work be performed. I think the section only applies, when the work is uncompleted when the complaint is made. In my opinion, if the work has been completed when the complaint is made, the Magistrate has no jurisdiction under the section." In the present case, it is not said whether the work has been completed or not and having regard to the nature of the work, it is not possible to say so. The complainant's sending the men to Matunga, Thana, Khopoli and other places was a distinct breach of the agreement on the complainant's part which offends against the ruling in *Emperor* v. *Namdeo Sakharam* (2).

(C) As regards 4 and 5, in fact the argument is one which interferes with the free competition of labour to secure adequate wages. Seven pairs were to be employed each getting eleven annas. Their daily wages came to about Rs. 5 and the amount of Rs. 200 could be paid off in forty days. As a matter of fact, five or six pairs have admittedly worked for forty-eight days. But the term fixed is nearly two years. The whole of the wages were not deducted from the advance simply to keep the accused bound. The agreement was thus unconscionable and hard. The complainant's witness, Exhibit 4, has admitted that "the accused was to get wages for the days he worked and not for days off work. When work is transferred from one place to another, there will be a delay of a few days in the course of the transfer. I did not think that there was anything in the agreement that if no work was given, the accused should run away." This means that if no work was provided for the accused, he and his men must starve.

(D) As regards 6th. The complainant has admitted that under the agreement the accused had to pay half the amount of wages in re-payment of the loan but he may pay less at a time, Rs. 200 were paid to re-pay the accused's debt at Haspet to another and in advance for wages to be earned by him. This and the terms of the agreement show that the advance was by way of a loan to be re-paid by the wages earned and the rulings in *Imperator* v. *Ningappa*, Criminal Ruling of 1895, dated 10th May and *In re Abdul Rasul* (3) apply to the present case. I have already given reasons for the 7th ground.

(E) As regards 8th. It was improper on the Magistrate's part to hold the advance of Rs. 68 proved especially when he disallowed the accused's Pleader to see the account-book. No agreement is proved in respect of this advance nor is the advance proved and the ruling in *Emperor* v. *Namdeo Sukharam* (2) applies.

Mr. *T. R. Desai*, for the Accused.

Mr. *W. B. Pradhan*, for the Opponent.

JUDGMENT.—In our opinion, Act XIII of 1859 (Workmen's Breach of Contract Act) is a statute which calls for strict interpretation, and the agreement which has been closely analysed by the learned Sessions Judge appears to us to fall outside that statute. The reasons for that view have been given by the Sessions Judge, and we need not recapitulate them. It will be enough for us to say that the respondent before us was not an employer or master within the meaning of the statute, but was, in our opinion, a mere broker or middleman for the purpose of supplying labour to the employer or master and the terms of the agreement seem to us, in many respects, to lie wholly outside the scope of the Act.

We must, therefore, set aside the order passed by the first class Magistrate.

Order set aside.

(1) 28 M. 37; 2 Cr. L. J. 149 (F. B.).

(2) 12 Bom. L. R. 135; 5 Ind. Cas. 863; 11 Cr. L. J. 273.

(3) 13 Bom. L. R. 548; 11 Ind. Cas. 586; 12 Cr. L. J. 402.

ALLAHABAD HIGH COURT.

CRIMINAL REVISION PETITION No. 432 OF 1912.
August 15, 1912.
Present:—Mr. Justice Rafique.
BARKATULLAH—APPLICANT
versus
SADHO KALWAR AND OTHERS—OPPOSITE PARTY.

Penal Code (Act XLV of 1860), ss. 182, 211—False information to Police.

The offence of laying false information to the Police falls under the first paragraph of section 211 as well as under section 182 of the Penal Code.

King-Emperor v. *Jagmohan*, 6 A. L. J. 989, 4 Ind. Cas. 812; 11 Cr. L.J. 54; *Hardwar Pal* v. *King-Emperor*, 10 A. L. J. 61; 13 Cr. L. J. 702; 34 A. 522; 16 Ind. Cas. 510, relied upon.

Criminal revision from an order of the Sessions Judge of Azamgarh.

Mr. *E. A. Howard*, for the Applicant.

Messrs. *G. P. Boys* and *R. K. Sorabji*, for the Opposite Party.

JUDGMENT.—The facts which have given rise to the present application in revision are as follows:—

On the 2nd of December 1911, Sadho Mewa and Bhairon, the opposite party, informed the Police that Barkatullah, the applicant and one other person, had slaughtered a cow in their house, the blood of which had flowed out into the street. The Police inquired into the report but no further action was taken in the matter.

On the 19th of January 1912, Barkatullah filed an application before the Magistrate at Azamgarh, asking for sanction under section 195 of the Code of Criminal Procedure, to prosecute the three informants under section 211 of the Indian Penal Code. The Magistrate rejected the application on the 6th of March 1912, holding that the offence, if any, of the three informants fell under section 182 of the Indian Penal Code and not under section 211 of the Indian Penal Code. The applicant preferred a revision to the Court of the Sessions Judge from the order of the Magistrate. The learned Judge is of opinion that section 211 of the Indian Penal Code would apply only in cases where the alleged false information related to cognizable offences. He also rejected the application. It is contended before me on behalf of the applicant that the offence of laying false information to the Police falls under section 182 of the Indian Penal Code as well as under paragraph 1 of section 211 of the Indian Penal Code. For the opposite party, this contention is questioned. There is no doubt that some of the High Courts have held that the offence of laying false information to the Police falls under section 182 of the Indian Penal Code only. But the current of rulings in this Court is otherwise. It has been held in several cases by this Court that the offence of laying false information to the Police falls under the first paragraph of section 211 also, vide *King-Emperor* v. *Jagmohan* (1) and *Hardwar Pal* v. *King-Emperor* (2). On the authority of these cases, it is clear that the offence complained of by the applicant and alleged to have been committed by the opposite party does fall under the first paragraph of section 211 of the Indian Penal Code. I, therefore, set aside the orders of the lower Courts and direct that the application be disposed of by the Magistrate according to law.

Application allowed.

(1) 6 A. L. J. 989; 4 Ind. Cas. 812; 11 Cr. L. J. 54.
(2) 10 A. L. J. 61; 13 Cr. L. J. 702; 34 A. 522; 16 Ind. Cas. 510.

BOMBAY HIGH COURT.

CRIMINAL REFERENCE No. 92 OF 1912.
September 27, 1912.
Present:—Mr. Justice Batchelor and Mr. Justice Rao.
EMPEROR—PROSECUTOR
versus
LALLUBHAI JAYCHAND GUJAR—ACCUSED.

Criminal Procedure Code (Act V of 1898), s. 195—Sanction to prosecute—Complaint to Magistrate—Investigation by Police—Permission to Police to proceed against complainant—Case classed B—Penal Code (Act XLV of 1860), s. 211.

A complaint of an offence was made to a Magistrate, who examined the complainant and sent the case to the Police for investigation. The Police reported that the case was false and asked for orders for the prosecution of the complainant. At the foot of this report, the Magistrate made the following endorsement:—"The case is classed as (*B*)* You may proceed against the complainant."

*This description could only have been appropriate if the original complaint had been made to the Police.

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Held, that the order made by the Magistrate at the foot of the report made by the Police could not be accepted as a sanction under section 195, Criminal Procedure Code.

FACTS.—A complaint of an offence was made to a Magistrate, who examined the complainant and sent it to the Police for investigation. The Police reported that the case was false and asked for orders for the prosecution of the complainant. At the foot of this report, the Magistrate made the following endorsement:—

"The case is classed as (B.); you may proceed against the complainant."

The case was referred to the High Court by the Senior Judge on the following

GROUNDS.—I am of opinion that this order does not amount to a proper sanction under section 195, Criminal Procedure Code. If the original complaint had been made to the Police, this order would have been suitable, for in that case the Police themselves would have legally prosecuted the man (who is the present accused). But in this case, the Police had no power to do so without the sanction of the Magistrate, in whose Court the complaint was lodged. I humbly think that no such sanction has been given and, therefore, feel obliged to refer the case for their Lordships' orders.

Mr. *B. V. Vidvans*, for the Accused.

JUDGMENT.—We agree with the learned Sessions Judge that the order made by the Magistrate in this case at the foot of the report made by the Police cannot be accepted as a sanction under section 195, Criminal Procedure Code. We may point out also that the Magistrate appears to have misunderstood the position in another respect in that the complaint made by Lallubhai Jaychand has up till this moment never been dismissed. We must, therefore, quash the commitment.

Order quashed.

ALLAHABAD HIGH COURT.

CRIMINAL REVISION PETITION No. 681 OF 1912.

September 26, 1912.

Present:—Mr. Justice Rafique.

GEORGE LANGRIDGE—APPLICANT

versus

GRACE ATKINS—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 179—Penal Code (Act XLV of 1860), s. 406—Criminal breach of trust—Loss entailed by criminal breach of trust completes offence—Jurisdiction.

The loss resulting from criminal breach of trust is a consequence which completes the offence. The Court within whose jurisdiction such loss accrues can try the offence.

Queen-Empress v. *O'Brien*, 19 A. 111; *Mahadeo* v. *King-Emperor*, 7 A. L. J. 319; 11 Cr. L. J. 372; 6 Ind. Cas. 563; 32 A. 397, followed.

A. and *B.*, who both resided at Cawnpore with their wives, entered into an arrangement by which a machine purchased with *A.*'s money was entrusted to *B.* While both were at Bombay, *A.* allowed *B.* to take the machine to some place in Madras to work it for the mutual benefit of both. Subsequently, *A.* died and *B.* thereupon misappropriated the machine and the money made out of it. *A.*'s wife and heir filed a complaint in the Court of the Cantonment Magistrate, Cawnpore, under section 406, Penal Code:

Held, that the Cawnpore Court had jurisdiction to try the offence.

Criminal revision against an order of the Sessions Judge of Cawnpore.

Mr. *E. A. Howard*, for the Applicant.

Mr. *C. Dillon*, for the Opposite Party.

Mr. *L. M. Banerji* (for Assistant Government Advocate), for the Crown.

JUDGMENT.—This is an application in revision which raises a point of jurisdiction. The applicant, George Langridge, contends that the Cantonment Magistrate of Cawnpore has no jurisdiction to try him on a charge under section 406 of the Indian Penal Code. According to the case for the prosecution, the applicant and Atkins, the husband of the opposite party, were in the service of the East Indian Railway in 1911 and both resided with their wives in Cawnpore. The two men were friends and they decided to improve their prospects by leaving the railway service and touring the country with an American machine called the "American Circling Wave." Atkins supplied the money for the machine and he went with the applicant to Bombay in October 1911, and took delivery of it. The applicant was to serve as an assistant of Atkins and was to get part of the profits as his remuneration. Atkins remained in Bombay for about three months. He fell ill and died there on the 23rd of January 1912. Before his death, he executed a Will of all his property in favour of his wife, Mrs. Atkins. During his illness, he permitted the applicant to take the machine to some place in Madras to work it there during a fair for their mutual benefit. A few days after the death of Atkins, the applicant presented an agreement in writing to Mrs. Atkins, for signature,

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claiming half the machine. Mrs. Atkins refused to sign the said agreement and denied the title of the applicant to any part of the machine. The applicant then went away without returning the machine to Mrs. Atkins or rendering to her any account of the profits made before or after the death of her husband. She filed a complaint in the Court of the Cantonment Magistrate of Cawnpore, against the applicant, under section 406 of the Indian Penal Code. Mrs. Langridge, the wife of the applicant, also filed a complaint against him under the maintenance section in the same Court. The applicant was arrested on the two warrants and taken to Cawnpore. He objected to the jurisdiction of the Cantonment Magistrate to try him on the charge of criminal breach of trust on the ground that the offence, if committed, at all was committed outside Cawnpore and in fact outside the United Provinces. The objection was overruled. The applicant preferred a revision to the Court of Session which was rejected. He has come up in revision to this Court and repeats his objection. It is argued by the learned Counsel for him that section 179 of the Code of Criminal Procedure, under which the Cantonment Magistrate appropriates the jurisdiction to himself and with whom the Judge has agreed, is inapplicable to the present case. The applicant has done no criminal act within the jurisdiction of the Cawnpore Courts, nor has any consequence ensued modifying or completing such act within the jurisdiction of those Courts. The alleged criminal breach of trust was admittedly committed outside Cawnpore; and as under the law the offence was completed as soon as the dishonest misappropriation or conversion of the machine or the profits took place, there was no consequence of the said misappropriation left to modify or complete the offence with which the applicant stands charged. In support of this contention, the following cases are cited:—*Babu Lal* v. *Ghansham Das* (1): *Ganeshi Lal* v. *Nand Kishore* (2), *Sirdar Meru* v. *Jethabhai Amirbhai* (3) and *Nirbhe Ram* v. *Kallu Ram* (4).

(1) A. W. N. (1903) 115; 5 A. L. J. 333; 7 Cr. L. J. 394.
(2) 10 A. L. J. 45; 13 Cr. L. J. 477; 34 A. 487; 15 Ind. Cas. 319.
(3) 8 Bom. L. R. 513; 4 Cr. L. J. 54.
(4) 4 O. C. 376.

For Mrs. Atkins, it is contended that the jurisdiction of a Criminal Court is determined by the allegations made in the complaint filed before it. In her complaint, she stated that the applicant was a mere agent in charge of the machine in question, permitted to exhibit it at various places for her and her husband's benefit and was bound to return it and to account to her for the profit at her place of residence, *i. e.*, at Cawnpore. His failure to do so gives the Courts at Cawnpore jurisdiction to try him on her complaint. It is admitted that the words "and of any consequence which has ensued" in section 179 of the Code of Criminal Procedure, refer to a consequence which completes or modifies the act alleged to be an offence. But in criminal breach of trust, loss is a necessary consequence and completes the offence. The unlawful retention by the applicant of the machine and profits of its exhibition has entailed loss on Mrs. Atkins at Cawnpore, and hence the Courts at Cawnpore have jurisdiction to try him. The learned Counsel for Mrs. Atkins relies on the following cases in support of his argument: *Queen-Empress* v. *O'Brien* (5) and *Mahadeo* v. *King-Emperor* (6). Moreover, it is urged that if the applicant's interpretation of section 179 of the Code of Criminal Procedure is allowed, Mrs. Atkins has no remedy. She does not know where was the machine at the time of her husband's death, or at the time she demanded its return, or at what places has the applicant exhibited it. In fact, she could not for a long time trace the address of the applicant and does not know even now where he is concealing the machine. It appears to me that both parties are agreed as to the interpretation of section 179 of the Code of Criminal Procedure. The point of difference between them is whether loss resulting from criminal breach of trust can be said to be such a consequence as completes the offence. This Court, if I have read the rulings rightly, has always held that loss entailed by criminal breach of trust is a consequence that completes the offence. The case of *Queen-Empress* v. *O'Brien* (5) is directly in point. To the same effect is the case of *Mahadeo* v. *King-Emperor* (6). None

(5) 19 A. 111.
(6) 7 A. L. J. 319; 6 Ind. Cas. 563; 11 Cr. L. J. 372; 32 A. 397.

of the cases cited for the applicant with the exception of the Oudh case helps him. In the case of *Babu Lal* v. *Ghansham Das* (1), Babu Lal was prosecuted for cheating at the instance of Ghansham Das, in the Court of the Joint Magistrate of Aligarh, with regard to the negotiation of certain *hundis*. It was found that as the said *hundis* were neither negotiated in the District of Aligarh, nor was any loss sustained by Ghansham Das on the registration of those *hundis*, the Joint Magistrate of Aligarh had no jurisdiction to entertain the complaint. The facts of the case, *Ganeshi Lal* v. *Nand Kishore* (2), were that the complainant had his principal shop in Cawnpore and a branch shop at Gauriganj, District Sultanpur, in Oudh. The profits made at the latter shop were to be remitted to the principal firm at Cawnpore. The accused misappropriated some money of the branch shop. The complainant prosecuted him in Cawnpore on the charge of embezzlement. On an objection by the accused, it was held by Mr. Justice Karamat Husain that the Cawnpore Court had no jurisdiction. The learned Judge came to that conclusion presumably on the ground that loss was sustained primarily by the branch shop. It was for that reason that he made a distinction between the case before him and that of *Queen-Empress* v. *O'Brien* (5). He did not differ from the ruling in the case of O'Brien, nor did he question the proposition that in a criminal breach of trust, loss to the victim was a consequence which completed the offence. In the case of *Sirdar Meru* v. *Jethabhai Amirbhai* (3), the complainant was assaulted by the accused and his leg broken within the Baroda territory. The complainant was taken to a hospital within the British territory where he was detained for 57 days, during which period he was unable to follow his ordinary pursuits. He originally filed in a British Court a complaint against the accused for causing him grievous hurt. The accused raised an objection of want of jurisdiction. It was held that as the offence of causing grievous hurt was complete within the Baroda territory inasmuch as the leg had been fractured in that territory, the objection of the accused must prevail. This case does not help the applicant at all. It is true that the inability of the complainant to follow his ordinary pursuits was a consequence of the fracture. But that inability did not in that particular case complete or modify the offence of the accused. Had the leg of the complainant not been broken and had an injury been caused which necessitated the complainant's detention in a British hospital for twenty days or more, the decision of the Bombay High Court would, I presume, have been different. According to the definition of grievous hurt, inability to follow one's ordinary pursuits for twenty days or more is only one of the tests of grievous hurt, *vide* section 320 of the Indian Penal Code. The Oudh case, as I have already remarked, is in favour of the applicant. But this Court has taken a different view as appears from the cases cited above. I, therefore, find that the Cantonment Magistrate of Cawnpore has jurisdiction to entertain the complaint against the applicant. The application of the latter fails and is rejected.

Application rejected.

BOMBAY HIGH COURT.

CRIMINAL REVIEW No. 245 OF 1911.

September 5, 1912.

Present:—Mr. Justice Batchelor and Mr. Justice Rao.

EMPEROR—PROSECUTOR

versus

TATIA MAHADEV—ACCUSED.

Penal Code (Act XLV of 1860), ss. 10, 352, 354—Girl six years old—Assault with intent to outrage modesty—Woman.

The accused took a girl six years old to his room; he made her lie down and he lay on her. The girl screamed and ran away:

Held, (1) that the girl, though young, was a "woman" for the purposes of section 354 of the Penal Code;

(2) that the facts amounted to an offence under section 354, and that the accused should be convicted of that offence.

Mr. *L. A. Shah*, Acting Government Pleader, for the Crown.

JUDGMENT.—In this case, we called for the record of our own motion and we have issued notice on the accused, Tatia Mahadev, to show cause why the sentence which had been passed upon him by the fourth Presidency Magistrate should not be enhanced. He has been convicted of common assault under section 352 of the Indian Penal Code

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and sentenced to a fine of Rs. 60, or in default one month's rigorous imprisonment.

The finding of fact upon which that conviction and sentence proceeded is this:—"I find", says the Magistrate, "that the complainant with her daughter, Chandribai, lives on the first floor and the accused lived on the second floor of the same house. The girl Chandribai was taken in his room by the accused and made to lie down and he lay on her. The girl screamed and coming down reported the matter to the complainant." The facts thus found seem to us to amount to the offence defined in section 354 of the Indian Penal Code, that is to say, an assault or use of criminal force to a woman with intent to outrage her modesty, and this view appears to us to be quite consistent with the fact that the girl Chandribai who was assaulted was only about six years old. Under section 10 of the Indian Penal Code, the word 'woman' denotes a female human being of any age, so that for the purposes of section 354, the girl Chandribai is a woman within that section. The Magistrate was apparently of opinion that the girl being only six years old was too young to have any sense of modesty developed, and upon that view he neglected to apply section 354. It seems to us that there are many answers to this view of the learned Magistrate's. One sufficient answer may be found in the proved fact of this particular case that the girl Chandribai screamed and ran away when the accused began his assault upon her. That action of hers is, we think, a clear indication that she felt her modesty to be outraged by the accused's conduct. Having regard to the conditions in which the poor classes of Bombay have to live in this city, we think that a deterrent sentence ought to be passed in a case where a man takes advantage of the absence of a girl's parents to commit an attack upon the defenceless girl. Therefore, after having heard all that the accused can urge in his behalf, we alter his conviction to a conviction under section 354 of the Indian Penal Code, and we sentence him to rigorous imprisonment for one year. The sentence of fine imposed by the Magistrate is set aside, and the fine, if paid, should be refunded.

Sentence enhanced.

ALLAHABAD HIGH COURT.

CRIMINAL REVISION PETITION No. 693 OF 1912.

September 30, 1912.

Present:—Mr. Justice Rafique.

KANHAI SINGH AND OTHERS—APPLICANTS

versus

EMPEROR—OPPOSITE PARTY

Criminal Procedure Code (Act V of 1898), ss. 367, 424, 537—Judgment at variance with directions given by law—Defect not cured.

Section 537 of the Code of Criminal Procedure does not cure the defects in a judgment which is clearly at variance with the directions given in sections 367 and 424 of the Code and which materially prejudices the accused in the trial of their appeal.

Criminal revision from an order of the Sessions Judge of Moradabad.

Mr. *G. P. Boy*, for the Applicants.

Mr. *L. M. Banerji* (for Assistant Government Advocate), for the Crown.

JUDGMENT.—This is an application in revision under section 439 of the Code of Criminal Procedure, questioning the judgment of the learned Judge of Moradabad, by which he upheld the conviction of the applicants made by the Deputy Magistrate. The only reason on which the applicants challenge the judgment of the lower Court is that it is not in accordance with law. It appears from the judgment of the learned Judge, that the notes that he made of the arguments of the Counsel for the parties have to be considered as part of his judgment. He opens his judgment by saying that he has appended the notes of the argument for the parties. The learned Judge does not discuss the evidence in the case nor refers to the witnesses whom he believes and on whose evidence he comes to the conclusion that applicants were guilty of the charges of which they were convicted. The judgment is clearly at variance with the directions given in sections 397 and 424 of the Code of Criminal Procedure as regards the writing of judgment. It is suggested for the Crown that the defects in the judgment are cured by section 537 of the Code of Criminal Procedure. The reply for the applicants is that the defects complained of have materially prejudiced them in the trial of their appeal. The judgment in question was not delivered by the learned Judge until a few months after the case had been argued before him. The tenor of the judgment shows that the case of the applicants was not present to his mind in all its aspects which had been

presented to him at the time of argument. I think that the contention of the applicant is sound and must prevail. I allow it and set aside the order of the learned Judge, dated the 15th of August 1912, and direct that the appeal be re-heard and disposed of according to law.

Application allowed.

BOMBAY HIGH COURT.
CRIMINAL REVISION APPLICATION No. 278 OF 1912.
September 27, 1912.
Present:—Mr. Justice Batchelor and Mr. Justice Rao.
EMPEROR—PROSECUTOR
versus
KOYA HANSJI—ACCUSED.

Arms Act (XI of 1878), ss. 13, 19 (e)—Arms—Possession—Servant fetching gun for licensed master.

Mere temporary possession, without a license, of arms for purposes other than their use as such is not an offence within the meaning of section 19 of the Arms Act.

Emperor v. *Harpal Rai*, 24 A. 454; A. W. N. (1902) 123, followed.

In the matter of Kali Nath Singh, 3 C. W. N. 394, relied upon.

A., who was licensed to keep a gun, went to a village with his servant, *B.* From there, they came back but *A.* left his gun behind him. He sent *B.* to bring back his gun from the village. While *B.* was bringing back the gun, he was arrested and convicted of an offence under section 19 (*e*) of the Arms Act for going armed in contravention of section 13 of the Act:

Held, that the accused was not guilty under section 19 (*e*).

Criminal application for revision from conviction and sentence recorded by the Magistrate, first Class, at Broach.

Mr. *G. N. Thakore*, for the Accused.

Mr. *L. A. Shah*, Acting Government Pleader, for the Crown.

JUDGMENT.—The facts in this case are these: The applicant is the servant of one Mahomedbhai Kasambhai, an inhabitant of Broach, who has a license to keep a gun. Mahomedbhai and the applicant left Broach, and went to a neighbouring village called Dhantaria. From there, Mahomedbhai returned to Broach leaving his gun behind him. He, therefore, sent the accused to bring back

his gun from Dhantaria to Broach, and the accused brought it back. On his way through the city of Broach, he was arrested by the Police, and has been convicted under section 19 (*e*) of the Arms Act of going armed in contravention of the provisions of section 13. Section 13 provides that no person shall go armed with any arms except under a license and to the extent and in the manner permitted thereby. It is unfortunate in this case that the prosecution have not put in the license granted to Mahomedbhai, for it may be that the particular terms of that document would be conclusive of the question before us; but in the absence of any assistance in this direction, we think that the established circumstances do not suffice to prove the applicant's guilt under section 19 (*e*) of the Arms Act. We agree with the Allahabad High Court's decision in *Emperor* v. *Harpal Rai* (1), where it was said, following previous decisions of that Court, that the mere temporary possession, without a license, of arms for purposes other than their use as such is not an offence within the meaning of section 19 of the Arms Act: See also *In the matter of Kali Nath Singh* (2). We must, therefore, reverse the conviction in this case and direct that the applicant be acquitted and discharged. The fine, if paid, should be refunded.

The order of confiscation made under section 24 of the Arms Act is also set aside.

Order set aside.

(1) 24 A. 454; A. W. N. (1902) 123.
(2) 3 C. W. N. 394.

PUNJAB CHIEF COURT.
CRIMINAL REFERENCE No. 911 OF 1912.
November 29, 1912.
Present:—Sir Arthur Reid, KT., Chief Judge.
ACHHRU AND OTHERS—ACCUSED—PETITIONERS
versus
EMPEROR, THROUGH RANGER, FOREST DEPARTMENT, KANGRA DISTRICT—RESPONDENT.

Criminal Procedure Code (Act V of 1898), ss. 249, 403, 437—Case challaned by Forest Department—Proceeding stopped by Magistrate, effect of—Further inquiry ordered by District Magistrate—Forests Act (VII of 1878), s. 32.

The Forest Department challaned a case of an offence punishable under section 32 of the Forests

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Act. The maximum term of imprisonment prescribed for this offence is six months. Acting under section 249, Criminal Procedure Code, the trying Magistrate stopped the proceedings. The District Magistrate, purporting to act under section 437, Criminal Procedure Code, set aside the Magistrate's order:

Held, (1) that the order of the District Magistrate was *ultra vires* as section 437 did not apply to the case:

(2) that the order under section 249 would not bar further proceedings in accordance with law.

Petition, under section 439 of the Criminal Procedure Code, for revision of the order of the District Magistrate, Kangra, dated the 25th April 1912, reversing that of the Magistrate, 1st class, Kangra, dated the 16th September 1912, ordering further proceedings in the case to be stopped, and directing him to make further inquiry into the complaint made by the Forest Department.

Mr. *Bhagat Ram Puri*, for Rai Bahadur Lala *Sukh Dial*, for the Petitioners.

JUDGMENT.—In this case, a Magistrate of the 1st class had before him a case of an offence punishable under section 32 of the Forests Act VII of 1878. The maximum term of imprisonment prescribed by the section is six months and the case was, therefore, a warrant case. There could, therefore, be no "discharge" of the accused person.

The Magistrate proceeded under section 249 of the Code of Criminal Procedure and stopped the proceedings.

The District Magistrate, purporting to act under section 437 of the Code, set aside the Magistrate's order.

The contention that this order of the District Magistrate was *ultra vires* has force inasmuch as section 437 empowers the District Magistrate to interfere only where a complaint has been dismissed under section 203 or section 204 (3) of the Code or where there has been a discharge.

Section 249 applies only to cases instituted otherwise than on a complaint and it has not been suggested by the District Magistrate that the section was not applicable by reason of there having been a complaint. Indeed, the District Magistrate stated in his preliminary order of the 18th December 1911, that "the Forest Department had challaned the case." There was, therefore, no dismissal of a complaint under the sections specified in section 437. The powers conferred on the District Magistrate under section 437 are, therefore, inapplicable to the present case. The order, under section 249, is, however, as pointed out by the District Magistrate, specifically excluded by the explanation to section 403 of the Code from being an acquittal and further proceedings in accordance with law are not barred. I set aside the order of the District Magistrate.

Order set aside.

ALLAHABAD HIGH COURT.

CRIMINAL APPEAL No. 440 OF 1912.

October 24, 1912.

Present:—Sir George Knox, KT., Judge, and Mr. Justice Rafique.

BADRI PRASAD—APPELLANT

versus

EMPEROR—RESPONDENT.

Penal Code (Act XLV of 1860), ss. 437, 471—Alternative charge—Evidence recorded by Assistant Sessions Judge and judgment given by Sessions Judge—Jurisdiction—Sessions case—Adjournment—Practice.

An Assistant Sessions Judge recorded the evidence in a Sessions case and the Sessions Judge pronounced judgment upon the evidence so recorded:

Held, that the Sessions Judge had no jurisdiction to do so.

An accused can be convicted at one and the same time of forging a document and using that document as forged under sections 467 and 471.

The intention of the Criminal Procedure Code is that a trial before a Court of Session should proceed and be dealt with continuously from its inception to its finish.

Adjournments should be granted only on the strongest possible ground and for the shortest possible period.

Criminal appeal from an order of the Sessions Judge of Mainpuri.

Mr. *Satya Chandra Mukerji*, for the Appellant.

Mr. *R. Malcomson*, Assistant Government Advocate, for the Crown.

JUDGMENT.—Badri Prasad has been convicted of an offence under section 471 of the Indian Penal Code and sentenced to a term of rigorous imprisonment and payment of a fine. He has appealed. We do not go into the facts of the case in view of the order which we propose to make. There has been unfortunately in the trial an irregularity which compels us to set it aside and to order a new trial. Badri Prasad was committed to the Court of Session at Mainpuri. The case was transferred by the Court of Session

to the Court of an Assistant Sessions Judge. The Assistant Sessions Judge heard the case so far as the evidence was concerned, but did not proceed to judgment on the ground that one of the issues in the case was at the same time awaiting decision under appeal in the Court of the District Judge, and we are told that the case remained pending for a year when it was taken by the Court of Session at Mainpuri sitting at Etawah. The learned Sessions Judge did not hear the evidence at all but proceeded to judgment upon the evidence recorded by the Assistant Sessions Judge. He had no jurisdiction to do this. The judgment and sentence are a judgment and sentence passed without jurisdiction and must be set aside. We notice a mistake of law, into which the learned Sessions Judge has fallen. He says that it is settled law that in such a case, the accused cannot be convicted at one and the same time of forging a document and using that document as forged and the charges under sections 467 and 471 must, therefore, be regarded as alternative. We know of no authority to this effect and none has been pointed out to us. It must be distinctly understood that we pronounce no opinion whatever upon the evidence relating to either of these charges. Moreover, we wish to point out that it is most inexpedient for a Sessions trial to be adjourned. The intention of the Code is that a trial before a Court of Session should proceed and be dealt with continuously from its inception to its finish. Occasions may arise when it is necessary to grant adjournments, but such adjournments should be granted only on the strongest possible ground and for the shortest possible period. With these remarks, we allow the appeal so far that we set aside the conviction and sentence and send back the case for trial before the Court of Session at Fatehgarh.

Record returned.

MADRAS HIGH COURT.

CRIMINAL REVISION CASE No. 754 OF 1912.
CASE REFERRED No. 103 OF 1912.
December 18, 1912.

Present:—Sir Ralph Benson, KT., Judge.

In re BHAGAVATTY PERUMAL PILLAY —ACCUSED.

Penal Code (Act XLV of 1860), ss. 467, 471—Forgery of document—Forgerer of document charged under s. 467, whether can be charged under s. 471—Proof of forgery.

The fact that a person charged with an offence under section 471, Indian Penal Code, is himself the forgerer of the document is no reason why he should not be charged under section 471, Penal Code, especially when he cannot be charged under section 467, Penal Code, owing to the latter offence having been committed beyond the jurisdiction of the Court.

The forgery must be proved in order to establish the offence under section 471, Penal Code, though it is not itself the subject of a charge.

Case referred for the orders of the High Court under section 432 of the Criminal Procedure Code, by the Chief Presidency Magistrate Egmore, Madras in his letter, dated 11th December 1912 in C. C. No. 28036 of 1912.

ORDER.—Charges of offences punishable under sections 471, 420 and 511, Indian Penal Code, should be framed against the accused as the evidence indicates that those offences were committed in Madras. The fact that the person charged with an offence under section 471, Indian Penal Code, was himself the forgerer of the document is no reason why he should not be charged under section 471, Indian Penal Code, especially when, as in this case, he cannot be charged under section 467 owing to the latter offence having been committed beyond the jurisdiction of the Court. The forgery must, of course, be proved in order to establish the offence under section 471 though it is not itself the subject of a charge.

The extradition of offenders from Travancore to British India is governed by Regulation I of 1906 of His Highness the Maharaja of Travancore dated the 22nd August 1906 published in the Travancore Government Gazette of the 28th idem.

ALLAHABAD HIGH COURT.

CRIMINAL REVISION PETITION No. 732 OF 1912.

October 4, 1912.

Present:—Mr. Justice Rafique.

GIGA—APPLICANT

versus

MUHAMMAD AMIN—OPPOSITE PARTY.

Workmen's Breach of Contract Act (XIII of 1859), applicability of—Loan advanced to workman not for doing any specific work.

The loans that can be recovered under Act XIII of 1859 are the loans which are advanced by employers to their workmen for doing specific work. Where a loan was advanced to a workman not for doing any particular work and the work which he was doing at the time that he took the loan had been finished and nothing of it remained to be done:

Held, that Act XIII of 1859 did not apply.

Criminal revision from an order of the Sessions Judge of Cawnpore.

Mr. *Satya Chandra Mukerji* for Mr. *E. A. Howard*, for the Applicant.

Messrs. *R. Malcomson*, Assistant Government Advocate, for the Crown.

Mr. *W. K. Porter*, for the Opposite Party.

JUDGMENT.—This is an application in revision by one Giga, praying that the order of the learned Cantonment Magistrate, dated the 23rd of July 1912, be set aside. It appears that Giga had employed Muhammad Amin, the opposite party, to work at the shop of the former. Muhammad Amin took a loan from the applicant for which he gave an agreement. Before the loan had been paide off, Muhammad Amin left the service of Giga. The latter filed a complaint under Act XIII of 1859, in the Court of the Cantonment Magistrate, for the recovery of the loan or for an order directing Muhammad Amin to return to work. The learned Magistrate referred the matter to arbitration. The majority of the arbitrators filed an award decreeing Rs. 51-4-0, to Giga, the applicant. That sum, I understand, has been paid. It is contended for the applicant that the learned Magistrate had no jurisdiction to delegate his powers under Act XIII of 1859, to arbitrators. I find that the objection taken by the applicant need not be considered as his application must fail on another ground. The loans that can be recovered under Act XIII of 1859, are the loans which are advanced by employers to their workmen for doing specific work. In the present case, it is admitted that the money advanced to Muhammad Amin was not advanced for doing any particular work. Whatever work he was doing at the time that he took the loan had been finished and nothing of it remained to be done. Under these circumstances the applicant's petition to the learned Magistrate could not be entertained, vide *In the matter of Anusoori Sanyasi* (1). The application fails and is rejected.

Application rejected.

(1) 28 M. 37 (F. B.); 2 Cr. L. J. 140.

ALLAHABAD HIGH COURT.

CRIMINAL REVISION PETITION No. 374 OF 1912.

July 18, 1912.

Present:—Sir George Knox, Kt., Judge.

LALTA PROSAD—APPLICANT

versus

EMPEROR—OPPOSITE PARTY

Criminal Procedure Code (Act V of 1898), s. 195(c)—Sanction to prosecute for forgery—Offence committed prior to production of document in Court—No sanction required.

Courts are prohibited from taking cognizance of an offence described in section 463 of the Penal Code when such offence has been committed by a party to any proceeding in any Court in respect to a document produced or given in evidence in any such proceeding. But if the offence was committed prior to its production in Court, prosecution for such offence requires no sanction.

Section 195 of the Criminal Procedure Code does not remove from the cognizance of Criminal Courts an offence described in section 463 of the Penal Code, when such an offence has been committed by an ordinary individual.

Application for revision against the District Magistrate of Bareilly.

Mr. *Gulzari Lal* (with him Mr. *Alston*), for the Applicant.

Mr. *R. Malcomson*, Assistant Government Advocate, for the Crown.

JUDGMENT.—A forgery is alleged to have been committed with reference to a deed of sale. From the deed it would appear that if a forgery was committed, it was committed on or about the 8th of September 1911. At that time, no proceedings were pending with reference to this particular document. The District Magistrate of Bareilly has, by an order, dated the 16th of February 1912, directed the prosecution of Lalta Prasad for forgery and has made the case over to one

Mr. Karar Hussain, for hearing. An objection is raised to this order based upon section 195, clause (c) of the Code of Criminal Procedure.

It is true that the Magistrate has not stated under what section he has directed the prosecution, but a prosecution for forgery would ordinarily run under section 463 of the Indian Penal Code. As I read section 195, clause (c), Courts are prohibited from taking cognizance of an offence described in section 463 when such offence has been committed by a party to any proceeding in any Court in respect to a document produced or given in evidence in any such proceeding. The section does not remove from the cognizance of Criminal Courts an offence described in section 463 when such an offence has been committed by an ordinary individual. Suppose, for instance, this very document had never been put into the Civil Court and suppose further that it is a forgery—is the person who forged it to be free from all prosecution? I do not by this mean to say that I have any reason for saying this document is a forged document. I know nothing about it. As long as the prosecution is confined to offences connected with this document committed prior to its production in Court, such prosecution is within the law and requires no sanction. Sanction is required for offences committed by a party to a proceeding in any Court in respect to a document produced or given in evidence in such proceeding.

I find no reason for interfering and dismiss the application.

Application dismissed.

LOWER BURMA CHIEF COURT.
FULL BENCH.

CRIMINAL APPEAL No. 119 OF 1912.

May 23, 1912.

Present:—Sir Charles Fox, KT., Chief Judge, Mr. Justice Hartnoll, Mr. Justice Robinson, Mr. Justice Parlett and Mr. Justice Young.

NGA TUN BAW—APPELLANT

versus

EMPEROR—RESPONDENT.

Penal Code (Act XLV of 1860), ss. 85, 86, 387, 398—Drunkenness—Particular knowledge or intention necessary to constitute offence—Imputation of knowledge to voluntary drunkard—Intention—Burden of proof—Presumption—English law—Extortion—Attempt at robbery.

The general presumption of law is that a man is taken to intend the ordinary and natural consequences of his acts; if a drunken man relies on his drunkenness as absolving him from a crime, he must show that his mind was so affected by the drink, he had taken, that he was incapable of forming the intention necessary to constitute the offence charged against him.

The effect of the omission to make any express provision, in section 86 of the Penal Code, regarding the intention which is to be attributed to a voluntary drunkard committing an act, which is an offence when done with a particular or *specified* intent, is that the question of intention is left to be dealt with on the general principles of law, which are the same both in India and in England.

The drunkenness of an accused person at the time that he committed the act charged as an offence may be and should be taken into consideration on the question whether he did the act with the intention necessary to constitute the offence charged. The law does not require that the intention, which would be ascribed to a sober man in connection with an act, must necessarily be ascribed to a drunken man who does the same act.

Section 86 of the Penal Code gives the drunken man the knowledge of the sober man when judging of his action but does not give him the same intention; it does not render him liable to be dealt with as if he had the same intent.

A. went up into *B.*'s house having a *dah* in one hand. He called out to *B.* that if *B.* did not give him money, he would cut *B.* and his wife. *B.* and his wife were in an inner room, the door of which was closed against *A.* *A.* kicked at it and slashed it with his *dah* but the door did not give way. *A.* then went to the door of another room; he kicked at it and slashed it but when the door opened, *A.* fell down. Meanwhile *B.* and his wife had fled through the back part of the house. *B.* assembled a number of villagers but when they approached the house, *A.* fled away. He was, subsequently, found in his father's house in a drowsy condition.

A. was charged with having attempted to commit robbery armed with a deadly weapon.

It was ascertained that *A.* had been drinking *toddy* before the commission of the offence.

His defence was that he was drunk and did not know what he did. He was convicted under section 398 of the Penal Code:

Held, (1) that *A.* was not so drunk as to be incapable of forming in his mind the dishonest intention necessary to constitute the offence of extortion in case his demands had been acceeded to;

(2) that *A.* was guilty of an offence under section 387 of the Penal Code;

(3) that as at the time *A.* uttered his threat to *B.* and his wife, the latter were inside a room, the door of which was shut against *A.*, who could not get at them, it was doubtful whether the conditions necessary to constitute the offence of an attempt at robbery were fulfilled in the case, and that *A.* should have the benefit of this doubt.

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Per *Hartnoll, J.*—To form an intention, a man must necessarily have the requisite knowledge to do so; but, if he has certain knowledge, he must, to form an intention, go a step further than having such knowledge.

Per *Young, J.*—In most cases, intention has to be inferred from the nature of the acts done and from all the circumstances of the case. If a drunkard by reason of his drunkenness does not know the nature of his act, he cannot be presumed to have intended the consequences of that act. Therefore, in cases where an act is not an offence at all unless it is done intentionally, drunkenness is an excuse.

A drunkard is often fully conscious of what he is doing and what are the natural consequences of his acts. If he fails to prove that owing to his intoxication, he had not the same knowledge in relation to the offence as he would have had if sober, then section 86 will not apply at all and an intention will be presumed or not just as it would be in the case of a sober man.

Criminal appeal against the conviction and order of the senior Magistrate, Akyab sentencing the appellant to seven years' transportation.

JUDGMENT.

Fox, C. J.—The facts to be dealt with are as follows:—The accused from somewhere outside the complainant's house called out to him by name "Tha Ban." The complainant did not answer. The accused then indulged in abusive language, took off a vest he was wearing, and went up into the complainant's house having a *dah* in one hand. He called out "Rich man, will you give me money or not? If you do not give me money, I will cut you and your wife." The door of the inner room, in which the complainant, his wife and daughter were, was closed against him. He kicked at it and slashed at it with his *dah*. He threatened with the *dah* two relatives of his who were paying a visit at the house, and told them not to leave it. He then went downstairs to another door, using words of bravado, and called to a man, Sein Tin, to come up on the house. He slashed and kicked at the second door, and on it opening he fell down. The complainant, his wife and daughter, had fled through the back part of the house. The complainant ran to the headman's house to report. The headman sounded his gong and a large number of villagers assembled. From the headman's house, the accused could be heard stamping about and using abuse in the complainant's house. When, however, the villagers approached it, the accused ran away, leaving his *dah* and vest in the house. He was found in his father's house either asleep or so drowsy that he had to be roused. In the headman's opinion, he was drunk. He apparently could not get up without assistance, and when up, he vomited. He had to be supported to the headman's house and there again he vomited. He did not answer questions or even speak on that night. From inquiries, the headman ascertained that he had been drinking toddy. The accused was charged with having attempted to commit robbery armed with a deadly weapon. The accused's defence was that he was drunk and did not know what he did on the evening in question. He was convicted and sentenced to seven years' transportation in lieu of seven years' imprisonment which is the minimum punishment under section 398 of the Indian Penal Code. The accused appeals on the ground that he was drunk at the time, and did not know what happened, and, therefore, could not have committed an offence or should not be punished for what he may have done.

The case affords an opportunity for reconsidering the question of how far the drunkenness of an accused can be taken into consideration in connection with the offence charged against him. The provisions of the Penal Code bearing on the matter are as follows:—

85. Nothing is an offence which is done by a person who, at the time of doing it, is, by reason of intoxication, incapable of knowing the nature of the act, or that he is doing what is either wrong or contrary to law: *provided that the thing which intoxicated him was administered to him without his knowledge or against his will.*

86. In cases where an act done is not an offence unless done with a particular knowledge or intent, a person who does the act in a state of intoxication shall be liable to be dealt with as if he had the same knowledge as he would have had if he had not been intoxicated, unless the thing which intoxicated him was administered to him without his knowledge or against his will.

These sections are in the Chapter of the Code dealing with "General Exceptions," and according to section 105 of the Evidence

Act, I of 1872, the burden of proving the existence of circumstances bringing a case within any of the exceptions lies on the accused, the Court being bound in the first instance to presume the absence of such circumstances. Section 85 protects an accused who can substantiate that when he committed the act, charged against him, he was in such a state of intoxication, in consequence of something administered to him without his knowledge or against his will, that he was incapable of knowing the nature of his act, or that he was doing what was either wrong or contrary to law. Further, if an accused can show that he was intoxicated at the time he committed the act and that the thing which intoxicated him was administered to him without his knowledge or against his will, he is not liable under section 86 to be dealt with as if he had the same knowledge as he would have had if he had not been intoxicated. The case of the man made drunk by another or others without his knowledge or against his will is not free from difficulty, but such a case rarely occurs. Cases of men who have made themselves drunk occur very frequently, and the application of section 86 of the Indian Penal Code to such cases very often presents very great difficulty.

Analysing the section, the opening words of it, "In cases where an act done is not an offence unless done with a particular knowledge or intent," govern the whole section. On first thought, they may appear to limit the application of the section to a small number of cases, for usually most acts charged as offences speak for themselves, and the idea of there not being offences at all unless done with a particular knowledge or intent scarcely strikes the mind. The Penal Code does not require any particular knowledge or intent to be shown in connection with some acts in order to constitute them offences, but in the majority of offences, it requires that acts in order to constitute offences must have been done with some specified knowledge or intent. This is so even in some of the most obvious of cases; for instance, if a stranger puts his hand into my pocket, takes my money from it and runs away with it, in order to constitute his act of taking my money without my consent an offence, the Penal Code requires that he must have done it with the intention of causing wrongful gain to himself or wrongful loss to me. Although one or both of such intentions is, in ordinarily occuring cases of the description, almost inseparable from the act, still by drawing on the imagination one might conceive a case in which a stranger might take my money from my pocket without the specified intention, and in such case he would not commit the offence of theft. All puzzling over the opening words of the section, and the applicability of it to any particular case, may be avoided by reading them by the light of the marginal note, *viz.*,—"Offence requiring a particular intent or knowledge committed by one who is intoxicated." This shows that the section was intended to apply to all cases in which the law requires acts to have been done with a particular (which I take to be synonymous with "specified") knowledge or intent in order to constitute them offences. It may next be noted that this section does not refer to any degree of intoxication, as section 85 does. The man who has by his own act made himself so drunk as to be incapable of knowing what he is doing, or whether he is doing what is wrong or contrary to law, is left in the same position as the man who has made himself only slightly intoxicated. That position is that he is liable to be dealt with as if he had the same knowledge as he would have had if he had not been intoxicated. This I take to mean that whatever knowledge you would have attributed to the accused, if he had been sober, you must attribute to him although you may be of opinion that he was drunk, when he did the act charged as an offence. The section, however, does not say that the man who has made himself drunk shall be liable to be dealt with as if he had the same intent as he would or must have had if he had been sober. This is omitted although the opening words of the section profess to deal with cases in which an act done is not an offence unless it was done with a particular intent as well as with cases in which an act done is not an offence unless done with a particular knowledge. No express provision is made as to how the question of the intention of a

person doing an act, which if done with a particular intent is an offence, is to be dealt with, and hence arises a serious difficulty which is left to Judges or interpreters of the law to solve It cannot be supposed that the omission by the Legislature to provide an express provision for the case of intent was accidental.

The question then is—how is the intention of a person who has made himself drunk, and in that state has done something which, if done by a sober man, would be an offence by reason of intent being imputed to him, to be dealt with? In *Crown* v. *Tha Sin* (1), Mr. Mayne's views, on section 86 expressed in paragraph 201 of his Criminal Law of India were adopted as a correct exposition of the effect of the section. Amongst his remarks, he says that "there seems no reason to suppose that the framers of the Code proposed to introduce a different rule from that of the English law," and "as the drunkard is assumed to have had the knowledge, he must necessarily be assumed to have had the intention, since, assuming the knowledge, the law will allow no other explanation of the act to be given." The learned commentator, no doubt, qualified this statement to a certain extent, but in the light of a recent decision in the Court of Criminal Appeal in England as to the English law on the subject, it may be questioned whether his statement of the law was quite accurate, and whether the above last quoted extract was not too broad a statement. In *Rex.* v. *Meade* (2), in the Court of Criminal Appeal in England Darling, J., who delivered the judgment of the Court, said:—"Originally the law was that an insane person was not liable to the same consequences and ought not to be judged by the same standard as a sane one, yet, if he was suffering from *dementia affectata*, that is, a temporary insanity caused by the accused's own voluntary act in getting drunk, then drunkenness was no excuse for the crime. . . . The law stood thus for many years, and, as far as we know, the point was first decided in a contrary sense in *Rex* v. *Grindlay* (3). Since then, there have been many decisions in which Judges have attempted to express the doctrine that where intent is of the essence of a crime with which a person is charged, that intent may be disproved by showing that at the time of the commission of the act charged, the prisoner was in a state of drunkenness, in which state he was incapable of forming the intent." The charge against the prisoner in the case was of murder, in which intent is of the essence of the offence. He gave the decision of the Court in the following words:—"We desire to state the rule in the following terms. A man is taken to intend the natural consequences of his acts. This presumption may be rebutted—(1) in the case of a sober man, in many ways: (2) it may also be rebutted in the case of a man who is drunk, by showing his mind to have been so affected by the drink he had taken that he was incapable of knowing that what he was doing was dangerous, *i.e.*, likely to inflict serious injury. If this be proved, the presumption that he intended to do bodily harm is rebutted." The learned editors of the 7th Edition of Russell on Crimes state that there is no reported decision in England on the question whether drunkenness can be considered as negativing the *animus furandi* in larceny. They go on to remark that "The English rule as to the effect of drunkenness on criminal responsibility seems to have been correctly laid down in a recent New Zealand case. The indictment contained two counts: (1) for stealing tobacco and cigarettes in a store; (2) for breaking into the store with intent to steal. The defence was that the defendant was so drunk as not to be responsible. Cooper, J., charged the Jury as follows: 'If a man chooses to get drunk, it is his own voluntary act. In cases, however, where intention is the main ingredient in an offence, drunkenness may, under certain circumstances, amount to a sufficient defence. In the first count, alleging an actual theft, you must be satisfied that the prisoner, if he took the cigarettes, did so with a fraudulent intent; and in the second count, the intent is the sole ingredient of the alleged offence The offence would not be complete under the second count unless the store was broken into by the prisoner

(1) 1 L. B. R. 216.
(2) (1909) 1 K. B. 895; 78 L. J. K. B. 476; 73 J. P. 239; 53 S. J. 378; 25 T. L. R. 359.
(3) (1819) 1 Rus. on Crimes (6th Edn.) 144.

with intent to commit an offence. If that existed, it does not matter whether the prisoner was drunk or sober, for a criminal intent may exist in the mind of an intoxicated person, and if so, his drunkenness is no excuse. But if the drunkenness is such as to take away from his act all criminal intent, then his act is not criminal. If the prisoner blundered into the store through a drunken mistake, and under such circumstances as to indicate inability to form a definite purpose, and especially to form the purpose of committing a larceny, then he ought to be acquitted. If, on the other hand, he was not so intoxicated as to be unable to form such purpose, and knew what he was about, then his partial intoxication will not excuse him." (Russell on Crimes 7th Edition, Volume I, page 89). The circumstances were apparently somewhat similar to those in the case of *J. M.* v. *King-Emperor* (4). The result of the New Zealand case was that the Jury found that the prisoner had blundered into the store under a drunken mistake, and without any intention to commit an offence, but that while in the store he appropriated the cigarettes, and knew then and there that he was taking the cigarettes of another person. On these findings, a verdict of guilty of larceny was directed.

The words which the eminent exponent of the Criminal Law, Sir James Fitz James Stephen, used in charging the Jury in *Reg.* v. *Doherty* (5) (charged with murder) deserve attention. He said:—"The general rule as to intention is that a man intends the natural consequences of his act. As a rule, the use of a knife to stab or of a pistol to shoot shows an intention to do grievous bodily harm, but this is not a necessary inference. In drawing it, you should consider for one thing the question whether the prisoner is drunk or sober. It is almost trivial for me to observe that a man is not excused from crime by reason of drunkenness. If it were so, you might as well at once shut up the Criminal Courts, because drink is the occasion of a large proportion of the crime which is committed: but although you cannot take drunkenness as any excuse for crime, yet when the crime is such that the intention of the party committing it is one of its constituent elements, you may look at the fact that a man was in drink in considering whether he formed the intention necessary to constitute the crime. If a sober man takes a pistol or a knife, and strikes or shoots at some one else, the inference is that he intended to strike or shoot him with the object of doing him grievous bodily harm. If, however, a man acting in that way was drunk, you have to consider the effect of drunkenness on his intention. In such cases, a distinction of vital importance occurs to which it is necessary to point. A drunken man may form an intention to kill another, or to do grievous bodily harm to him, or he may not: but if he did form that intention, although a drunken intention, he is just as much guilty of murder as if he had been sober. . . If you conclude that Doherty took the life of Graham by a pistol shot, fired at him with intent to do grievous bodily harm, he would be guilty of murder even though he were drunk, but if his drunkenness prevented his forming such an intention, he would be guilty of manslaughter, and not murder, though such an act in a sober way would prove an intention to do grievous bodily harm."

It may be gathered from the above cases that from the year 1819, the English law has been that the drunkenness of an accused person at the time he committed the act charged as an offence may be, and should be taken into consideration on the question whether he did the act with the intention necessary to constitute the offence charged, and that law does not require that the intention, which would be ascribed to a sober man in connection with an act, must necessarily be ascribed to a drunken man who does the same act. The English Law, as stated in the above extracts, appears eminently reasonable; it does not involve blind adherence to any rule of law, it recognises that there are degrees of intoxication, and that a drunken man may have the capacity for forming the intention necessary to constitute an act an offence. A voluntary drunkard, like every other person, is in the first instance presumed to have intended the

(4) (1910) U. B. R. 17; 8 Ind. Cas. 469; 11 Cr. L. J. 659.

(5) (1887) 16 Cox C. C. 306.

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natural consequences of his act, but this presumption may be rebutted by his showing that at the time he did the act his mind was so affected by the drink he had taken that he was incapable of forming the intention requisite for making his act the offence charged against him. The result of such law is that the question of intention must be determined in each individual case according to the actual facts proved in the case according to the principles laid down. The Indian Law has, in section 86 of the Penal Code, made an express provision regarding the knowledge which should be imputed to a voluntary drunkard committing an act which is an offence when done with a particular knowledge or intent. The effect of the omission to make any express provision regarding the intention which is to be attributed to such a man doing such an act appears to me to be that the question of intention is left to be dealt with on the general principles of law and the general principles of Indian Law on the matter do not appear to me to differ from the general principles of the English Law as stated in the judgment and summings up I have quoted from.

The rule that a man is taken to intend the natural consequences of his act is, as indicated by Mr. Justice Darling, a presumption which may be rebutted by the sober man, and also by the drunken man: if the latter relies on his drunkenness as absolving him from the crime, he must show that his mind was so affected by the drink he had taken that he was incapable of forming the intention necessary to constitute the offence charged against him. In the case before us, the accused was charged with attempt at extortion amounting to robbery on the facts that he called out to the complainant:—"Rich man, will you give me money or not? If you do not give me money, I will cut you and your wife" and that he behaved in a violent manner, using his *dah* and acting in such a manner as to lead the complainant and his wife to believe that he would carry out his threat if he could get at them and they did not accede to his demand. Extortion is thus defined in section 383 of the Code:—"Whoever intentionally puts any person in fear of any injury to that person or to any other, and thereby dishonestly induces the person so put in fear to deliver to any person any property or valuable security, or anything signed or sealed which may be converted into a valuable security, commits 'extortion.'" A person does a thing dishonestly when he does it with *the intention* of causing wrongful gain to one person or wrongful loss to another person. Extortion amounts to robbery only when the offender at the time of committing the extortion is in the presence of the person put in fear, and commits the extortion by putting that person in fear of instant death, of instant hurt, or of instant wrongful restraint. The offender is said to be present if he is sufficiently near to put the other person in fear of instant death, of instant hurt, or of instant wrongful restraint. Judging from the state he was found in at his father's house not long after his behaviour at the complainant's house, it is probable that he was intoxicated when at the latter's house, but it appears to me impossible to believe that he was at that time intoxicated to such a degree that he did not know what he was doing, or that he did not intentionally use the words he did and behave in the manner he did, or that by using the words and indulging in the conduct, he did not intend thereby to cause wrongful loss to Tha Ban and wrongful gain to himself, by putting Tha Ban in fear of injury to himself and his wife and thereby inducing Tha Ban to give him money. It is a case of a drunken man who was not so drunk as to be incapable of forming in his mind the dishonest intention necessary to constitute the offence of extortion in case his demands had been acceded to. There may, however, be reasonable doubt as to whether the conditions necessary to constitute the offence of an attempt at robbery were fulfilled in the case, in view of the fact that Tha Ban and his wife were, at the time the accused uttered his threat to them, inside a room the door of which could be and was as a fact closed against him so that he could not get at them. I think the accused should have the benefit of this doubt. Section 337, which provides punishment for putting a person in fear of death or of grievous hurt (not necessarily instant), appears to me to be the section most nearly applicable to the accused's words and acts and the circumstances under which they were uttered and done I would alter the conviction to one under that section, and setting aside the Magis-

trate's conviction and sentence would sentence the accused under section 387 of the Indian Penal Code to rigorous imprisoment for one year.

HARTNOLL, J.—I have had the opportunity of reading the judgment of the learned Chief Judge, and as he has set out the facts of this case, it is unnecessary to set them out again. One of the main questions for consideration is whether appellant is entitled to be acquitted on the ground that he was drunk and did not know what he was doing. Section 86 of the Indian Penal Code is the one that has to be construed in dealing with his plea, and having regard to its terms and to the rule of English Law as to how far drunkenness is an excuse for crime, it seems to me that there can be no doubt that the words "or intent" were deliberately omitted after the words "as if he had the same knowledge" and the inference is that as there is no reason why the Indian Law should differ from the English Law in this connection, it was intended that the same rule should be applied here as in England. The English rule has been clearly set out in the judgment of the learned Chief Judge. It may be said that knowledge and intention are so intimately connected that, if the law gives a drunken man the same knowledge as a sober one in judging his actions, it follows as a matter of course that he must be given the same intention for a man's intention is only to be gathered from the workings of his mind, and it is the workings of his mind that must give him his powers of reasoning from which flows knowledge; but I do not think that this is necessarily so. To form an intention, a man must necessarily have the requisite knowledge to do so; but, if he has certain knowledge, he must, to form an intention, go a setp further than having such knowledge—in other words, he must, on the knowledge he has, form the intention to do a certain act; and I think that that is what section 86 aims at. It gives the drunken man the knowledge of the sober one when judging of his actions but does not give him the same intention; it does not render him liable to be dealt with as if he had the same intent for it expressly omits to say so. As it stands amongst the general exceptions, I think that it was enacted so as to form a general exception in the case of a man who has made himself voluntarily drunk to the ordinary presumption of law that is drawn when deciding whether a certain intention should be held to exist or not, where the intention is of the essence of the offence. That general presumption of law is that a man is taken to intend the ordinary and natural consequences of his acts and it is that presumption that a man who pleads drunkenness is allowed to rebut, and, moreover, if he pleads that through drunkenness he could not have had the intention imputed to him, the burden of proof lies strictly on him to show that the ordinary presumption should not be drawn. This is laid down by section 105 of the Evidence Act. The concluding words of that section enact that the Court shall presume the absence of circumstances bringing the case within the general exception and, in my opinion, it cannot be too strongly laid down, that, where a plea of being incapable to form an intention through drunkenness is urged, very strict proof should be insisted on, for men who have made themselves drunk should not be lightly excused the consequences of their acts. I, therefore, agree with the learned Chief Judge in the exposition of the law at which he has arrived, namely, in dealing with a man who raises the plea now urged in the first instance, the ordinary presumption of law applies. He must be taken to intend the natural consequences of his acts; but this presumption may be rebutted by showing his mind to have been so affected by the drink he had taken that he was incapable of forming the intention necessary to constitute the offence charged against him.

Applying this rule to the present case, I can see no reason to differ from the conclusion arrived at, and the order proposed to be passed, by the learned Chief Judge.

ROBINSON, J.—I have had the advantage of reading the judgment of the learned Chief Judge and in that I concur.

The question is what is the effect of section 86 of the Indian Penal Code and I will briefly state my view of the object with which that section was enacted and as to how far it excuses certain criminal acts and to what extent it relieves the doer of responsibility. Section 85 does not apply, I think, to a case of voluntary drunkenness at all. Voluntary drunkenness may result in such a deceased state as to amount to insanity and when this is the case, section

84 would apply. We are not, however, in this case concerned with that matter. The question here is in respect of a temporary condition of drunkenness and with the question as to what was the intention with which the man acted when he did the acts which form the basis of the charge.

Section 86 was, I consider, enacted to provide against a particular intention being imputed to a drunken man as a matter of course, because such an intent could and would rightly be imputed to a sober man. It was, in my opinion, enacted to include in our Code the rule prevailing in English Law. The opening words of the section are not perhaps happily chosen but there can be no doubt that the section is intended to apply to those cases in which before a particular offence can be held to have been committed, a particular knowledge or intent must be established. Where the act is done by a person in a state of intoxication, he is liable to be dealt with as if he had the same knowledge as he would have had if had not been intoxicated. So where a particular knowledge only is essential to constitute the offence and a sober man must also be held to have had that knowledge, the intoxicated man can also be held to have had that knowledge.

But the Legislature in enacting this is careful not to say that he is liable to be dealt with as if he had the same intent and that although the intent is mentioned in the earlier part of the section. That this was intentionally done, there can be no doubt and the result is that if a particular intent is a necessary ingredient in the offence it must be found to be present. When the defence is that owing to intoxication, the accused had not the necessary intent when he did the act, he must prove the intoxication and that it was of such a character that section 86 would apply; otherwise the law requires the absence of this exception to be presumed. It must be noted further that the wording of the section is that he is "liable to be dealt with" as if he had the same knowledge as a sober man. This wording was, I consider, specially chosen. There are many cases in which if a certain knowledge must have been present to a sober man, a certain intent must, as a matter of course, be held to have existed. If a man puts a pistol to another's head and blows his brains out, he must be held to have known that he was likely to cause his death, and as the necessary consequence of firing off the pistol is to cause death, he must also further be held to have intended to cause death. If he had the knowledge merely, he would be guilty of culpable homicide not amounting to murder but if he has the intent to cause death, the offence is one amounting to murder. If then section 86 had said the same knowledge was to be imputed to the drunken man as to the sober one, the effect would have been that the same intent would be held in such cases to have existed as a necessary consequence. This was not, however, contemplated and the word "liable to be dealt with" are employed. Thus if a drunken man did these acts, he is liable to be dealt with as if he had the same knowledge as a sober man, that is, he is liable to be convicted of culpable homicide not amounting to murder but if he can show that he was so drunk that he was incapable of forming the intent to cause death or that he did not so intend, the intention should not be imputed to him. The state of drunkenness, in which he was, must be weighed; his conduct, both acts and words, his probable motive and all the surrounding facts must be considered.

It must not be forgotten that drunken men can form intentions and act so as to carry them out but what the particular intent was must be found and in deciding what it was, the fact of his being drunk can be considered in the same way as any other facts. Section 86 embodies, in my opinion, the law as laid down in *Reg.* v. *Doherty* (5) and *Rex* v. *Meade* (2). In the present case, I agree that the facts are as set out in the judgment of the learned Chief Judge—the man may have been very drunk and very shortly after the offence was committed was almost unconscious and practically incapable. I cannot hold that he was in such a condition at the time he did the acts that he was incapable of realizing what he was doing or of forming any intention. His conduct was sustained; his words and acts evidenced a deliberate intent, he did not attack his own relatives and he followed the complainant and his wife forcing his way through two shut doors. At the same time, I think his state was such that he may be given the benefit of the doubt and for the reasons given by the learned Chief Judge, I concur in holding that

section 387 is the proper section under which he should be convicted. I also agree in the sentence proposed.

PARLETT, J.—The first point for consideration is what is the correct application of section 86 of the Indian Penal Code to this case. That section must not be interpreted as if it were to the effect that a person voluntarily drunk must be presumed to have had the knowledge of a sane and sober man. It makes no mention of any presumption to be drawn, but says that he shall be liable to be dealt with as if, when he did the act he had the same knowledge as he would have had if he had been sober. I think it desirable to pay close attention to the exact wording of section 86 because it does not appear to me to be in accordance with the English Law as laid down in the recent case of *Rex* v. *Meade* (2). The rule is there stated that the presumption that a man intends the natural consequences of his acts may be rebutted "in the case of a man who is drunk by showing his mind to have been so affected by the drink he had taken that he was incapable of knowing that what he was doing was dangerous, *i.e.*, likely to inflict serious injury." Assuming that the learned Judges were referring to cases of voluntary drunkenness, it appears to me that section 86 of the Indian Penal Code expressly forbids the application of such a rule in India, and lays down that however a person's knowledge or capacity of knowing may have been affected by the drink he has taken, he is still liable to be dealt with as if, when he did the act, he had the same knowledge as he himself would in fact have had if he had been sober. What knowledge he would have had if sober, is a matter of fact and open to him to prove if he can. Thus an untutored savage might prove that never having seen or heard of a fire-arm before, he would, if sober, have been totally devoid of knowledge of its lethal properties. Usually, however, it will be a matter of inference well nigh irresistible, as that any sane and sober person knows that to strike another in the face with the fist is likely to cause hurt. The knowledge which an accused would have had in his sober state being determined, it forms an important element in deciding what was his intention in doing the act. But it is not the only one. His words and conduct as well as the other attendant circumstances must also be considered; and whereas his actual state of mind at time of doing the act under the influence of drink is expressly excluded from consideration by section 86 when his knowledge is in question, I think it may and should be taken into account when deciding upon the intention with which his act is done. A strange man who unbidden invades a woman's house may be assumed to know that he will annoy her; that knowledge will still be imputed to him if he is voluntarily drunk, but he may, if he can, prove that his intention in entering was merely to find a place to sleep off the fumes of liquor, and the fact of his being intoxicated may be taken into account in deciding the matter.

In the present case, there is no suggestion that the accused, if sober, would not have known both that his acts and words would put the complainant and his wife in fear of injury, and also that if he obtained the money he demanded, wrongful loss and wrongful gain would be caused, and he is, therefore, liable to be dealt with as if, when he did the acts and uttered the words, he knew that those results would follow. In the case of a sane and sober man, the only reasonable inference would be that he intended them to follow. The only circumstances I find which tend to weaken this inference are that he was distantly connected with complainant, that he actually stole nothing and that he was drunk. The first is of little weight. As to the second, he only wanted money and there is no reason to suppose there was any lying about where he could get it, while it is clear that as soon as the *thugyi* sounded his gong, accused bolted to his father's house and there composed himself to sleep. His conduct in that respect alone suffices to negative the plea which apparently he intended to set up that his mind was so obscured by drink that he was incapable of forming any intention at all. I find nothing to indicate that his intention was to cause any other than the natural and almost inevitable results of his acts and words, and I, therefore, consider that the intention of causing them must be imputed to him. I agree that there may be a doubt as to whether the offence of robbery by extortion was completed and concur in the proposed order and sentence.

YOUNG, J.—The criminal responsibility of a drunkard is dealt with in sections 85 and 86

of the Penal Code. The former section provides that nothing is an offence which is done by a person who by reason of intoxication is incapable of knowing the nature of his act or that he is doing what is wrong or contrary to law provided that the thing which intoxicated him was administered to him without his knowledge or consent. The latter that when an act done is not an offence unless done with any particular knowledge or intent, the voluntary drunkard is to be dealt with as if he had the same knowledge as he would have had if he had not been intoxicated. The proviso to the former section shows, in my opinion, that if the thing which intoxicated him has been self-administered, or administered to him with his knowledge or consent, in other words, if he is a voluntary drunkard, then though by reason of his intoxication he is as a fact incapable of knowing the nature of his act or that it is wrong or contrary to law, such incapacity so arising will not excuse him.

Offences under the Code, viewed in connection with these two sections, would seem to fall into various classes. The first consists of those acts which in order to be offences are not declared to require any intention or any knowledge on the part of the agent, as for example the offence of kidnapping a person from British India or a minor from lawful guardianship, of committing rape or the committing of a public nuisance.

In such cases, a drunkard could not excuse himself by pleading that he did not know or intend to do the act, for the Code declares the mere commission of the act to be an offence. In the second class of cases, the Code requires an act to be done knowingly or voluntarily in order to be an offence without specifying any particular knowledge as requisite: for example, to cause hurt is not an offence, unless it is caused voluntarily, section 321.

A man is said to cause an effect voluntarily when he causes it by means whereby he intended to cause it, or by means which at the time of employing those means he knew or had reason to believe to be likely to cause it. In my opinion, this vague unspecified knowledge follows from a knowledge of the nature of the act. The agent cannot know the one without knowing the other; as Mr. Mayne says:—"A man is properly said to be ignorant of the nature of his act when he is ignorant of the properties and operation of the external agencies which he brings in to play. (Paragraph 185 of his work on Criminal Law.)

In such cases, also, therefore, ignorance due to voluntary drunkenness is, I think, no excuse in law.

In each of these cases, however, the result will be different and the drunkard will be excused if he can show that his habits have produced a fixed or even an intermittent state of unsoundness of mind of the requisite character, as for example, if a drunkard commits an offence in a state of delirium *tremens*. In such a case, section 84 will apply as stated by Mr. Mayne in para. 200 of his work.

A third class of cases arises when an act, to be an offence, has to be committed intentionally and the intention is not specified as for example in sections 224, 225, 228 of the Code.

In most cases, intention has to be inferred from the nature of the acts done and, from all the circumstances of the case and in my opinion, if a drunkard by reason of his drunkenness does not know the nature of his act, he cannot be presumed to have intended the consequences of that act and, therefore, in cases when an act is not an offence at all unless it is done intentionally, drunkenness, in my opinion, is an excuse.

It must, of course, be remembered that by reason of section 105 of the Evidence Act, the drunkard will be presumed to know the nature of his act and the *onus* of proving that he did not will lie upon him.

There are also many acts in the Penal Code which are declared not to be offences unless done with a *particular* intention or knowledge. To these, section 86 applies. I agree with the learned Chief Judge, whose judgment I have had the advantage of perusing, that the word 'particular' in this section is synonymous with 'specified.' These acts are divided into two classes, the first consisting of those acts in which a specified knowledge on the part of the agent is sufficient to constitute the act an offence, as for example in cases of adultery, defamation, culpable homicide and even murder if the circumstances are such as to bring the act within the 4th clause of section 300, while the second class consists of those acts in which a specified intention on the part of

the agent is requisite to cause them to be offences, as for example in cases of murder which do not fall within the clause above mentioned and in all cases in which the definition contains the words dishonestly, fraudulently and the like as in theft, robbery forgery. In all these cases, the intention must be proved. In the case of a man who is not drunk, the proof of intention is almost invariably a matter of inference, and when the result of a man's acts is the natural or necessary consequence of those acts, an intention to produce those consequences is almost irresistibly inferred from his having done them with the knowledge that those consequences were the natural or necessary results of his acts.

The justification for drawing the inference weakens in proportion as the result produced is the probable, likely, unlikely or improbable consequence.

Section 86 is two-fold. It deals both with acts which are offences if done with a specified, knowledge only, or if done with a specified knowledge or with a specified intent and *secondly*, with acts which are offences only if done with a specified intent. Its provisions, however, are the same with regard to both classes and it enacts that the voluntary drunkard is to be dealt with as if he had the same knowledge as he would have had if he had not been intoxicated. This means, in my opinion, that the voluntary drunkard must in the first instance prove to the Court that owing to his intoxication he had not the same knowledge in relation to the offence as he would have had if sober. The *onus* of proving this will be upon him and the contrary will be presumed (*vide* section 105 of the Evidence Act).

If he falls to prove this and it is hardly necessary to say that a drunkard is often fully conscious of what he is doing and what are the natural consequences of his acts, then section 86 will not apply at all and an intention to have produced those consequences will be presumed or not just as it would be in the case of a sober man.

If, however, he succeeds in satisfying the Court that as a fact and owing to his drunkenness, he had not the same knowledge as he would have had if sober, then the section provides that he is to be dealt with as if he had the same knowledge, and if his knowledge would have included the particular knowledge required to constitute an act an offence, he is liable to be dealt with accordingly and convicted. Therefore, a drunkard may always be convicted for acts which only require a particular knowledge, in order to be offences, assuming he would have had that knowledge when sober. He may, therefore, always subject to this assumption, be convicted for such offences as culpable homicide, the causing of hurt to a man, or harm to his property, or defamation.

But the section does not say that such a man is to be dealt with as though he had the same knowledge and intention as he would have had if sober. The term "intent" is carefully omitted in the second part of the section, though present in the first part, and the whole wording is, I think, studiously chosen. Knowledge on the part of the drunkard is not to be presumed. He is only to be dealt with in the same way as if he had that knowledge. From actual knowledge, it is possible to presume intent; from a knowledge that had by law to be presumed, it might have been argued that intention must also be presumed in law. The Legislature was, therefore, careful not to say that a voluntary drunkard should be presumed to have the same knowledge as he would have been sober, but stated should be dealt with as if he had that knowledge which *ex hypothesi* he did not have: and lastly as it intended that drunkenness should be an excuse for certain offences, it used indeterminate terms "shall be liable to be dealt with." In cases, therefore, when a specified intention is an essential ingredient of the offence, as for example in all cases of theft, robbery, dacoity and wherever an act in order to be an offence must be done dishonestly as defined in the Code, drunkenness is an excuse, in my opinion, provided the drunkard proves that he had not, as a fact, the knowledge which would enable the requisite intention to be inferred.

There are also acts which are already offences but which become more heinous if done with a specified intent or knowledge.

In the matter of M. M. J.

In these cases, the same principles will apply : if the intent is essential to constitute the offence, a drunkard cannot be convicted of the more heinous offence, though he may be convicted of the less aggravated offence, if intention was not essential to such offence, as for example, a drunkard who can rebut the presumption of intention cannot be convicted of kidnapping a child under ten with the intention of robbery, but he may be convicted of kidnapping if the child was under lawful guardianship. Lastly, in offences where voluntary drunkenness is an excuse, it will often be found that the offence is composite or resultant in other offences for which he may be convicted. Thus if in committing robbery, he inflicts or attempts to inflict hurt, or if in committing house-breaking, he damages person or property, though he cannot, if he brings himself within section 86, be convicted of robbery or house-breaking, he may be punished for the hurt he inflicts or attempts to inflict or for the damage he causes to property or again if he thieves when drunk and retains when sober, it is quite possible that he could be found guilty of criminal misappropriation.

In the case under consideration, the accused has been convicted of an attempt at robbery armed with a deadly weapon. As either theft or extortion is an essential ingredient in robbery and as each requires intention on the part of the agent as an essential factor to constitute the offence, it follows that, in my opinion, the accused could not, if he had succeeded in his attempt, have been convicted of robbery provided that he satisfied the Court that owing to his intoxication his actual knowledge of what he was doing was not such as to justify the presumption that he intended to cause wrongful gain to himself. If he could not have been convicted of the consummated act, he could not, in my opinion, have been convicted of the attempt. But on the facts which are set out in the judgment of the learned Chief Judge, I am clearly of opinion that as a fact he knew quite well what he was doing and did as a fact intend to cause wrongful gain to himself. His appeal, therefore, to section 86, in my opinion, fails. I also agree that taking all the circumstances into consideration, it is possible to consider the case to have been an attempt at extortion rather than robbery and I agree in the order and sentence proposed.

Sentence altered.

LOWER BURMA CHIEF COURT.

CIVIL MISCELLANEOUS CASE NO. 3 OF 1912.

June 24, 1912.

Present:—Sir Charles Fox, KT., Chief Judge, and Mr. Justice Hartnoll.

In the matter of M. M. J., BARRISTER-AT-LAW AND AN ADVOCATE OF THE CHIEF COURT, LOWER BURMA.

Legal Practitioners Act (XVIII of 1879), *s.* 13—*Professional misconduct—Advocate—Grave moral turpitude—Instituting false case and supporting it by gross perjury—Evidence—Conviction.*

Where an Advocate was found guilty of having committed gross perjury and where the course of his conduct displayed great moral turpitude in having instituted a false case and having supported it by false statement:

Held, that he was unfit to remain an Advocate any longer and should be ordered to be struck off the rolls.

In proceedings under the Legal Practitioners Act, the High Court will not go into the merits of the conviction but will ordinarily accept the findings of Criminal Courts as final.

ORDER.—On consideration of the judgments and findings of the Head Quarters Special Power Magistrate of Hanthawaddy in his Regular Trial No. 4 of 1911, and of the Sessions Judge of Hanthawaddy Division in his Criminal Appeal No. 703 of 1911, we issued notice to M. M. J., a Barrister-at-law and an Advocate of this Court, to show cause why he should not be dismissed and struck off the roll of Advocates of this Court on the ground that he had been found guilty and convicted by Criminal Courts of an offence which showed that he was unfit to remain an Advocate of the Court.

On his appearing before us to show cause, we intimated to him that in this proceeding, we did not consider ourselves at liberty to go into the merits of his conviction and that we must accept the findings of the Criminal Courts, that of the Sessions Court being ordinarily final. In exceptional cases only does this Court consider the evidence

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and facts of a case in its Revisional Jurisdiction under section 439 of the Code of Criminal Procedure. Although over six months had elapsed since his conviction, and he had not applied to this Court during that time for revision of his case, we allowed him time to put in an application and have heard him in person on it. We did this in case there might be a possibility of the decision of Sessions Court being wrong and of a further wrong being done to him by striking him off the roll of Advocates upon that decision. In that matter, we have come to the conclusion that the Criminal Courts were right in their findings, but in view of the punishment which striking him off the roll of Advocates will entail, we have reduced the sentence upon him (from three to two years' rigorous imprisonment—Ed.).

In showing cause against being struck off the rolls, after the hearing of the revision case, the respondent said that if his conviction was upheld, he could not show any cause but he asked us to consider whether it was obligatory that this course should be taken.

Shortly the facts leading up to the accused being prosecuted and convicted of perjury and to his being sentenced to rigorous imprisonment for three years, are as follows:—

A young woman, Ma Pu, applied to a Magistrate for an order against the respondent for maintenance, alleging that she had been married to him and that he was the father of her child. The respondent was successful in resisting the application. The young woman was poor, and had practically no legal assistance in prosecuting her case.

Not content with his success in resisting having to pay maintenance to the young woman, the respondent took proceedings to prosecute the woman for having given false evidence in her case against him. The Magistrate who tried the maintenance case sanctioned her prosecution in respect of certain statements which he regarded as self-contradictory. These included one that on the night on which what she referred to as marriage between herself and the respondent took place, she and the respondent had slept in one bed. She had said in that case that after the night of the marriage she had lived with the respondent in his house as man and wife for about two months when she became *enceinte* and he then told her to go and stay in her sister's house. The perjury case against her was dealt with by another Magistrate. In this case, the respondent affirmed that Ma Pu's statements as to her having been taken to his house, as to her having slept and lived with him in his house had not a tittle of truth in them, and that the only occasion, on which he had previously seen her, was on one day when she came to his office with some clients he was acting for. The Magistrate found Ma Pu guilty and sentenced her to rigorous imprisonment for six weeks. Her child was then about six months old.

The prosecution and the imprisonment of the poor woman roused indignation even among an extraordinarily apathetic population, and she obtained assistance to appeal to the Sessions Court. That Court set aside her conviction and ordered a re-trial by another Magistrate. That Magistrate acquitted Ma Pu and directed the prosecution of the respondent for perjury. In this trial, Ma Pu had legal assistance and she was enabled to bring considerable evidence as to what had happened between her and the respondent. On the prosecution of the respondent, one of the Assistant Government Advocates, conducted the case for the Crown. The respondent was represented by Counsel in both Courts. The result of the prosecution was that the accused was held to have given false evidence when in prosecuting Ma Pu for an offence for which, if guilty, she would have been liable to imprisonment for seven years, he denied that he had had anything to do with her except in connection with a case of another client of his. It was proved that she had lived in his house and that she had gone with him for a picnic with a number of other people, and there can be no doubt that he was, as she alleged, the father of her child. The prosecution by him of the young woman and his support of it by gross perjury displays great moral turpitude on his part and we cannot allow a man who has been guilty of such baseness to remain an Advocate of this Court. We dismiss M. M. J. from his office of Advocate and direct

that his name be struck off the roll of Advocates of the Court.

CALCUTTA HIGH COURT.
CRIMINAL REVISION PETITION No. 639 OF 1912.
May 31, 1912.
Present:—Mr. Justice Holmwood and Mr. Justice Imam.
ABDUL KHALEK—PETITIONER
versus
EMPEROR—PROSECUTOR.

Criminal Procedure Code (Act V of 1898), ss. 35 (3), 413—Appeal—Sentence of one month's imprisonment under more sections than one—Sentences to run concurrently—Appeal, whether lies to Sessions Court.

Concurrent sentences for the purpose of appeal must be taken in the aggregate.

Therefore, where a Deputy Magistrate convicted the accused under sections 143 and 365/114, Indian Pena l Code, and sentenced them to one month's rigorous imprisonment under each section, the sentences to run concurrently:

Held, that an appeal lay to the Sessions Court.

Rule against the order of the Sessions Judge of Chittagong, dated April 10th, 1912, confirming on appeal the order of the Deputy Magistrate of Chittagong, dated March 28th 1912, convicting the accused under sections 143 and 365/114, Indian Penal Code, and sentencing them to one month's rigorous imprisonment under each section, the sentences to run concurrently.

Mr. *J. N. Sen Gupta*, Babus *Probodh Kumar Das* and *Profulla Chandra Bose*, for the Petitioner.

JUDGMENT.—It is perfectly clear that the Judge is bound to entertain and hear the appeal in this case. Under the rulings of this Court, concurrent sentences for the purpose of appeal must be taken in the aggregate. The interpretation of section 35 (3) appears to leave it without doubt that concurrent sentences come within the meaning of that clause; otherwise there would be no distinction whatever between a concurrent sentence and a single sentence in which no sentence was passed under the second charge.

The Rule is made absolute and the appeal will be heard in due course by the learned Sessions Judge.

The petitioner will remain on the same bail pending the hearing of the appeal.

Rule made absolute.

LOWER BURMA CHIEF COURT.
FULL BENCH.
CRIMINAL REVISION PETITION No. 5C5-A OF 1912.
August 12, 1912.
Present:—Sir Charles Fox, KT., Chief Judge, Mr. Justice Hartnoll, Mr. Justice Robinson, Mr. Justice Parlett and Mr. Justice Young.
EMPEROR—APPLICANT
versus
CHANNING ARNOLD—RESPONDENT.

Criminal Procedure Code (Act V of 1898), ss. 215, 346, 347, 349—Commitment once made can be quashed only on point of law—Section 347 to be read subject to section 208.

Where a Magistrate thinks from the first that a case ought to be tried by a Court of Session, the procedure laid down in Chapter XVIII of the Code of Criminal Procedure is *prima facie* obligatory on him and he must, under section 208, take all such evidence as may be produced for the prosecution or on behalf of accused and give the accused an opportunity to cross-examine the prosecution witnesses. Section 347 has no applicability in such a case.

The words "stop further proceedings" in section 347 refer obviously to proceedings of a trial or of an inquiry with a view to a trial by himself when it appears to the Magistrate that the case is one which ought to be tried by the Court of Session or the High Court.

A commitment made without examining prosecution witnesses and allowing the accused an opportunity to cross-examine is illegal and must be quashed.

Per *Robinson, J.* dissenting:—Section 347 applies to *all inquiries whatsoever.*

A commitment, without examining the prosecution evidence and giving the accused an opportunity to cross-examine witnesses, is not illegal and cannot be quashed.

Reference made by the Chief Judge to the Full Bench to consider whether the order of committal to the Sessions Court passed by the District Magistrate, Rangoon, of Mr. Channing Arnold in Criminal Bailable No. 83 of 1912 of this Court was a legal one.

FACTS.—Mr. Andrew, Deputy Commissioner of Mergui, brought a charge of defamation of character under section 500, Indian Penal Code, against Mr. C. Arnold, Editor of the *Burma Critic*, a weekly newspaper published in Rangoon, for his articles in connection with the case of one Captain McCormick, who was charged with abducting a Malay girl at Victoria Point in the Mergui District. On Mr. Arnold's admitting the authorship of the articles in question, the District Magistrate, Rangoon, committed Mr. Arnold to stand his trial before the Sessions of the Chief Court. He declined to allow the accused's Advocate

to complete the cross-examination of the complainant. He did not examine the prosecution witnesses and declined to hear the statement of the witnesses for defence. The case was put up for orders before the Chief Judge who thought this procedure a novel one and referred, to a Full Bench, the question whether the committal was a proper one or not. The order of the District Magistrate was as follows:—

In this case, the accused, Mr. Channing Arnold, is complained of for having, as Editor and part proprietor of the newspaper, called the *Burma Critic*, published or caused to be published in the issue of April 28, 1912, certain articles defaming complainant, Mr. G. P. Andrew. I. C. S., Deputy Commissioner and District Magistrate of Mergui, by reflecting on and denouncing in the strongest possible terms the proceedings held by Mr. Andrew in his Criminal Regulation No. 27 of 1911, in which one Captain McCormick, a planter living near Victoria Point in the Mergui District, was charged with abducting and raping a little Muhammadan girl named Aniah and was after inquiry discharged. The articles alleged, among other things, that the complainant, out of friendship for Captain McCormick, pulled the wires in every possible way from the first police investigation down to the final order, that he condoned the offence, cheated the prosecution of their Advocate, tried the case *in camera* and employed knowingly a paid employee of the accused as interpreter (the evidence being given in the Malay language), in short that he grossly betrayed his trust and refused justice to the poor and helpless for no other reason than that they were poor and helpless.

This, of course, constitutes the very gravest defamation that it is possible to conceive against a Magistrate, unless it were that he had himself committed the offences of which Captain McCormick was accused. The complainant has been examined and cross-examined in this Court. I may say that it was evident to me from the first that this case is so serious that it should be tried by Sessions rather than by me under section 451, Criminal Procedure Code, and the only reason that I did not take the course I now take was that I had always read section 347 as being subject to the provisions of section 208, Code of Criminal Procedure. But by investigation of my own since the last hearing, I find that this is not the case [see *Phanindra Nath Mitra* v. *Emperor* (1) and the case quoted there with approval *In re Clive Durant* (2)]. The opinion I have formed that the case is one which ought to be tried by Sessions has certainly not been altered by the result of the cross-examination so far as it has gone and I may say that whatever the evidence that accused could produce whether by cross-examination or by his own witnesses, and whatever my own opinion might be thereon, I should still consider that the issue involved is too serious to be adjudicated upon in a Police Court: while if the imputations cannot be justified, it may be very seriously doubted if the punishment that I could award would meet the case.

It cannot be said that this course, apart from legality, is unjustifiable in the present case and will prejudice the accused in his trial, for under section 105 of the Evidence Act, the burden of proving that the articles are not defamation lies upon him, and the Court is bound to presume that the circumstances, which will bring him under the exceptions (one and two) do not exist. In short, the accused is guilty in the eye of the law till he proves himself innocent. The object of a preliminary inquiry is (1) to prevent charges being tried by Sessions without a *prima facie* case, and (2) to give the accused full notice of the charge he has to meet. Condition (1) is obviously fulfilled here under section 105 of the Evidence Act. Condition (2) is also fulfilled. There is no possible doubt of the nature of the offence accused is charged with. In a trial for murder, (under the same condition, *i. e.*, if he admitted homicide), besides being acquitted as acting under the right of private defence, he might be convicted of assault, hurt and all its variants, rash homicide, culpable homicide and murder. There are many degrees of guilt and he is entitled to know which of these he is charged with, and will be tried for. But, in this case, there is only one possible offence, though there are ten different ways of escape (besides that of disproving the publication or making of the imputation).

(1) 36 C. 48; 12 C. W. N. 1014; 8 Cr. L. J. 221; 1 Ind. Cas. 469.

(2) (1898) Ratanlal's Unrep. Cr. C. p. 975.

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It may be assumed that an editor of a newspaper would not have taken such an extreme step as publishing the articles complained of, without some inquiry, and it can, therefore, be no hardship to him, if he is committed to Sessions without completing the cross-examination and producing his own witnesses in this Court. His defence will not depend on the cross-examination of the prosecution; even, if it did, holding the opinion that I do that the case is one that should in any case go to Sessions, it would be waste of time and also contrary to the law for me to proceed. Section 347 is mandatory not permissive, and obviously applies to all cases which by law are triable either by the Court of Session or by a Magistrate, those, that is to say, which lie in the debatable land of jurisdiction. It may be said that I ought to have complied with it sooner and I regret that I did not. I have explained that it was due to misreading the true scope of section 347. It is true that the case in *Phanindra Nath Mitra* v. *Emperor* (1) was stopped by the Magistrate at a different stage, but in both the cases cited, stress is laid by the learned Judges on the words of the section, "at any stage of the proceedings". For this reason, *i.e.*, because the cross-examination is incomplete ,I shall refrain from all comment on the imputations themselves. It is sufficient for me that they are admitted and that accused intends to try and justify them. It may be objected that section 347 is ousted by section 447. But this is clearly not so, section 447 is a mere supplemental section, prescribing to what Courts European British subjects shall be committed for varying offences, whereas section 347 occurs in a chapter applicable to *all* inquiries and trials.

The last possible objection I shall deal with is one which will be true in fact, but does not, in my opinion, affect the validity of my order, namely, that I have not heard the parties. As to this, I cannot think it necessary. The Code leaves the matter entirely to the Magistrate. The section is mandatory and would certainly have been complied with at the first hearing provided that the accused had (as, no doubt, he could have) returned the same answers in the examination under section 342 of the Criminal Procedure Code. The fact that it was not complied with, then, is no proof that I did not then hold the opinion I have recorded, because I expressed that opinion in open Court at the first hearing, nor is it any bar to my subsequent compliance with what is a very plain provision of law.

For these reasons, I direct that the accused Channing Arnold be committed to the Court of Session for trial under section 500 of the Indian Penal Code. I wish to add to this that had I meant to try this case myself under section 451, the charge would have been framed and a Jury ordered to be empanelled under that section at the first hearing on the admission by accused of publication. The accused is, therefore, in a better and not a worse position in the Court of Session than he would have been in this Court, if indeed the cross-examination that has taken place is held by him to have bettered his position.

Mr. *Rutledge*, Government Advocate, appeared to show cause why the order of committal passed by the District Magistrate, Rangoon, should not be set aside as being illegal and Mr. Hamlyn appeared for the accused.

Mr. *Rutledge* stated that the learned Magistrate took his course on the law as he understood it and not from any argument or any suggestion on the part of the Crown. He should have preferred from his own point of view that accused be allowed opportunity of cross-examining the prosecution witnesses and producing his own witnesses as thereby he would have been informed of the line defence was going to take and would have been able to ascertain the credibility and character of the witnesses accused wished to produce. He had been deprived of all these advantages by the Magistrate's present action.

Counsel then referred to the case of *Queen-Empress* v. *Elahi Bux* (3) and added that case did not much help the decision of the point raised. Then he referred to a case reported as *Queen-Empress* v. *Ahmadi*(4). There the High Court held that the Magistrate was not empowered to frame a charge until he had taken all the evidence that the ac-

(3) 2 A. 910.
(4) 20 A. 264.

cused had produced before him. The order of the Magistrate was set aside and the case was returned to the Magistrate of Gorakhpore to fix a day to hear evidence on behalf of accused and to complete the inquiry according to law. A similar deci- was arrived at in another case, *Emperor* v. *Muhammad Hadi* (5). Counsel then referred to *In re Clive Durant* (2) and to *Empress* v. *Elahi Bux* (3), on which the present action of the District Magistrate was based.

Mr. *Hamlyn* said that his client was prejudiced by the course pursued by the Magistrate. The Magistrate had made up his mind from the start to send the case to the Sessions and it, therefore, became obligatory upon him to make an inquiry under Chapter XVIII of the Criminal Procedure Code. In the ordinary course, the learned Magistrate was competent to try this case but he says in his commitment order that: *Firstly*, because the case was of a serious nature and *secondly* because he could not inflict sufficient penalty himself, Mr. Arnold being a European British born subject, he had made up his mind at a very early stage to commit the accused to the Sessions. He ought, therefore, to have followed the procedure in section 207 of the Criminal Procedure Code.

Counsel then referred to *King-Emperor* v. *Pemc Ranchod* (6) and to *Fazarali* v. *Mazaharullah* (7). In the latter case, Holmwood and Sharfuddin, JJ., held that where after a Magistrate had made up his mind to commit a case to the Court of Session but before the case for the prosecution was absolutely closed, one witness for the prosecution remaining to be examined, the defence applied to cross-examine the prosecution witnesses, they were entitled to the indulgence of cross-examining the prosecution witnesses. Counsel said that this case fitted the case before the Magistrate to a nicety.

Mr. *Rutledge* replied.

ORDER.

Fox, C. J.—This case is being considered by a Full Bench in order that it may be finally decided so far as the Courts subordinate to this Court are concerned, whether a novel procedure in committing an accused for trial is legal or illegal.

The accused in this case is charged with defamation punishable under section 500 of the Indian Penal Code. In his reasons for committal, the Magistrate says that it was evident to him from the first that the case was so serious that it should be tried at the Sessions of this Court rather than by himself under section 451 of the Code, and he also says he expressed this opinion in open Court at the first hearing of the case before him.

From this, there can be no doubt that his proceedings from the first constituted an inquiry into a case which in the opinion of the Magistrate ought to be tried by the Court of Session or High Court, and, consequently, the procedure laid down in Chapter XVIII of the Code of Criminal Procedure was *prima facie* obligatory. Section 207 lays this down in the clearest and most definite terms. Section 208 makes the taking of all such evidence as may be produced for the prosecution or on behalf of accused, and the giving of accused an opportunity to cross-examine the witnesses for the prosecution compulsory before a committal order can be made. The Magistrate started to follow the procedure enjoined by the Chapter: the complainant was examined and partially cross-examined on the first day. On the second day, the cross-examination was continued but not finished, and the Advocate for accused then suggested the case should be postponed to enable another witness to attend.

When the case next came on for hearing, the Magistrate, after apparently intimating what he was about to do, examined accused and framed a charge against him, and then, according to his view, stopped further proceedings and committed accused to this Court for trial in accordance with the provisions of sections 347 of the Code. He did this because it appeared to him that certain decisions of the Bombay and Calcutta High Courts had construed section 347 in such a way that, thinking as he did that the case ought to be tried at Sessions, it was imperative on him to stop the case before himself and make a committal order. In fact he appears

(5) 26 A. 177; 1 Cr. L. J. 357.
(6) 4 Bom. L. R. 85.
(7) 16 C.L.J. 45; 13 Cr. L. J. 688; 16 Ind. Cas. 336.

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to have considered that he ought to have stopped the case on the first day of hearing, provided that accused had been examined and had admitted publication of the defamatory matter. The accused's Advocate and accused himself protested against the procedure adopted, and before us the accused's Advocate reiterated that it was to accused's prejudice.

The sole question we have to consider is whether it was legal or not, for under section 215, a commitment once made can be quashed only on a point of law. The only justification for the procedure, if there is justification at all, must be sought for in section 347 of the Code. That section is as follows:

(1) "If in any inquiry before a Magistrate, or in any trial before a Magistrate before signing judgment, it appears to him at any stage of the proceedings that the case is one which ought to be tried by the Court of Session or High Court, and, if he is empowered to commit for trial, he shall stop further proceedings and commit the accused under the provisions hereinbefore contained.

(2) If such Magistrate is not empowered to commit for trial, he shall proceed under section 346." The section is in Chapter XXIV of the Code, which contains the general provisions as to inquiries or trials. It is one of those sections providing for what a Magistrate should do when in the course of a case he is of opinion that he should not finally deal with a case himself. Section 346 lays down generally what he should do, if he considers his powers are insufficient for the case, or that for some other reason the case should go before another Magistrate. Section 349 provides for what he should do when after hearing all the evidence he is of opinion that accused is guilty, but he considers that accused should receive a punishment which he cannot inflict, but which some other Magistrate can inflict.

Section 347 is the successor to section 221 of the Criminal Procedure Code of 1872. That section was in Chapter XVII which contained the provisions regarding the trial of warrant cases by Magistrates. It ran as follows:

"In any trial before a Magistrate, in which it may appear at any stage of the proceedings, that from any cause the case is one which the Magistrate is not competent to try, or one which, in the opinion of such Magistrate, ought to be tried by the Court of Session or High Court, the Magistrate shall stop further proceedings under this Chapter and shall, when he cannot or ought not to make the accused person over to an officer empowered under section 36 (*i.e.*, a Magistrate empowered to award sentences up to seven years' imprisonment), commit the prisoner under the provisions hereinbefore contained. If such Magistrate is not empowered to commit, he shall proceed under section 45." This last mentioned section is similar to section 346 of the present Code. In the general revision and re-arrangement of the Code, there was, no doubt, good reason for removing this provision from the Chapter dealing with warrant cases to the Chapter dealing with provisions applicable generally to all inquiries and trials before Magistrates. Possibly one reason may have been that according to some decisions in High Courts, a trial of a warrant case before a Magistrate did not begin until accused had been charged and his plea to the charge had been taken, and in order to avoid all possible question as to the applicability of provisions similar to those of section 221 of the Code of 1872 to any stage of a proceeding before a Magistrate, the Legislature inserted the words "in any inquiry" in section 347 of the Code of 1882 which is enacted in the Code of 1898. The important question is, what is the proper construction of the words "he shall stop further proceedings and commit the accused under the provisions hereinbefore contained?" In *In re Clive Durant* (2), the Magistrate committed a case without taking all the evidence for the prosecution. Two learned Judges of the Bombay High Court rejected an application to quash the order of commitment and held that the commitment was legal because the section enabled a Magistrate at any stage of the proceedings to stop further proceedings and commit. They made no allusion to the words "under the provisions hereinbefore contained." In *Phanindra Nath Mitra* v. *Emperor* (1), the Magistrate had committed without allowing the accused to cross-examine witnesses for the prosecution and to call witnesses for the defence. The application to be allowed to cross-examine and to call witnesses for the defence was made after the

prosecution had closed its case. Two learned Judges of the Calcutta High Court rejected an application to quash the commitment, holding that section 347 was not to be read as subject to section 208 of the Code, which lays down that the accused shall be at liberty to cross-examine the witnesses for the prosecution and to call witnesses. In this case also, no allusion is made to the meaning of the words "according to the provisions hereinbefore contained."

In connection with this case, I will say that if the case had been that the commitment was illegal because the Magistrate had refused to re-call the witnesses for the prosecution in order that accused might cross-examine, then, after the close of the case for the prosecution, I should fully agree that this afforded no ground for holding that the commitment was illegal, for Chapter XVIII contains no provision similar to that in section 256 (1) for re-calling prosecution witnesses for cross-examination in a case being tried by a Magistrate, and the proper time for cross-examining a witness in an inquiry under Chapter XVIII is in ordinary course immediately after the witness's examination.

I must, however, entirely dissent from the general construction put upon the section in the two cases quoted. This construction appears to me to overlook the fact that the committal is to be made under the previous provisions—not the previous provision—for committing a case. Committal to a Sessions or High Court is effected merely by making a committing order under section 213 of the Code, a section in Chapter XVIII of the Code. That section contains the sole provision for the mere act of committing an accused for trial. Under the construction put on section 347, in the two judgments alluded to above, the Magistrate in the present case would, as he says, have been quite justified in making a committing order on the first day of the hearing, without allowing cross-examination even to be opened and in any case, a Magistrate would after hearing possibly only the first witness for the prosecution and then being convinced that the case must go to the Sessions or High Court, make a committing order, without even drawing up a charge against accused. A construction which confines the word "commit" to the mere order of commitment leads to absurdity. It must be conceded that the Magistrate must do something besides writing out and signing such an order: for that something he has to go to the provisions of Chapter XVIII. This being so, it appears to me that the meaning of the words "commit the accused under the provisions hereinbefore contained," is that the Magistrate must make his proceedings conform to the provisions of Chapter XVIII, and that before he writes and signs a committal order, the provisions of that Chapter, which specially provides for procedure antecedent to a trial by a Sessions or High Court, must be carried out. The words "stop further proceedings" appear to me to refer obviously to proceedings of a trial or of an inquiry with a view to a trial by himself which he has been engaged on up to the time when it appears to him that the case is one which ought to be tried by the Court of Session or High Court.

It was suggested that section 347 may have been enacted with a view to shortening the proceedings before commitment. It appears to me that the position of the section, among sections dealing merely with cases which a Magistrate thinks should not be finally dealt with by himself, entirely negatives any idea that the section was enacted by the Legislature with any such object. Even in the Indian Criminal Law Amendment Act, 1908, which is designed for the more speedy trial of certain offences, although the procedure of Chapter XVIII of the Code is very considerably altered for such cases, still the Magistrate is bound, before he makes a committal order, to record the evidence of all such persons as may be produced in support of the prosecution, if it has not already been recorded under Chapter XVIII. But perhaps the strongest reason for holding that section 347 in no way overrides and in no way dispenses with the obligation of following Chapter XVIII is that in that Chapter, the Legislature has laid down provisions for procedure before commitment some of which were obviously intended and rightly intended for the benefit of accused persons. I

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allude to the provision that all the witnesses for the prosecution shall be called, the object of which plainly is that the accused should be made aware of all the evidence that he will have to meet on his trial; to the provision for cross-examining the witnesses for the prosecution, and the provision for the accused being able to call witnesses before the Magistrate, the object of which provisions is plainly to give accused a full opportunity of convincing the Magistrate that there are not sufficient grounds for committing him for trial, and thereby putting on him the anxiety and expense of defending himself at a trial and in a great many cases depriving him of his liberty for a possibly considerable time. A construction of section 347, which places the Legislature in the position of having first enacted elaborate provisions for procedure antecedent to a committing order—some of such provisions are manifestly intended for the benefit of accused persons—but later on in the same Act having in a general provision enacted that the previous procedure need not be followed, cannot, in my opinion, be a correct construction.

Possibly, the intention of the section might have been expressed in clearer wording, but the wording, as it is, appears to me to be sufficiently plain, especially if the section is not read as an isolated section, but is taken in connection with the other relevant portions of the Act. In the present case, the Magistrate began inquiry under Chapter XVIII of the Code being convinced from the first that the case was one which he ought not to try himself, but which he ought to commit to this Court for trial. Section 347 had, in my opinion, no applicability to the case. In any case, however, the word "shall" in section 203 is as imperative as the same word in section 347.

The Magistrate was bound to take all the evidence which might be produced by the prosecution to allow the witnesses for the prosecution to be cross-examined by the accused, and to take all such evidence as might be produced on behalf of accused. He has not carried out these imperative provisions of the law before committing the accused for trial to this Court. The case comes before this Court in a manner not contemplated by law. I would hold that the commitment was illegal and I would quash it under section 215 and send the case back to the Magistrate ordering him to continue the inquiry under Chapter XVIII which he commenced, and to proceed with it according to the provisions of that Chapter.

ROBINSON, J.—The facts are fully stated in the judgment of the learned Chief Judge. The question before us stated generally is whether the provisions of section 347 are subject to those of section 208. The points to be decided in particular are:—(1) whether section 347 applies to all inquiries: (2) what meaning is to be assigned to the words "at any stage of the proceedings;" (3) what is the effect of the words "shall stop further proceedings and commit;" and (4) to what provisions do the words "under the provisions hereinbefore contained" refer?

That section 347 applies to all inquiries whatsoever is perfectly clear both from the actual words used and from the history of this section. It says "if *any* inquiry . . . ." Again it was first enacted in the Code of 1872 in practically similar terms but confined to trials. But it found a place in the Chapter dealing with the trial of warrant cases. That section also applied to the cases now governed by section 346. In the Code of 1882, the section was divided into two and was removed to the Chapter dealing with general provisions as to inquiries and trials. It was also extended so as to cover not only trials but also inquiries. No change was made when the present Code was enacted.

The expression "trial" had been differently interpreted and an attempt was made to define it but was given up. The reason to my mind was because the word had been held to bear different meanings in different sections—a difference which is shown possibly by the context. However this may be, it is clear that the point was present to the mind of the Legislature and, therefore, the wording of section 347 would be carefully considered. If it had been intended to confine the provisions to cases where Magistrates would primarily try themselves, that is, would start their proceedings under Chapter XX or XXI, this would have been clearly expressed. Instead of that, language of the widest description was used, and it must, I consider, be held that the section did apply to all inquiries and all trials. The words "at any stage of the proceedings," are also

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perfectly clear. No Magistrate could possibly hold that he could commit unless he had some legal evidence before him establishing a *prima facie* case; but when he is satisfied of that and that the case ought to be tried by the Court of Session, the stage is reached to which that section applies. The section provides that then he "shall stop further proceedings and commit." It may be said that I should not stop at the word "commit," but I do so purposely in order to emphasise the provision. An inquiry under Chapter XVIII was with a view to commit from the commencement. That section said that both under that Chapter and under Chapter XX or XXI, the same result is to follow. If any meaning is to be given to those words in the case of inquiries under Chapter XVIII, it must be that there need not be any further proceedings, except the acts necessary to a committal. If the proceedings began under Chapter XX or XXI, to give them any other meaning is to read into the sections words limiting their meaning to proceedings in primarily summons or warrant cases. There was no justification for any such curtailment. But it may be said such justification is to be found in the words "commit under the provisions hereinbefore contained." The section must be considered together as a whole. No interpretation can be justified which renders other words in the section surplusage. We are here dealing with an inquiry which the Magistrate considered was one under Chapter XVIII from the start. If then these words mean that he is to go through the whole procedure laid down in Chapter XVIII, the direction to him to stop further proceedings is to be treated as non-existent. That direction can only be avoided by reading in words that are not there, and that may not be done. I think, however, that a meaning can be given to the last words of the sub-clause, that was reasonable and consistent with what preceded them and with the clear object and intention of the section. The words "provisions hereinbefore contained" refer back to the word "commit" and applies to the provisions for the actual committal as distinct from the taking of evidence or the examination by the accused. Those provisions are those of sections 210, 213 and 218. When "the Magistrate is satisfied that there are sufficient grounds, for committing the accused for trial", he must frame a charge. He must then make an order committing the accused for trial and notify the fact of the committal. These are "the provisions hereinbefore contained." This view appears to me to allow of an interpretation, which permits of effect being given to all the words of the section without omitting any and without reading in any words and to all cases. I have already mentioned that in the Code of 1882, the section was separated into two sections. In the Code of 1872, the words "under the provisions hereinbefore contained" applied to Magistrates who were not empowered to commit. Section 347 (2) lays down that the latter are to proceed under section 346. Section 346 requires the Magistrate to stay proceedings and submit the case to another Magistrate, who may "commit accused for trial." Nothing is said there about "provisions hereinbefore contained." If I am wrong in my opinion on section 347, I do not think that is of great moment, but otherwise the omission of those words which previously existed is significant and points to their not being *the* important words of the section. But though this is my opinion of the strictly legal interpretation of section 347, I would record my opinion that the discretion given should be most cautiously exercised. There are instances in which the *prima facie* case made out by the prosecution is so strong that the defence evidence could rarely justify a Magistrate in discharging accused. It is for such cases as these that the section is intended. There are instances when to continue recording evidence down to all the formal evidence would be a mere waste of time. But in exercising his discretion, a Magistrate should always remember that the inquiry is meant not only for the establishing of a *prima facie* case, but also to inform the accused fully of the charge and the evidence which he had to meet. He must not lightly take upon himself the duties of the Sessions Court on the one hand, but he must not subject the accused to the anxiety and expense of a trial on the other, without giving him the opportunity, so long as any reasonable possibility exists, of showing that he should not be tried. In the present case, the accused, it is true, knew clearly enough the charge and his plea throws the whole *onus* on him, but he does not know what

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evidence he had to meet at his trial. The Magistrate does not know what his defence really is, nor how strong his proof of innocence may be, and I do not think the stage had been reached at which he should have acted under section 347. This, however, is not a point of law and I do not think the committal could be quashed.

HARTNOLL, J.—I entirely concur in the order proposed to be passed by the learned Chief Judge and have little further to say in addition to the reasons which have been given by him.

Section 207 of the Code is:—

"The following procedure *shall* be adopted in inquiries before Magistrates where the case is triable exclusively by a Court of Session or High Court, or, in the opinion of the Magistrate, ought to be tried by such Court." It will be noted that the section distinctly deals with two sorts of cases (1) those triable exclusively by a Court of Session or High Court and (2) those which in the opinion of the Magistrate ought to be tried by such Court. In the present case, the Magistrate from the beginning formed the opinion that the case ought to be committed to this Court if the accused admitted publication of the article complained of, and so in accordance with the provisions of section 207, it was obligatory on him to follow the provisions of Chapter XVIII; but he has construed the provisions of section 347 as rendering it obligatory on him not to do so. This could never have been the intention of the Legislature for, if the views of the Magistrate were followed, there would be no need for the elaborate provisions of Chapter XVIII at all, and also the provisions of Chapter XVIII and of section 347 would be contradictory in their nature. There is no doubt, in my mind, that section 347 is entirely a supplementary section to Chapter XVIII and refers to a case which the Magistrate at first takes up with a view to disposing of it himself. Before concluding it, he finds that it is one which ought to be tried by the Court of Session or High Court: in other words, comes under the category of the second class of cases referred to in section 207. Section 347 was enacted to lay down the rule of procedure when such a position arises. It enacts that the proceedings of the Magistrate taken with a view of finally disposing of the case himself shall cease and that he shall deal with the case under the provisions of Chapter XVIII. The position of section 347 supports this view, and it could never have been intended to create an arbitrary power of committal at any stage after the elaborate provisions laid down in Chapter XVIII which are obviously and rightly intended for the benefit of accused persons—provisions which were intended to give them the opportunity of clearing themselves before the Magistrate of charges made against them and so freeing them from, in some cases, a period of incarceration and in all from the prolonged anxiety and expense incurred by a trial being ordered, and which were also intended to give them notice of the evidence which will be brought against them on their trials and so the opportunity of refuting it.

PARLETT, J.—I am of opinion that in this case, the Magistrate was in reality acting from the outset under Chapter XVIII of the Criminal Procedure Code and that section 347 can apply to it only if it be held that that section so completely overrides the provisions of Chapter XVIII as not only to empower but even to require a Magistrate, who is holding an inquiry under that Chapter, to make an order committing the accused for trial immediately it appears to him that a *prima facie* case has been made out which should be tried by the Court of Session or the High Court. It this were intended, it would have been easy to place the matter beyond doubt by enacting the last sentence of section 347 (1) in some such words as these "he shall stop further proceedings and, notwithstanding anything contained in Chapter XVIII, shall forthwith make an order committing the accused for trial." Moreover, if it were intended that an accused could be committed for trial without the whole of the prosecution evidence being taken, in the same way that a charge can, under such circumstances, be framed against him in a warrant case, there can be no doubt that section 210 would like section 254 contain the words "or at any previous stage of the case."

That such is not the intention of section 347 can, I think, be demonstrated by a consideration of the following section which runs:—

"Whoever, having been convicted of an offence punishable under Chapter XII or

Chapter XVII of the Indian Penal Code with imprisonment for a term of three years or upwards, is again accused of any offence punishable under either of those Chapters with imprisonment for a term of three years or upwards, shall be committed to the Court of Session or High Court, as the case may be, unless the Magistrate before whom the proceedings are pending is of opinion that he can himself pass an adequate sentence if the accused is committed."

Leaving aside the further reference to section 30 of the Criminal Procedure Code, this section read by itself and construed literally might be taken not merely to authorize but even to enjoin a Magistrate to make an order committing an accused person for trial merely upon the following materials which would usually be forthcoming without the examination of a single witness:—

(*a*) Evidence of accused's previous conviction of one of the offences specified;

(*b*) An accusation against him of having committed one of those offences after such conviction, and

(*c*) The Magistrate's opinion as to the appropriate sentence if the accused is convicted. Yet it could not be seriously argued that because section 348 contains no specific reference to Chapter XVIII, a commitment made under section 348 should not be made strictly in accordance with all the provisions of that Chapter, and if a Magistrate taking up a case from the outset under section 348 with a view to commitment is bound by those provisions, why should he not be equally bound by them because the circumstances which lead him to form the opinion that a case which he originally intended to dispose of himself should be committed for trial, *e.g.*, evidence of previous convictions of any of the offences specified in section 348, came to light at a later stage of the proceedings? I am unable to suggest any reason that could justify any such apparent anomaly, but I think the question suggests an explanation of why section 347 directs that the accused shall be committed "under the provisions hereinbefore contained," whereas neither section 346 nor section 348 contains those words. These last two sections refer to cases where the Magistrate who eventually commits the accused for trial has from the commencement of his proceedings contemplated such commitment. He is, therefore, bound by section 207 to adopt throughout the procedure prescribed in Chapter XVIII and it is accordingly unnecessary in sections 346 and 348 to repeat the provisions of section 207. Under section 347, the conditions are quite different. The Magistrate may have already framed a charge without examining all the prosecution witnesses or without their having been cross examined: the section, therefore, warns him that if he decides to commit for trial, he must make his proceedings conform to the provisions of the Criminal Procedure Code relating to commitment. Those provisions, and so far as I am aware, all of them, are contained in Chapter XVIII of the Code: Other sections, *e.g.*, 346 to 348 and 447 lay down certain circumstances under which, and the Court to which, a commitment should be made, but, so far as I am aware, nowhere but in Chapter XVIII is the procedure laid down to be followed in making such commitment. If the words in section 347 "shall stop further proceedings and commit the accused under the provisions hereinbefore contained" did not mean that all the provisions of Chapter XVIII were to be complied with, I consider it must have been made clear which provisions were to be and which need not be followed by substituting some such words as "under the provisions of section (or sections) so and of this Code." I feel no doubt that section 347 requires that every commitment made under it shall comply with all the essential provisions of Chapter XVIII. Among them, I consider the main provisions to be those of sections 208, 209, and 210, namely, that all the evidence produced in support of the prosecution shall be taken. The accused shall be given an opportunity to cross-examine the witnesses for the prosecution; he shall be allowed to produce any evidence he wishes in his behalf and the Magistrate shall take it; he shall be examined for the purpose of enabling him to explain any circumstances appearing in the evidence against him; and a charge shall be framed declaring with what offence he is charged. These provisions clearly operate greatly in favour of an accused person by giving

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him full opportunity of showing cause why a commitment should not be made, and by giving him full notice of the case he will have to meet if it is made. They also achieve other desirable ends. They prevent the waste of time entailed upon all concerned by unnecessary commitment. They also help to prevent miscarriages of justice: it is easy to imagine a case where, owing to the death of a witness, a prosecution would fail but for the provisions of section 33 of the Evidence Act, or where an accused person would be greatly prejudiced by the Magistrate's refusal to examine a defence witness whose attendance at the trial it became subsequently impossible to secure, while section 283 of the Code of Criminal Procedure can only be used if the evidence of the witness was duly taken in the presence of the accused before the Committing Magistrate, which can only mean taken under the provisions of Chapter XVIII.

In the present case, the accused has expressly pleaded that he was prejudiced by the procedure adopted, but even if he had not, I think it must have been held that the commitment was not made according to law and should be quashed.

I concur in the order proposed by the learned Chief Judge.

YOUNG, J.—The facts of this reference are fully set out in the judgment of the learned Chief Judge, with which I concur.

Section 347 runs as follows:—"(1) If in any inquiry before a Magistrate or in any trial before a Magistrate before signing judgment, it appears to him at any stage of the proceedings that the case is one which ought to be tried by the Court of Session or High Court, and if he is empowered to commit for trial, he shall stop further proceedings and commit the accused under the provisions hereinbefore contained. (2) If such Magistrate is not empowered to commit for trial, he shall proceed under section 346."

The first question that is to be decided is whether the words "in any inquiry or in any trial" are exhaustive. If they are exhaustive they constrain the Magistrate to act in flat contradiction of sections 207-210 which are equally imperative; this seems to me improbable, and I think the words "at any stage of the proceedings" tend to show that the proceedings must be in an inquiry in which the Magistrate is not bound to commit if a *prima facie* case is made out or in a trial which he is competent to hold. In other words, the proceedings must be such that they could be and have been started by the Magistrate with the intention of concluding them himself and then at some stage, he must have become satisfied that this original intention was inappropriate and that the case was one which ought to be finally dealt with by a superior Court.

If then it is not exhaustive and does not apply to cases in which the Magistrate is incompetent to deal with finally, does the section apply to cases which the Magistrate is competent to decide, but in which he becomes convinced at any stage that he ought not to decide? This again would give him power to contravene the same imperative sections of the Code, contained in sections 207-210; section 207 of the present Code is exactly the same as section 207 of the Code of 1882, and provides as follows:—"The following procedure shall be adopted in inquiries before Magistrates where the case is triable exclusively by a Court of Session or High Court, or, in the opinion of the Magistrate, ought to be tried by such Court." It is also the same as section 189 of the Code of 1872 with the significant exception of the last clause relating to inquiries which in the opinion of the Magistrate ought to be tried by such Court. These words were added by the Code of 1882.

Section 347 of the present Code is also the same as section 347 of the Code of 1882.

The analogous section of the Code of 1872 related only to trials. The Code of 1882 extended its provisions also to inquiries in which the Magistrate became convinced that the case should be dealt with finally by another Court.

The same Code, therefore, which extended the provisions of section 347 to these inquiries was careful to provide expressly for the procedure to be adopted in such cases, and yet if the provisions of section 347 are to enable the Magistrate to

commit *at once*, they enable or rather require a Magistrate to act in direct contravention of section 207. This also seems to me improbable.

Yet the section directs him to stop further proceedings and commit under the provisions hereinbefore contained.

That "commit" cannot always be construed in its absolutely literal sense, is, I think, clear from a perusal of section 348 as pointed out by Parlett, J. It is to my mind impossible to suppose that a man who falls under section 348 must be committed just because he is accused of a certain offence. The word must be used elliptically and the ellipse must be "If in the Magistrate's opinion there are grounds for committing". Section 310 shows when and under what circumstances a Magistrate may be satisfied that there are grounds for committing, and I see no reason why the word "commit" should not be used in a similarly elliptical sense in section 347, and the words, "under the provisions hereinbefore contained", in my opinion, support such view.

If so, the words "shall stop further proceeding" must mean shall stop further proceedings in the inquiry or trial in which he is engaged. This was the procedure expressly directed under the Code of 1872.

In that Code, the section was confined to warrant cases and found place in the Chapter relating thereto, and the section required the Magistrate to stop further proceedings under that Chapter.

In the present Code, the section is placed in the general Chapter and so the reference to the Chapter would be inappropriate, but the result will be the same if as I think the section should be construed in the way suggested, *viz.*, so as to refer only to inquiries into offences which he is competent to try himself and which it was his original intention to try if a *prima facie* case should be made out. I do not think that the words "in any inquiry" relate to inquiries where *ab initio* the Magistrate has determined to send the case to Sessions if a *prima facie* case is made out but I think that the words "in any inquiry" were placed in section 347 by the Code of 1882 simply because of the difficulty of defining in cases triable by Magistrates the stage at which the proceedings ceased to be an inquiry and became a trial and to enable him to act at the earliest possible stage.

In the present instance, the Magistrate was competent to try the case himself but either *ab initio* or at a very early stage became convinced that the case was one which should, if a *prima facie* case were made out, be tried not by himself but by the Chief Court. In the one case, he should, in my opinion, have followed the procedure laid down by the Chapter XVIII from the start, in the other he should have stopped further proceedings in the inquiry or trial whichever it may have been, in which he was engaged and adopted the procedure prescribed by Chapter XVIII. I do not think he need have started *de novo* but he should have allowed the Crown to call such witnesses as it deemed fit, and have allowed the accused to cross-examine them and call witnesses himself if so advised. He has not done this, but has committed in contravention of section 210 and the commitment is, therefore, in my opinion illegal. I agree that it must be quashed and in the order proposed.

Order quashed.

LOWER BURMA CHIEF COURT.
FULL BENCH.

CRIMINAL REFERENCE No. 19 OF 1912.
February 23, 1912.

Present:—Sir Charles Fox, Kt., Chief Judge, Mr. Justice Hartnoll, Mr. Justice Ormond, Mr. Justice Robinson and Mr. Justice Parlett.

NGA PO SEIK—APPELLANT
versus
EMPEROR—RESPONDENT.

Penal Code (Act XLV of 1860), *s.* 405—*Breach of trust—Advance to brokers on pro-notes—Loan or trust—Debtor and creditor—Trust.*

A., a paddy dealer, entered into an agreement with *B.*, the object of which was that *A.* should supply *B.* with certain baskets of paddy to be bought at a particular place and to be delivered at *B.'s* mills. On the same day, *B.* advanced *A.* Rs. 10,000 to enable him to obtain this paddy and it was agreed that the account should be settled by *B.* taking over the paddy at the ruling market rate on the day of delivery. *A.* undertook to use this sum to no other purpose than the purchase of paddy for *B.* Simultaneously, *A.* executed five promissory-notes for Rs. 2,000 each in

favour of *B.* bearing no interest. *A.* was to bear the loss, if any, and was to retain the profit if any:

Held, (*Hartnoll, J.*, dissenting), (1) that there was no entrustment of the money to *A.* within the meaning of section 405 of the Penal Code;

(2) that the effect of the transaction was to create the relationship of debtor and creditor between *A.* and *B.*

Per *Fox, C. J.* -The property in respect of which criminal breach of trust can be committed must be either the property of some person other than the person accused, or the beneficial interest in or ownership of it must be in some other person, and the offender must hold such property on trust for such other person or in some way for his benefit.

Mere breach of contract is not made synonymous with criminal breach of trust.

Per *Ormond, J.*—In a prosecution for criminal breach of trust, the fact of trust must be established beyond all reasonable doubt.

ORDER OF REFERENCE.

The following reference was made to a Full Bench by Mr. Justice Hartnoll:—

The appellant, Maung Po Seik, was charged by the Societa Anonima Coloniale de Trieste with criminal breach of trust and has been convicted under section 406 of the Indian Penal Code and sentenced to undergo nine months' rigorous imprisonment.

At the hearing of the appeal, a preliminary point was raised that appellant's agreement with the complainant Company was such that there was no trust created within the meaning of section 405 of the Indian Penal Code so that there could be no breach of trust and, consequently, no conviction for criminal breach of trust. My attention was drawn to the recent case of *Wong Yone Wain* v. *Emperor* (1), which was decided by my learned colleague, Mr. Justice Ormond, and which was stated and seems to be a precisely similar case to the present one. In that case, it was held that there was no trust and the appellant was acquitted. The authorities quoted in that case were again quoted before me. It is proved and admitted that on March 21st, 1911, the complainant Company advanced Rs. 10,000 to appellant who at the time signed an undertaking in the following form:

8 Annas Stamp.

In consideration of the sum of Rs. 10,000 only advanced to me as per promissory-notes No. 86/90, dated the 21st March 1911, I, the undersigned, undertake to buy about 10,000 baskets of sound paddy at Mangaladon village and to deliver the same to the "Societa Anonima Coloniale de Trieste," at their Dowbong mill within 20 days from date. The value of the paddy to be credited at the ruling market-rate for the like paddy on the day of delivery.

I undertake that the above sum of Rs. 10,000 will be used to no other purposes than the purchase of the above mentioned 10,000 baskets of paddy.

Signature in Burmese.

At the same time, he signed five promissory-notes for Rs. 2,000, each payable on demand but not bearing interest. It was further admitted that if the money or any of it, or if paddy bought with such money was lost while it was in the possession of the appellant, the loss was to fall on the latter. Again, if appellant made losses in purchasing paddy and disposing of it to the complainant Company, according to the terms of his undertaking, he was to bear them, whereas if he made profits, he was to enjoy such.

It was contended, on behalf of the appellant, that the undertaking did not create any trust and that the execution of the promissory-notes made the transaction merely a loan, that immediately the notes were executed and the money was handed over the property in the money passed from the complainant Company to the appellant. I was asked to consider the legal consequences resulting on the promissory-notes being executed—now that the relation of the debtor and creditor was established and that the appellant would be liable on them to any holder in due course. It was urged that the undertaking was only one to utilize appellant's own money and the argument was further raised that in the case of a trust, a trustee is not liable for loss incurred in the legitimate use of money nor can he enjoy any profits derived from its use. Counsel for complainant Company urged, on the other hand, that the undertaking and the promissory-notes must be taken into consideration together, that the

(1) 5 Bur. L. T. 11; 6 L. B. R. 43; 13 Cr. L. J. 269; 14 Ind. Cas. 653.

real position was that the appellant was a trustee and only technically a debtor, that he undertook only to expend money in the purchase of paddy for the Company, and confidence was reposed in him by the Company, that he would only so use the money. It was submitted that the undertaking created a trust, that the Company could have either sued on the undertaking or on the promissory-notes, that the promissory-notes were only taken for extra security, that if the Company had negotiated the notes and the holder had sued appellant, the latter could have sued the Company. It was asked whether, if the appellant had used the money to pay off his own debts, the Company could not have applied for an injunction to prevent him doing so.

In my opinion, the terms of the undertaking and also the oral agreement, if evidence of such oral agreement is admissible, cannot be ignored in deciding what was the nature of the true contract between the parties and it would be entirely wrong in determining whether a trust was created or not to proceed on a consideration of the promissory-notes only and the legal consequences resulting therefrom. I will first proceed to consider the undertaking and the promissory-notes together, leaving out for the present any consideration of the terms of the oral agreement and their effect. In the undertaking, the appellant undertakes that the Rs. 10,000 will be used for no other purposes than the purchase of paddy for the Company. The promissory-notes show that no interest was to be paid on the Rs. 10,000 and this fact alone indicates that the transaction was no ordinary loan. It seems to me to be quite clear that the Rs. 10,000 were advanced by the Company to appellant for the purchase of paddy which was to be supplied to the Company at the current market rate and that the appellant bound himself not to utilize the money in any other manner. The promissory-notes were merely taken as extra security for the realisation of the money in case it became necessary to take steps for its recovery. Five notes of Rs. 2,000 each were taken so that suits might be brought in the Small Cause Court. This is clear from the evidence of Yeo Kin Sein. Looking at the undertaking and the promissory-notes together, I am unable to see that the Company parted with the entire property in the Rs. 10,000 for they did not give the unrestricted use of it to the appellant. They stipulated that it was to be used for no other purpose than the purchase of paddy for themselves and this stipulation was acquiesced in by appellant. If a third person knowing of this condition of the agreement between the Company and appellant took the Rs. 10,000 in satisfaction of a debt owing to him by the appellant, it seems to me that the Company could sue him and recover the money, for it would, undoubtedly, be a wrongful act for the third person knowing of the condition to have taken the money which was not at the entire disposal of appellant and which he was bound to use for the Company's purposes. If I am correct in this view, it is an instance to show that the Company did not part with the complete property in the money. Therefore, looking at the undertaking and the promissory-notes by themselves and construing by them the nature of the agreement between the parties, I am of opinion that their effect is to show that there was an entrustment of Rs. 10,000 to the appellant for the purchase of paddy and that they cannot be held to show that the Company parted with all dominion over the money advanced.

It now remains to consider the terms of the oral agreement and their effect assuming that evidence of such oral agreement is admissible. The terms were that appellant was to purchase the paddy at such rates as he chose and to supply it to the Company at the current market-rate in Rangoon, bearing all consequent loss or enjoying all consequent profit and that if the money or any of it or paddy purchased with the money was lost while it was in the appellant's possession, he was to bear such loss and so the question arises whether such conditions do not create such a state of affairs, that it must be held that the Company parted with all dominion over the property and so no trust could be created with respect to it. If the further conditions other than those ascertained by a consideration of the undertaking and promissory-notes had been that all legitimate loss of the Rs. 10,000 or part of it or paddy purchased with it should fall on the Company, I am certainly of opinion that a trust was created, the Company would not only have restricted the use of the money but also have further kept its dominion over it by agreeing to bear any legitimate loss that

occurred. But it did not. The appellant was to bear such loss. Does this create such a condition that the Company must be held to have divested themselves of such dominion over the money, that they cannot create a trust with respect to it? One of the incidents of an entrustment of property is that the person entrusted with it holds it on behalf of another and is not liable to account for it, if it is lost without culpable negligence on his own part. Here one of the conditions of the contract between the Company and the appellant was that the appellant was responsible for loss in any case. This is a condition incompatible with an entrustment and, therefore, it may be argued that there was no trust; on the other hand, it may be said that there was an entrustment at any rate as long as the money or paddy was not lost and that after there was a loss, a different state of affairs came in. But the question arises whether it would not be wrong to say that at one period the appellant must be held to have possession in trust and at another not so to hold and whether he must not be considered to have held it in the same character throughout, that character being determined from a consideration of the whole contract and its conditions. The position seems to be that one portion of the contract between the parties makes appellant hold the money in trust for a specific purpose whereas another portion of it is incompatible with a state of entrustment. The resulting effect and whether it should be held that there exists an entrustment within the meaning of section 405 of the Indian Penal Code, seems to me to be a matter of some difficulty to decide. This view of the case was not clearly realized and argued before me and I would prefer not to express any opinion at present.

My views as set out above are different to those held by my learned colleague, Mr. Justice Ormond, in what is allowed to be a precisely similar case. Mr. Justice Ormond held that the money was advanced as a loan pure and simple, which loan was re-payable on demand and that the accused undertook to buy paddy with the money and sell the paddy to the Company at the current market-rate and that as in the case of a loan, the property in the money passes to the borrower, there could be no breach of trust in respect of property of which he is a sole owner. In the case of *Tha Po* v. *Emperor* (2), the question as to whether a condition that threw on the person taking the advance all loss made any difference in his relation to the person advancing money was not discussed.

But there is a further aspect of the case that has presented itself to me which is as follows: As I have set out, in my opinion, the undertaking and promissory-notes taken by themselves show that there was an entrustment to appellant within the meaning of the section 405 of the Indian Penal Code. If it be decided that the effect of the additional oral agreement so varies the meaning of the written part of the contract that it must be held that there was no entrustment within the meaning of section 405 of the Indian Penal Code, does not a consideration of the oral part of the agreement create a condition of affairs inconsistent with the plain meaning of the terms of the undertaking and the promissory-notes taken together? and if so, should appellant be allowed to produce in evidence at all that part of the contract between him and the Company that can only be proved by oral evidence. In the case of *Reid* v. *So Hlaing* (3), it was held that where a party to a written contract institutes a criminal proceeding against another party to such contract which involves consideration and determination of what the contract between the parties was, no evidence of any oral agreement or statement is admissible in such proceeding for the purpose of contradicting, varying, adding to, or subtracting from the terms of the written contract unless such oral evidence is admissible under one or more of the provisos to section 92 of the Evidence Act. The only proviso of section 92 that, I can see, is applicable to the present case is proviso 2 and that is only applicable when the separate oral agreement is not inconsistent with the terms of the written one.

Owing to the divergence of opinion between my learned colleague and myself and the other questions of difficulty which I consider arise, I am of opinion that the matter is one for the consideration of a Full Bench of this Court and I refer to such the following question:

(2) 3 L. B. R. 200; 4 Cr. L. J. 463.
(3) 5 L. B. R. 241; 3 Bur. L. T. 124; 8 Ind. Cas. 952; Cr. L. J..

"On the facts proved and admitted as to the agreement that was entered into by the appellant and the respondent Company and which are admissible in evidence, was there an entrustment of property within the meaning of section 405 of the Indian Penal Code to the appellant?

JUDGMENT OF THE FULL BENCH.

Fox, C. J.—I understand that the facts admitted and proved are that the Company advanced the appellant Rs. 10,000 upon his signing five promissory-notes for Rs. 2,000 each payable on demand, and the document set out in the reference; that the Company would not have advanced him the money unless he had signed the document as well as the promissory-notes; that whether he expended the whole of the Rs. 10,000 on purchasing paddy or not, he supplied paddy to the Company of the value of only about Rs. 5,000 at the Rangoon market-rate at the time of delivery; that the accused, although colloquially called a paddy broker, was not a broker in the proper sense of the term but was a *middleman* who, if the agreement evidenced by the document had been carried out, would in his own interests have bought at the lowest price he could get paddy at or in the village named, and after having it brought and delivered to the Company at Rangoon would have received from it credit against the advance of Rs. 10,000 calculated on the ruling market-rate in Rangoon on the day of delivery for paddy of the description delivered; that if such price covered more than what he had paid for the paddy and his expenses in bringing it to Rangoon and delivering it, he was entitled to the profit; if, however, the opposite was the case, he was to bear the loss; that until the delivery of paddy to the firm, he bore all responsibility for the money he received and for paddy he bought with it, and he was responsible for payment of the promissory-notes in any event, even if the money he received was lost by him by misadventure or act of God.

The above liabilities and position of the accused were not, as I understand, the result of any oral agreement; they are the legal consequences of the documents, and the relationship of the parties. The accused was charged with having dishonestly used part of the Rs. 10,000 advanced to him and with having thereby committed criminal breach of trust. This charge involved his having held the Rs. 10,000 on trust for the Company. The question is whether he did so hold it or not. Criminal breach of trust is defined as follows in section 405 of the Indian Penal Code:—"Whoever, being in any manner entrusted with property, or with any dominion over property, dishonestly (*i.e.*, with the intention of causing wrongful gain to one person or wrongful loss to another person) misappropriates or converts to his own use, that property, or dishonestly uses or disposes of that property in violation of any direction of law prescribing the mode in which such trust is to be discharged, or of any legal contract, express or implied, which he has made touching the discharge of such trust, or wilfully suffers any other person so to do, commits criminal breach of trust." The name and definition of the offence are the creation of the Indian Legislature. Under rulings of the Privy Council, we are precluded from looking for guidance as to the intentions of the framers to anything that was said by them before the Penal Code was passed; we are confined to consideration of the words used, but can look for assistance to the illustrations given in the Code. Looking at the section and illustrations, it appears to me clear that before a person can be convicted of the offence he must have in some way become entrusted with property or with dominion over property of which he is not the beneficial owner, and whilst holding or having dominion over such property, he must have dishonestly done one of the acts enumerated in connection with it. One of those acts is the dishonest use or disposition of the property in violation of any legal contract, but the legal contract must be one the person has made *touching the discharge of the trust*. Mere breach of contract is not made synonymous with criminal breach of trust. In all the cases given in the illustrations to the section in which the person is said to have committed the offence, the property in respect of which he is said to have committed it is property of another person, or property of which the offender was not the beneficial owner, although in one case, that of the executor he had the legal title.

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I take it then that the property in respect of which criminal breach of trust can be committed must be either the property of some person other than the person accused, or that the beneficial interest in or ownership of it must be in some other person, and the offender must hold such property on trust for such other person or in some way for his benefit.

The documents in the present case do not appear to me to show that the accused was entrusted with the Rs. 10,000 by the prosecutors, or that he subsequently held it in trust for them or for their benefit. What they do show is that they advanced him the Rs. 10,000 and that he undertook and contracted to use it in a certain way. In colloquial language, it may, no doubt, be said that when one party advances money to another, he entrusts him with that money, but the legal position is that the person to whom the money is advanced becomes indebted to the one who has advanced it, and becomes liable to discharge the debt, not by paying back the actual coin or currency notes advanced, but by paying other moneys or in any other way which may be provided for or agreed upon. I agree with Dr. Gour's view in paragraph 3198 of his Penal Law of India in which he deals with comments on the debts and the case of moneys advanced to a contractor for building purposes. He says: "In such a case, it would be more correct to say that the money was paid and not entrusted to the contractor, though payment may have been made for a specific purpose and on the strength of a certain assurance." If the accused held the Rs. 10,000 on trust for the prosecutors or for their benefit, then the prosecutors retained certain rights over the coin or currency notes they advanced; but if on taking the money to his home, it had been seized under an attachment in execution of a decree against him, would or could a Court have sustained a claim by the prosecutors to the money as against the attaching creditor? Again, if he held the money on trust for them, the prosecutors might have brought a suit to specifically enforce the contract by compelling him to carry out his undertaking to apply the money only in the purchase of paddy. But would or could a Court under section 12 of the Specific Relief Act enforce such undertaking on the ground that the act to be done was in the performance of a trust? The case of *Reg.* v. *Townshend* (4) was relied on by the prosecutors' Advocate. In that case, the accused was held liable to conviction under the 80th section of the Larceny Act, 1861, not in respect of the advance he received from the prosecuting bank, but in respect of the goods and proceeds of goods which the advance enabled him to obtain, and because he had in writing undertaken to hold the goods in trust for the bank and to hand it the proceeds of goods he sold. The document he signed was held to make him a trustee of the goods and proceeds of them under an express trust. There is no such declaration of trust of either the money advanced or the paddy to be bought with it in the agreement in this case. The word "entrusted" has been explained and applied in England in *Phillips* v. *Huth* (5) and *Hatfield* v *Phillips* (6) but these cases were in connection with an act dealing with civil liabilities only, and do not seem to afford much guidance to the interpretation of the word in a penal statute. The decision of Mr. Recorder Agnew in *Maung Pwa Gyee* v. *Queen-Empress* (7) was referred to. In the judgment, he said that the fact that the relation of debtor and creditor is established does not necessarily make it impossible to convict the debtor of criminal breach of trust, but he cited no authority for this proposition. The case of *Queen-Empress* v. *Moss* (8) does not appear to me to support it. In that case, the charges against one of the Directors of the bank, as set out in the report, were that he had dishonestly misappropriated, etc., the funds of the bank, not the funds of the depositors, the creditors of the bank. Being of opinion that the documents in the present case evidence an advance by the prosecutors to the accused resulting in the relationship between them of creditor and debtor, and a contract by the debtor to apply the moneys in a certain way, which contract did not establish a relationship of trustee and *cestui que trust* between them, I would answer the question referred in the negative.

(4) (1884) 15 Cox Cr. C. 466.
(5) 6 M. & W. 572; 10 L. J. Ex. 65.
(6) 9 M. & W. 647; 11 L. J. Ex. 425.
(7) 2 Bur. L. R. 9.
(8) 16 A. 88.

HARTNOLL, J.—Though I understood at the first hearing that the terms as to profit and loss agreed on between the parties were the subject of an oral agreement, at the hearing of the reference, it was stated that this was not so and it was explained that the terms I referred to as those of an oral agreement were a matter of general practice in Rangoon. Though I have not got it down in my notes, according to the learned Chief Judge, whose judgment I have had the opportunity of reading, he understood that the terms between the parties referred to by me as those of an oral agreement were the legal consequences of the documents and the relationship of the parties. At the hearing of the reference, no arguments were based on the case of *J. Reid* v. *So Hlaing* (3) and it was allowed that all admitted facts were admissible in evidence, and so it is not necessary to discuss any bearing that that case might have on the decision of this one. In the order of reference, I set out my views and I abide by them. It certainly appears to me that the mere circumstance of taking the five promissory-notes does not necessarily establish the fact that the relation between the parties could only have been that of creditor and debtor and that, therefore, there could have been no entrustment. The real essence of the agreement between the parties seems to me beyond doubt the supply of paddy by appellant with the money of the respondent Company, and the money was handed over to him for this purpose and no other—a fact which both parties thoroughly understood. It is clear to me that the transaction was no ordinary loan nor was it ever meant to be one by either party. The respondent Company reposed confidence in appellant that he would only purchase paddy with the money advanced, and but for this confidence reposed in him he would not have got it at all. By restricting, its use I am unable to hold that the respondent Company ever parted with all their property in the money. But, as I have noted in the order of reference, the difficult point of the case, to my mind, is whether the conditions of profit and loss are so incompatible with a state of entrustment that it should be ruled that there was no such state. After the most serious consideration, I have come to the opinion that they are not. It is not impossible to hold a thing in trust and yet be responsible in case of its loss. To take a simple case, *A.* hires a carriage to *B.* for a certain monthly sum, one of the terms of the contract being that *B.* is responsible for all damage to, or the total loss of the carriage. In such a case, if *B.* dishonestly sold the carriage and used the proceeds, he would clearly be guilty of criminal breach of trust, and yet he agreed to bear all loss that happened to the carriage. The present case is a more complicated one, but yet I think that the same principle comes in. Though appellant held the money in trust, yet if he chose to do so, he could contract to render himself liable for all loss incurred with respect to it. Holding, therefore, the views I do, I would answer the question in the affirmative.

ORMOND, J.—The answer to the question referred depends, I think, upon the answer to the following question:—Do the two documents and the admitted facts show: either (1) that it was the intention of the parties that the complainant should retain the ownership of the money handed over to the accused, and should be the owner of the paddy, as soon as the money might be converted into paddy? or (2) that the accused, having borrowed the money from the complainant, constituted himself a trustee of that money for the complainant? The promissory-notes would show that the money was advanced as a loan; and, consequently, that the accused became the owner of the money. And there is nothing in the other documents to show that this was not so. There is nothing in writing to show that the promissory-note was only to take effect in certain events. The second document speaks of the money as having been "advanced" to the accused, and the accused undertakes to "use" it in a specified manner, *i.e.*, to buy paddy with it; the accused is to "deliver" the paddy to the complainant and is to be credited with its market-value on the day of delivery. This is quite consistent with the accused having to buy the paddy on his own account and agreeing to sell it to the complainant. And the admitted facts, *viz.*, that the accused was a paddy dealer and

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that he was to bear any loss and to make any profit he could out of the transaction, places it beyond question, to my mind, that the accused was to buy the paddy on his own account and not as trustee or agent on behalf of the complainant. If the document had not recited the fact of the advance by the complainant it would be simply a contract under which the complainant agreed to buy and the accused agreed to sell about 10,000 baskets of paddy at the market-rate of the day on which delivery is given, delivery to be given within 20 days. And the second document clearly does not contain a declaration of trust on the part of the accused. It contains an expression of intention on the part of the accused to expend a certain fund (which belonged to him) in the purchasing of paddy and an undertaking to sell that paddy to the complainant. But there is a great difference between a promise to expend money in a certain manner "in future," *e.g.*, in the purchasing of paddy, and a declaration of trust *in præsenti* in respect of the contemplated fund. And it can make no difference how the accused became the owner of the fund, whether by loan from the complainant or otherwise. If the facts had simply been that the accused had said to the complainant "I have Rs. 10,000 in my pocket, if you promise to buy and take delivery of 10,000 baskets at any time within 20 days at the market-rate of the day on which delivery is given, I will promise to buy paddy and sell it to you;" and if that proposal was accepted, it could not be contended that the accused had constituted himself a trustee for the complainant in respect of that Rs. 10,000. In a prosecution for criminal breach of trust, the fact of the trust must be established beyond all reasonable doubt. But in this case the prosecution in effect asks the Court to find that a trust is necessarily implied because the accused promised to buy paddy with the money at his own risk and on his own account, and to sell the paddy to the complainant. The loan by the complainant was, no doubt, induced by the promise of the accused but I can find no sufficient indications of a trust in the two documents and the admitted facts. I would, therefore, answer the question referred in the negative.

ROBINSON, J.—It is necessary to state distinctly what are the facts proved and admitted in this case. I am of opinion that they are as follows:—Accused is a paddy dealer. He entered into an agreement with complainant on March 21st, 1911, the object of which was that he should supply and complainant should receive about 10,000 baskets of paddy which were to be bought at Mangaladon and delivered within 20 days of that date at complainant's Dowbong Mill. Complainant the same day advanced him Rs. 10,000 to enable him to obtain this paddy and the parties agreed that the account should be settled by complainant taking over the paddy at the ruling market-rate on the day of delivery. The accused undertook to use this sum for no other purpose than the purchase of the above mentioned 10,000 baskets of paddy. The accused executed simultaneously five promissory-notes for Rs. 2,000 each in favour of complainant. The price at which complainant agreed to take over the paddy was fixed and accused was to bear the loss, if any, and was to retain the profit, if any, resulting from the price at which he bought the paddy. The question, then, is, whether there was an entrustment of this money to accused by the complainant? Did the legal ownership of the money remain in the complainant, or was there merely a debt due by accused to the firm? There can be no question that the money was advanced under the agreement that it should be used for the one specific purpose of buying paddy to be delivered to the complainant and for nothing else. The accused, no doubt, promised that this should be done and would not have got the advance unless he had so promised. But is that sufficient to create an entrustment? We must, I think, regard all the circumstances and there are the facts as to the profit and loss and the fact of the execution of the promissory-notes. The accused was clearly not the agent merely of the complainants nor a buyer for them and no more. If he had been, the com-

plainant must have taken the profit or borne the loss. The complainant wanted the paddy and was willing to assist accused towards getting it for them. Accused was willing to get it, but would only do so if the complainant helped him with an advance. The consideration to the accused was the chance of making a profit and the fact that he would have to bear the loss shows that the legal ownership in the advance vested in him. The profit or loss to the complainant arose from the price ruling on the day of delivery and had nothing to do with the price on date of first purchase. It might be argued that the chance of profit was the payment for the service to be rendered, but there is more present here and the liability to bear the loss takes the matter out of the category of mere remuneration and has a distinct bearing on the question of ownership of the advance. Then we have the execution of the promissory-notes. These cannot be regarded merely as an extra precaution or as providing a ready means of recovering the money on breach of the contract to supply paddy They evidence *prima facie* a loan and they must be given the ordinary legal effect that they carry. This must be taken into consideration with the facts and inferences set out above, and they greatly strengthen the argument that accused was not a mere agent but was legal owner of the money. For the purposes of the criminal offence, it is essential that there should have been an entrustment, that a trust should have been created. This is not to be lightly assumed but must be clearly proved. The mere fact that promissory-notes were taken does not prove a loan, but even if none had been executed, I do not see that accused can be held to have become trustee. Complainant wished certain things to be done for his benefit and was prepared to help accused to do them. This is a common experience. The money is given not as a loan merely nor as a trust. It is advanced to enable accused to do that which will be for complainant's benefit and accused is prepared to undertake the work on the chance of making a profit. It is a loan with a condition attached, which condition was not fulfilled.

I am unable to find that the money advanced remained the property of the complainant or that it was entrusted to accused in such a way as to amount to an entrustment and so to bring failure to carry out the promise within the purview of the criminal law. Suppose accused had gone to Mangaladon and arranged for the purchase of 10,000 baskets, but had then been robbed off the Rs. 10,000, would he have had to bear the loss? Complainants, I take it, would say so and sue on the pro-notes and they would deny all liability to the vendors of the paddy to carry out the contract. It could not legally be held that accused was their agent so as to connect them with the contract to purchase. Moreover, it is stated in the order of reference that under these circumstances accused was to bear the loss. I think the question referred should be answered in the negative.

PARLETT, J.—I am inclined to think that it was the intention of both parties to the transaction that the complainant firm should retain some dominion over the money in the hands of the accused, but that they have not succeeded in carrying out their intention. In my opinion, the effect of the documents and of the agreement between the parties as to profit and loss on the transaction and as to liability for loss of the money advanced from whatever cause arising was, that the property in the money passed to the accused. I doubt whether the last clause of Exhibit A amounted to a declaration of trust with respect to the money and the paddy into which it might be converted, and unless it did the beneficial interest remains with the accused. I would answer the question referred in the negative.

MUHAMMAD ABDUL AZIZ v. RAFI-UN-NISSA BIBI.

ALLAHABAD HIGH COURT.
FIRST CIVIL APPEAL No. 6 OF 1911.
October 22, 1912.
Present:—Sir Henry Richards, Kt., Chief Justice, and Mr. Justice Banerji.
MUHAMMAD ABDUL AZIZ—DEFENDANT—APPELLANT
versus
RAFI-UN-NISSA BIBI AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Lambardar and co sharers—Suit for profits—Pendency of partition suit no bar—Civil Procedure Code (Act V of 1908*), O. II, r.* 2*—Principle for awarding interest—Discretion.*

The pendency of a suit for partition is no bar to a suit for profits against the *lambardar*.

Two suits were brought for profits, one in respect of the share owned by the plaintiff as owner and the other as an assignee of another co-sharer:

Held, that the second suit was not barred by Order II, rule 2 of the Code of Civil Procedure.

There is no provision of law regulating what interest ought to be allowed to a successful plaintiff suing for profits against the *lambardar*. The rate depends on the discretion of the Court. In fixing the rate of interest, the analogy of what is allowed in favour of a landlord against a defaulting tenant is not an unreasonable one.

First appeal from a decree of the Assistant Collector, first class, of Jaunpur.

Messrs. *W. R. Porter*, *Surendra Nath Sen* and *Shafi-uz-zaman*, for the Appellant.

Messrs. *A. H. O. Hamilton* and *J. N. Chaudhri*, for the Respondents.

JUDGMENT.—This and the connected appeals arise out of suits for profits against the *lambardar*. The plaintiff, *Musammat* Rafi-un-nissa, in the first appeal which arises out of Suit No. 2 of 1909, sues for certain arrears of profits as vendee of the share of her husband, Abdul Jail. The other first Appeal No. 334 arises out of Suit No. 3 of 1909. In that suit, the plaintiff claimed merely as assignee of the profits, the profits being originally due to Abdul Alim. The connected second appeals also arise out of suits for profits under similar circumstances. All the appeals can be conveniently disposed of by a single judgment.

The first point taken by the learned Advocate on behalf of the appellant is grounded on the following circumstances. It appears that a suit was brought in the year 1905 to which the present defendant was a party for the partition of certain property including the property in respect of which the profits are claimed in the present suits. It would appear that that suit, which was commenced in the year 1905, has got only as far as the filing of the written statement. Who is to blame for this gross delay does not appear, but it is a matter for which both parties must to some extent be accountable. The Judge, in whose Court the case is pending, himself ought to have taken some steps to prevent a case remaining pending for such an unreasonable period. However, all that we have to consider in the present appeal is, whether or not the pending of that suit is a bar or ought to prevent a decree being given in favour of the plaintiff assuming her to be otherwise entitled thereto. We entirely agree with the Court below that it is no bar and that it ought not to interfere with the decrees being granted in the present suits.

The next ground was the suggestion that the plaintiff by bringing a suit for profits in respect of the share of which she was owner and being also entitled to the profits which she claimed in the second suit as assignee, has split her cause of action and that the second suit was barred by the provisions of Order II, rule 2, of the Code of Civil Procedure. Reliance was placed on the cases of *Shafkat-un-nissa* v. *Shib Sahai* (1) and *Murti* v. *Bhola Ram* (2). In our opinion, the circumstances of these two cases are quite distinguishable from the present. In the present cases, the plaintiff's cause of action is quite distinct, in one case she is the absolute owner of the property in respect of which she claimed profits, in the other case she is merely the assignee of the profits, due to her vendor. In addition to this, the vendor in each case was different.

The third ground was that the Court below was wrong in allowing 12 per cent. interest. There is no actual provision of law regulating what interest ought to be allowed to a successful plaintiff suing for profits against a *lambardar*. The Court below appears to have acted on the analogy of what is allowed in favour of a landlord against a defaulting tenant. We think that this is not an unreasonable analogy and we see no sufficient reason to interfere with the discretion of the Court below in the amount of interest allowed. In some cases, there might be

(1) 4 A. 171.
(2) 16 A. 165.

special circumstances which would render it inequitable to give a high rate of interest, but no such special circumstances have been brought to our notice in the present case and, furthermore, the question of the rate of interest distinguishable from giving interest at all, does not appear to have been raised in the Court below.

The fourth point was that the Court below decided the case without hearing certain witnesses of the defendant. We are referred to an order on the order sheet, dated the 26th of September 1910. It does not appear from anything to which our attention has been called that any application was made to the Court below to adjourn the hearing of the case upon any reasonable grounds and that such application was refused. Furthermore this ground of appeal has not been supported by any evidence which would lead us to the conclusion that the Court below had acted unfairly or improperly. In our opinion, this ground of appeal has no force whatever.

The fifth ground was hardly pressed and, in our opinion, has no force whatever. It is suggested that because there is a clause in the *wajib-ul-arz* that no division of profits was necessary, that, therefore, the profits could not be sued for. It is quite clear that this provision in the *wajib-ul arz* dealt with the period when the owners of the property were joint in food and business, a circumstance which has long since ceased to exist.

There were certain other minor grounds which were mentioned in the course of the argument which has been fully dealt with in the judgment of the Court below with which we agree.

The result is that the appeal fails and is dismissed with costs.

Some objections were filed on behalf of the respondents as to the amount allowed against the *lambardar*. We think that the Court below dealt with the case fairly and justly upon such evidence as the parties on both sides thought fit to adduce. We think there is no force in the objections and accordingly dismiss them with costs.

Appeal dismissed.

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL No. 717 OF 1911.

September 10, 1912.

Present:—Mr. Justice Batchelor and Mr. Justice Rao.

HIRA NAIKIN—APPELLANT

versus

RADHA NAIKIN—RESPONDENT.

Naikin—Adoption of daughters—Will—Construction—Persona designata—*Practice—Hindu Law or Muhammadan Law.*

A., a professional prostitute of the class known as Naikins, made a Will in favour of *B.*, a daughter of one of her near relatives. The Will declared that as the testatrix had no issue of her own, she had adopted *B.*, but in the subsequent passages of the Will, sometimes the adjectival phrase 'adopted daughter' occurred, and sometimes it did not occur in relation to the name of *B.* *B.* claimed the property of *A.* as her adopted daughter and also as *persona designata* under the Will:

Held, that the adoption was invalid;

Mathura Naikin v. *Esu Naikri*, 4 B. 545 at p. 565, followed.

Venku v. *Mahalinga*, 11 M. 393, dissented from.

(2) that according to the Will, *B.* was not to take the property as being the adopted daughter, but that *B.* was the adopted daughter and was to take the property because she was the special object of *A.*'s bounty.

Where in a case, there is no specific evidence to show whether the parties are to be reckoned as Muhammadans or Hindus, but from the very beginning of the litigation to its appearance in the High Court in second appeal, the assumption, which throughout was accepted by both parties, was that they were to be governed by Muhammadan Law, the High Court would not allow any of the parties in the second appeal to disturb that assumption.

Second appeal from the decision of the first class Subordinate Judge, at Satara, in Appeal No. 53 of 1910, varying that passed by the Subordinate Judge at Karad, in Civil Suit No. 429 of 1908.

Mr. *Jayakar*, (with him Mr. *J. R. Gharpure*), for the Appellant.

Mr. *Coyajee*, (with him Mr. *K. H. Kelkar*), for Respondent No. 1.

Mr. *S. R. Bakhale*, for Respondent No. 2.

JUDGMENT.—In this litigation, the parties concerned are professional prostitutes of the class known as Naikins, and their relation is shown by the genealogy recorded in the judgment of the lower Appellate Court. The plaintiff Radha sued to obtain by partition her half share in the properties belonging to the women, Tana and Sundra. There is no dispute as to the plaintiff's right to a half share

HIRA NAIKIN v. RADHA NAIKIN.

in Tana's property. The question is whether the plaintiff is entitled to a half share in Sundra's property. The second defendant Hira resists such a claim alleging that she herself was validly adopted as a daughter of Sundra, and is thus entitled to inherit Sundra's property ; and in the alternative, she relies upon the Will of Sundra made in her favour.

The trial Court found substantially in the second defendant's favour. But that decree was materially modified on appeal by the learned first class Subordinate Judge, and from his decree, the present appeal is brought by the second defendant.

The first question raised in argument by Mr. Jayakar for the appellant was that the suit is time-barred, inasmuch as knowledge of Hira's adoption ought to be debited to the plaintiff as early as Sundra's Will of the 22nd of November 1898. There is, however, no evidence upon the record from which the plaintiff can be affected with notice of the adoption prior to the 26th of February 1904, when Exhibit 17, the plaintiff's own deposition, shows that the fact of the adoption had been brought to her attention. Reckoning from the 26th February 1904, the suit is well within time. The objection, therefore, as to limitation fails.

Then an argument was addressed to us upon the question of the legality of Sundra's adoption. Upon the record as it stands, and the facts as they are found, we have no doubt that the case falls directly within the authority of Mr. Justice West's decision in *Mathura Naikin* v. *Esu Naikin* (1), which was referred to with approval by the Privy Council in *Ghasiti* v. *Umrao Jan* (2). It is true that the learned Judges of the Madras High Court in *Venku* v. *Mahalinga* (3) have upon this point taken a different view from that which commended itself to Mr. Justice West; but for ourselves, we accept West, J.'s judgment and desire to say nothing which could restrict or weaken its authority. On the facts as they are found, that decision governs the case, and we see no reason whatever why we should furnish the appellant with further opportunities of eking out her case by calling evidence on the chance of proving other facts with a view to lend a different colour to the defence. The second point, therefore, also fails.

The third point was that even if Hira was debarred from inheriting as an adopted daughter by reason of the invalidity of the adoption, yet she was entitled to take as *persona designata* under Sundra's Will. We are of opinion that this argument must prevail. The question here, as in all such cases, is whether the words expressing the relation of an adopted daughter are merely descriptive of the particular individual selected for the testator's bounty, or whether those words are to be read as the cause or condition of that bounty. Several cases have been alluded to in argument with a view of affording us assistance in our present decision. It seems to us, however, that in a matter of this kind, each case must really be decided upon its own facts, and that we should gain no direct assistance by looking outside the particular expressions of the Will now before us That Will, undoubtedly, starts with the declaration that as the testatrix has no issue of her own, she has adopted Hira, the elder daughter of the Naikin Mana. It must be remembered, however, that this Hira was nearly related to the testatrix. In the subsequent passages in the Will, sometimes the adjectival phrase 'adopted daughter' occurs and sometimes it does not occur in relation to the name Hira. And it appears to us, upon the best consideration we can give to the Will as a whole, that in the testatrix's mind the validity of the adoption was not a condition precedent to Hira's deriving the benefit accorded to her under the Will. We do not think that Hira was to take the property as being the adopted daughter, but that Hira was the adopted daughter and was to take the property because she was the special object of Sundra's bounty. In our opinion, therefore, the argument upon this point must prevail.

It remains only to notice what will be the effect of this decision. For the appellant, it is contended that the whole of the property devised by the Will should go to the appellant whereas in the Courts below the Will has been treated as being a Muhammadan Will, so

(1) 4 B. 545 at p. 565.
(2) 20 I. A. 193 at p. 201; 21 C. 149.
(3) 11 M. 393.

that by its provisions Hira could not take more than one-third of the property. We think that this latter view is the view which must now be accepted. It is true that there is no specific evidence to show whether the parties are to be reckoned as Muhammadans or Hindus. What we have, however, is the fact that from the beginning of this litigation to its appearance in this Court in second appeal, it has been fought out consistently on the footing that the parties in this respect were to be governed by Muhammadan Law. Since that has been the assumption which throughout was accepted by both parties, we think, it is too late now for the second defendant in second appeal to attempt to disturb it.

The decree of the lower Appellate Court must, therefore, be varied by the insertion of a provision directing that the appellant is entitled to receive one-third of the property devised by the Will of Sundra; and the appellant must have her costs of this appeal in proportion to her success.

Costs of Mr. Bakhale's client, respondent No. 2, to come out of the estate.

Decree varied.

ALLAHABAD HIGH COURT.

FIRST APPEAL FROM ORDER No. 54 OF 1912.

October 30, 1912.

Present:—Mr. Justice Tudball and Mr. Justice Rafique.

CHUTTAN LAL—DEFENDANT—APPELLANT

versus

KANHAYA LAL—PLAINTIFF—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XVII, rr. 2, 3—Plaintiff's suit dismissed by Assistant Collector as not proved—Appeal.

An Assistant Collector dismissed a suit for profits recording the following order:

"As the plaintiff has failed to prove his claim and has failed to prosecute the case, it is ordered that the plaintiff's claim be dismissed for default."

Held, that the Assistant Collector did not take action under rule 2, Order XVII, but that he acted under rule 3 of that Order and, therefore, an appeal lay against that order.

First appeal from an order of the District Judge of Aligarh.

Mr. *Peary Lal Banerji*, for the Appellant.

Dr. *Satish Chandra Banerji*, for the Respondent.

JUDGMENT.—This appeal has arisen out of the following circumstances. The plaintiff-respondent brought a suit for profits as assignee of the right of a co-sharer against the *lambardar* in the Court of an Assistant Collector of the first class. The suit was first of all dismissed for default of appearance and was, subsequently, reinstated on the application of the plaintiff. Various dates were fixed and issues were framed. The 4th of April was finally fixed for the taking of the evidence of the parties and the decision of the suit. The plaintiff's *mukhtar*, though he had filed an application for summoning the witnesses, apparently had delayed in paying in the necessary diet money. The summonses to witnesses had, therefore, not been served. The *patwari*, one of the witnesses, had apparently attended at a previous day and was again present on the 4th of April. The plaintiff's *mukhtar* on that date wished to examine him as a witness. As, however, the *patwari* had been present for several days at the Court, the Assistant Collector ordered the *mukhtar* to pay him a certain amount of extra diet money. This the *mukhtar* refused to do, whereupon the Court refused to allow him to examine the witness. The rest of the plaintiff's evidence was not forthcoming. The Court accordingly adjourned the case to the 13th of April, for the purpose of delivering judgment. As the Assistant Collector's order on the back of the application shows, after the case had been closed, the *mukhtar* put in an application for adjournment to enable him to again summon his witnesses. This the Assistant Collector, for reasons given by him good, bad, or indifferent, refused to allow, and on the 13th of April, the Judge delivered a judgment dismissing the plaintiff's claim. That judgment ends as follows: "The plaintiff is the vendee of the profits of Hoti Lal, co-sharer. The sale-deed is an unregistered one. Even the necessary witnesses to prove the deed were not summoned. As the plaintiff has failed to prove his claim and has failed to prosecute the case, it is ordered that the plaintiff's claim be dismissed for default and that he should pay the defendant's costs." The judgment was written in vernacular, and the word which has been translated as default is the word *adam-pairawi*. From the decision of the Assistant Collector an appeal was

preferred to the District Judge who remanded the case to the Court of first instance for decision on its merits. The defendant has brought this appeal against this order of remand, and in the commencement it is admitted that no appeal lies to this Court from an order of remand, and an application has been filed asking this Court to treat the appeal as a revision. The point taken is that the decision of the first Court is not a decree but an order of dismissal for default, and, therefore, no appeal lay to the District Judge. On behalf of the respondent, the opposite party, a plea is taken that there is no machinery in the Tenancy Act which enables this Court to revise an order of remand passed by the District Judge, that section 115 of the Code of Civil Procedure does not apply, and that even under that section, this Court has no power to revise the order in question. It is unnecessary to decide the points raised on behalf of the respondent, because we are clearly of opinion that the Court of first instance did not take action under rule 2 of Order XVII, but that it took action under rule 3 of that same Order and that it simply dismissed the plaintiff's suit as he had failed to prove his case. In this view, it is quite clear that an appeal did lie to the District Judge. There is, therefore, no reason whatsoever for interference on revision even if we had power to entertain such an application. In this view, the appeal fails and the application is disallowed. The opposite party will have his costs.

Appeal dismissed.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1219 OF 1911.

October 1, 1912.

Present:—Mr. Justice Sundara Aiyar and Mr. Justice Sadasiva Aiyar.

RATHNA MUDALI—PLAINTIFF—APPELLANT

versus

PERUMAL REDDY AND OTHERS—DEFENDANTS—RESPONDENTS.

Mortgage—Redemption—Owner of share of equity of redemption, whether entitled to redeem the whole mortgage—Transfer of Property Act (IV of 1882), ss. 0, 91.

A person who is entitled only to a part of the equity of redemption has not, under all the circumstances, the right to insist on redeeming the whole mortgage. If there are several persons in whom the equity of redemption is vested, one of them and the mortgagee acting together are entitled to deal with the former's interest in the equity of redemption and the mortgagee's rights as against him, provided the rights of the other owners in the equity of redemption are not thereby injuriously affected. But nothing done either by a mortgagor or a mortgagee behind the back of the other can affect the right of that other so as to injure him in any way.

Where the mortgagee has dealt with one of those entitled to the equity of redemption, a person entitled to the remainder may claim to redeem his share only of the equity of redemption.

The objection to a mortgagee splitting up a mortgage is entitled to weight only where the owner of a part of the equity of redemption is prejudicially affected by the splitting.

If some of the co-owners of the equity of redemption should desire to continue the mortgage of their shares, one of the co-owners cannot be held entitled to redeem the whole of the mortgage.

The question whether the Court will allow redemption of the whole of the mortgage at the instance of a person entitled to a part only of the equity of redemption, must depend on the circumstances of each case.

Per *Sadasiva Aiyar, J.*—A mortgagee has the right to release any portion of the mortgaged property or to sue for a sale of a portion thereof, though such release or abstention will not affect the rights and liabilities as between themselves of the owners of the different portions of the equity of redemption in the mortgaged properties.

Second appeal against the decree of the Court of the District Judge of Chingleput, in Appeal Suit No. 147 of 1910, presented against that of the Court of the District Munsif of Chingleput, in Original Suit No. 513 of 1908.

Mr. *Narayanasastry*, for the Appellant.

Mr. *S. Sreenivasa Iyengar*, for the Respondents.

JUDGMENT.

SUNDARA AIYAR, J.—The facts of this case, so far as they are necessary for the decision of this second appeal, are briefly as follows:—One Vedachala executed an usufructuary mortgage to one Thangavelu, on the 7th April 1900, Exhibit II. This mortgage was subsequently transferred to the 2nd and 3rd defendants in the suit. The 1st defendant is the heir of Thangavelu. Vedachala had three sons. He and each of the sons was, therefore, entitled to a fourth share in the property. On the 2nd May 1900, two of the sons, Singaravelu and Thiruvengada, sold their half share of the property to the 4th defendant. The mortgagees, the 2nd and 3rd

defendants, received half of their debt from the 4th defendant and gave up possession of a portion of the properties to him. The plaintiff obtained a transfer of the equity of redemption from Vedachala and his remaining son and he has instituted this suit for redemption of the mortgage. He claims to be entitled to be put in possession of the whole property mortgaged by Vedachala on payment of the whole amount and is not content with a decree for possession of half the property on payment of half the mortgage amount. The 4th defendant resists the plaintiff's attempt to recover the whole of the property and contends that as he has become the owner of half of the equity of redemption and the plaintiffs entitled only to the remaining half, he should not be allowed to recover possession of more than half of the properties and he claims to be entitled to retain possession of the property in his possession as representing the share of his transferors. The District Munsif gave the plaintiff a decree for the whole property. On appeal, the District Judge modified the Munsif's decree holding that the plaintiff was not entitled to recover the whole of the property and held that on payment by the plaintiff of half of the mortgage amount, the plaintiff and 4th defendant should be held to be jointly entitled to the possession of the mortgaged lands. The second appeal to this Court is preferred by the plaintiff and he contends that he is, as a matter of right, entitled to recover the whole of the property mortgaged under Exhibit II. The question for decision is whether the plaintiff is entitled, as a matter of right, to redeem the whole of that mortgage and to recover possession of the whole of the property in the circumstances of the case. It will be noticed that the mortgagees have split up the mortgage, so far as they could, by receiving a portion of the mortgage amount from the 4th defendant, the assignee of half of the equity of redemption and the 4th defendant has now become the owner of a share both in the equity of redemption and in the mortgage. Section 91 of the Transfer of Property Act lays down that any person having an interest in the right to redeem the property may redeem or institute a suit for redemption of the mortgaged property, but I do not think that it lays down that a person who is entitled to a share only of the equity of redemption has, under all circumstances, the right to insist on redeeming the whole of the mortgage and recovering possession of the whole of the mortgaged property. Section 60 enacts that a person entitled to a share only of the mortgaged property is not entitled to redeem his share only on payment of a proportionate part of the amount remaining due on the mortgage, and lays down an exception where a mortgagee has acquired in whole or in part a share of the mortgagor. The mortgagee under this section has ordinarily a right to insist on treating the mortgage as indivisible and on the redemption of the whole mortgage. But he cannot do so where he has split up the equity of redemption by becoming the owner of a part of it himself. I do not think that there is any principle of justice which requires that a person who is entitled only to a part of the equity of redemption should necessarily be held to have a right to redeem the whole of the mortgage If there are several persons in whom the equity of redemption is vested, there is no reason why one of them and the mortgagee acting together should not be held to be entitled to deal with his interest in the equity of redemption and the mortgagee's right as against him provided the rights of the other owners in the equity of redemption are not thereby injuriously affected. Of course, nothing done either by a mortgagor or a mortgagee behind the back of the other, can affect the right of that other so as to injure him in any way. Where the mortgagee has dealt with one of those entitled to the equity of redemption, it has been held that a person entitled to the remainder may claim to redeem his share only of the equity of redemption. See *Marana Ammanna* v. *Pendayala Perubotulu* (1) and *Subramanyan* v. *Mandayan* (2). It has also been held that a mortgagee may claim to recover the share of the debt due from a person entitled to a portion of the equity of redemption when he has already entered into an arrangement with the owner of the remainder provided the right of the defendant is not prejudiced by the arrangement entered into between the mortgagee and the defendants' co-owners of the equity of redemption.

(1) 3 M. 230.
(2) 9 M. 453.

RATHNA MUDALI v. PERUMAL REDDY.

See Hari Kissin Bhagat v. *Valiat Hussain* (3), *Mahadaji Hari Limaye* v. *Genapat Shet Dhond Shet* (4), *Brij Kishore* v. *Madho Singh* (5) and *Venkatachala Chetty* v. *Srinivasa Varadachariar* (6). In *Lakshuman Giriraya Naik* v. *Madhu Kristian Shervai* (7), it was held that the mortgagee was entitled to have an account taken between him and the owner of a part of the equity of redemption when he had already settled his rights as against the owner of the remainder of the equity. The objection to a mortgagee splitting up a mortgage is entitled to weight only where the owner of a part of the equity of redemption is prejudicially affected by the splitting. In *Huthasanan Nambudri* v. *Parameswaran Nambudri* (8), it was, no doubt, held by this Court that a person entitled to a part only of the equity of redemption had a right to redeem the whole notwithstanding the mortgagee's objection that he should not be permitted to redeem more than his share of the equity. In that case the persons who were entitled to the remainder of the equity were parties to the suit and also seem to have resisted the plaintiff's attempt to redeem the whole. It does not appear whether they claimed to continue the mortgage in so far as their shares were concerned. The decision proceeded on the principle that a mortgage contract was indivisible and that it was the right equally of the mortgagor and mortgagee to keep it indivisible. The judgment was based on some decisions of the English Courts, *Pearce* v. *Morris* (9) and *Hall* v. *Heward* (10); but in those English cases, the plaintiff's co-owners of the equity of redemption were not parties and it does not appear that they objected to the redemption of the whole of the mortgage by the plaintiff. I cannot see any principle on which it should be held that even if some of the co-owners of the equity of redemption should desire to continue the mortgage of their shares, one of the co-owners should be held to be entitled to redeem the whole of the mortgage. I do not think that *Huthasanan Nambudri* v. *Parameswaran Nambudri* (8) was intended to go the length of laying down such a general rule and certainly the English cases, which were followed there did not propound any such rule. The question whether the Court will allow redemption of the whole of the mortgage at the instance of a person entitled to a part only of the equity of redemption must depend on the circumstances of each case and the rights acquired by the mortgagee or by third persons, subsequent to the mortgagee. In this case, there is no reason why the plaintiff should first be allowed to redeem the whole of the mortgage and 4th defendant who has a right both of a mortgagee and mortgagor be left to bring a fresh suit for recovering his share of the equity of redemption from the plaintiff. In two cases, *Marakar Akath Kondira Kayil Mamu* v. *Punjapatath Kutteu* (11) and *Thillai Chetti* v. *Ramanatha Ayyan* (12), it was held that when the plaintiff was entitled only to part of the equity of redemption and the defendant entitled to another part, the plaintiff could not sue to redeem at all without first getting a partition of the equity of redemption. With all respect, it seems to me that those cases have gone too far in holding that the plaintiff's suit should be altogether dismissed. It may be noted that in those cases it was the mortgagee himself who had acquired a share of the equity of redemption and there was, in my opinion, the less reason for holding that a partition should be first effected between the parties to the suit before a suit for redemption could be maintained. In Bombay, on the other hand, it was held that notwithstanding that the mortgagee had become owner of a part of the equity of redemption, the mortgagor was entitled to insist on redeeming the whole mortgage. See *Mora Joshi* v. *Ramachandra Dankar Joshi* (13), *Narayan* v. *Ganapat* (14). In my opinion, both the Madras cases and the Bombay cases mentioned above are contrary to the principle of the proviso to section 60 of the Transfer of Property Act. I can see no reason why on the facts found there should not be a decree for partition in this case so as to allow plaintiff

(3) 30 C. 755; 7 C. W. N. 723.
(4) 15 B. 257.
(5) 28 A. 279; (1905) A. W. N. 279, 3 A. L. J. 27.
(6) 28 M. 555; 15 M. L. J. 442.
(7) 15 B. 186.
(8) 22 M. 209.
(9) 5 Ch. 227; 22 L. T. 190; 19 W. R. 196; 39 L. J. Ch. 342.
(10) 32 Ch. D. 430; 55 L. J. Ch. 604; 54 L. T. 810; 34 W. R. 571.
(11) 6 M. 61.
(12) 20 M. 295.
(13) 15 B. 24.
(14) 21 B. 619.

to recover half the properties included in the mortgage. The 2nd and 3rd defendants did not claim to be entitled to any part of the properties now. The 4th defendant, according to their admission, is entitled to all that the plaintiff cannot claim. I ought to notice a contention that Vedachala was himself entitled to the whole of the property and that the 4th defendant acquired no right by the conveyance he obtained from two of the sons of Vedachala. I am unable to see that this contention was put forward in either of the Courts below. It has not been raised even in the memorandum of second appeal. It was held in Original Suit No. 261 of 1901, which was instituted by the original mortgagee, Thangavelu, against Vedachala and his sons and the 4th defendant that the latter was entitled to the shares of the two sons that were conveyed to him subject to the mortgage in Thangavelu's favour. The plaintiff in this suit did not, as I have already observed, contend in the lower Courts that Vedachala was solely entitled to the property. No doubt, the plaintiff's object in insisting on recovering possession of the whole property is to make an attempt to set up a claim to the whole in case the 4th defendant be driven to another suit for recovering the shares of his transferors. I do not think that this course should be followed. The learned Vakil for the appellant consents to a decree for partition if we hold that he ought not to be allowed to redeem the whole mortgage. I have already held that the plaintiff was in no way prejudicially affected by the mortgagee's splitting up the mortgage and receiving half the amount due to them from the 4th defendant and I am, therefore, of opinion that the decree of the lower Appellate Court should be modified by the plaintiff being allowed to redeem only half the properties on payment of half the mortgage amount, *i.e.*, Rs. 187-5-0. The plaintiff will be put in possession of half the properties included in the mortgage-deed after a fair partition between him and the 4th defendant. The 4th defendant must be put in possession of the remainder. It would be desirable to allot the lands in 4th defendant's possession to him in partition in so far as that can be done without injustice to the plaintiff. In the circumstances, we think the parties should bear their own costs throughout.

SADASIVA AIYAR, J.—I do not think it necessary to set out the facts which have been mentioned in some detail in the judgment just now pronounced by my learned brother. I shall content myself with making some observations on the principal question of law involved in this case. It is unnecessary for the purpose of deciding on that question of law to consider the cases where the objection of the mortgagee to partial partition by the owner of a fraction of the equity of redemption was allowed as a valid objection or the cases where a similar objection of the mortgagee who had himself split up the mortgage was disallowed. Such cases have very little relevancy to the question in dispute before us.

In the Privy Council case, *Nawab Azimat Alikhan* v. *Jowahir Singh* (15), their Lordships say at page 416 that co-mortgagors who were entitled only to a portion of the mortgaged property could not redeem against the will of the mortgagee any portion of the mortgaged property except the one village in which those co-owners (the plaintiffs) were interested. That suit was brought by the purchasers of the equity of redemption in one of the four mortgaged villages for redemption of all the four villages. And their Lordships say that the mortgagee, "if desirous of retaining possession" of the other three villages as mortgagee was entitled to do so against the plaintiffs, "whose rights in that case were limited to the redemption and recovery of their village of Hissanipur, upon payment of so much sum deposited in Court as represents the portion of the mortgage-debt chargeable on that village." I think that this opinion of the Privy Council is binding on us and I, therefore, do not propose to deal in detail with the Indian and English cases decided before and after the Privy Council decision, and I shall make reference only to a few of the latest cases. In *Munshi* v. *Daulat* (16), it was held, following *Kuray Mal* v. *Puran Mal* (17), that where all the proprietors of an estate joined in mortgaging it and the mortgagee subsequently purchased the share of one of the mortgagors and when another mortgagor sued to redeem his own share and also the share of yet another mortgagor, the plaintiff could only redeem his own share. In *Mir Eusuff Ali Haji* v. *Panchanan Chatterjee* (18), the following observations occur:—

(15) 13 M. I. A. 404; 14 W. R 17 (P. C.)

(16) 29 A. 262; A. W. N. (1907) 49; 4 A. L. J. 74.

(17) 2 A. 565.

(18)) 15 C. W. N. 800 at pp. 805, 806; 11 C. L. J, 639; 6 Ind. Cas. 842.

RATHNA MUDALI v. PERUMAL REDDY.

"Now what was the true position of the mortgagors when they transferred a portion of the property to Henasatulla, who obtained a release from the mortgagee by payment of a sum of money"? It is firmly settled doctrine that as between the original parties, the release of a part of the premises does not affect the lien of the mortgagee upon the residue, which is bound for the whole debt. No doubt, as against others who have liens upon the remainder of the mortgaged premises, a mortgagee, with notice of such lien, has no right to release any portion of the mortgaged premises to the injury of the owners of such liens. To put the matter in another way, as between the mortgagor and mortgagee, the latter is not entitled to release a portion of the hypothecated property and diminish his own security to that extent. While, therefore, we adhere to the view taken in the cases of *Imam Ali* v. *Baij Nath Ram Sahu* (19) and *Hakim Lal* v. *Ramlal* (20) that the mortgagee, who has security upon two or more properties which he knows belongs to different persons, cannot release his lien upon one so as to increase the burden upon the others without the privity and consent of the persons affected [*Kattlewell* v. *Watson* (21)], we are of opinion that this doctrine has no application to the present case where the release took place at a time when the appellant had not purchased any interest in the mortgaged premises, and the mortgagors alone were the persons affected by the release. We must not, however, be assumed to adopt the rule laid down by the learned Judges of the Allahabad High Court that such a release may be granted even to the prejudice of persons who had previously acquired an interest in the mortgaged properties. That view is clearly opposed to the principles of equity, justice and good conscience, and though recognised in *Sheo Prasad* v. *Behari Lal* (22), *Misri Lal* v. *Muthu Lal* (23), *Sheo Tahal Ojha* v. *Sheo Dan Rai* (24) and *Pirbhu Narain Singh* v. *Amir Singh* (25), was not adopted in *Ram Ranjan Chakrabutty* v. *Indra Narain Dass* (26).

The case in *Krishnayyar* v. *Muthukumaraswami Pillai* (27), which lays down a similar principle, cannot, to that extent, be supported. The contrary view, which accords with the rule adopted by this Court, was followed in *Ponnusawmi Mudaliar* v. *Srinivasa Naiken* (28). It is again unnecessary for the purpose of deciding this case to express a final opinion on the question whether the mortgagee himself as plaintiff can sue for sale of a portion alone of the mortgaged property after releasing the other portions at his pleasure. As at present advised, and notwithstanding the great respect I have for the opinions to the contrary including that of Asutosh Mukerjee, J., I do not see any objection on principle to the mortgagee doing so.

A mortgagee can sue for a personal decree alone against his mortgagor giving up all claims to bring any portion of the mortgaged properties to sale if he so desires; why should he not, therefore, be allowed to sue for the sale of a portion of the mortgaged property for the whole (or the portion remaining due and unpaid) of his mortgage money, leaving the owners of the equity of redemption in the mortgaged properties to settle their claims as between themselves either in the same suit (if convenient) or in another suit? He would, of course, be barred afterwards from attaching other portions of the mortgaged properties and bringing them to sale in execution of the money decree he obtained. He might also perhaps be barred from again suing for a mortgage decree for sale of the other portions left out in his first suit for sale. But these considerations have nothing to do with his rights to release any portion or to sue for the sale of a portion only of the mortgaged property though such release or abstention would not affect the rights and liabilities as between themselves of the owners of the different portions of the equity of redemption in the mortgaged properties. If he has himself purchased any

(19) 33 C. 613; 10 C. W. N. 551; 3 C. L. J. 576.
(20) 6 C. L. J. 46.
(21) 21 Ch. D. 685 at p. 714; 46 L. T. 83; 30 W. R. 402; 51 L. J. Ch. 281.
(22) 25 A. 79; A. W. N. (1902) 203.
(23) 28 A. 28; A. W. N. (1905) 168.
(24) 28 A. 174; 2 A. L. 630 (F. B.); A. W. N. (1905) 244.
(25) 29 A. 369; A. W. N. (1907) 83.
(26) 33 C. 890; 10 C. W. N. 862.
(27) 29 M. 217.
(28) 31 M. 333.

portion, he must, of course, make proportionate abatement of the mortgage amount when bringing a suit for sale. In the present case, the plaintiff claims only an undivided half share in the mortgaged property. Therefore, it seems to me that *against the will of the mortgagee and of the 4th defendant*, who has obtained half the mortgagee's interest by paying half the mortgage money to the mortgagee and half share in the equity of redemption by purchase of same from two out of four owners of the equity of redemption, the plaintiff cannot claim to redeem more than plaintiff's half share of the mortgaged properties. As I said before, I hold this view, following *Kuray Mal* v. *Puran Mal* (17), *Munshi* v. *Daulat* (16), *Nawab Azimat Ali Khan* v. *Jowahir Singh* (15). There are, no doubt, some comparatively old cases and some English cases in which it was said that a mortgagee could not compel even the owner of only a portion of the equity of redemption to redeem only that portion. But in most of these cases, it does not appear that the owners of the other portions of the equity of redemption were parties to the suit or objected to the plaintiff's redeeming the whole. Any such case, like *Huthasanan Nambudri* v. *Parameswaran Nambudri* (8), which decided that even in that state of circumstances, the plaintiff is entitled to redeem the whole against the will of the mortgagee and against the wishes of the other owners of the equity of redemption, I respectfully dissent from. I am also against making any distinction between cases where the mortgage is split up (*a*) by the mortgagee releasing certain of the properties (or certain share of the properties) comprised in the mortgage, (*b*) by himself purchasing a portion of the mortgaged property, and (*c*) by the joint owners of the equity of redemption effecting a partition of their properties either by metes and bounds or by agreeing to hold the property in common in definite shares instead of jointly. I hold generally that against the mortgagee's consent, the owner of a definite share of the equity of redemption should not be entitled to redeem more than his share unless the owners of the other shares consent, or do not object to plaintiff's redeeming their shares also. The very general words of section 91 of the Transfer of Property Act, "any person, having an interest in or charge on a property, can institute a suit for the redemption of the mortgaged property" cannot be construed to mean that a plaintiff, who owned only a fractional share, can redeem other shares than his own when the owners of those other shares object to his redeeming their fractions or contend that their shares have already been redeemed by them. In the above view, the decree of the lower Appellate Court allowing the plaintiff to redeem the plaintiff's half share alone on payment of half the mortgage amount (which half of the mortgage amount alone remains due to the mortgagee) and allowing the plaintiff in execution to be put in possession of the half share by permitting him to take possession of the whole land as common owner with the 4th defendant, seems to me to be correct. Strictly speaking, this second appeal should be dismissed as plaintiff and 4th defendant did not express their consent in the lower Court to have a partition effected between them; see *Thillai Chetti* v. *Ramanath Ayyan* (12). But as before us, the plaintiff and the 4th defendant have so consented to an order allowing partition on redemption, I concur in the decree proposed by my learned brother.

PRIVY COUNCIL.

APPEAL FROM THE HIGH COURT AT ALLAHABAD.

December 5, 1912.

Present:—Lord Macnaghten, Lord Moulton, Sir John Edge and Mr. Ameer Ali.

LALLU SAHI—APPELLANT

versus

Mahant RAJBANS BHARTHI AND ANOTHER —RESPONDENTS.

Consideration—Proof—Registration not conclusive without further proof—Oral evidence to explain registered deed—Securities without consideration—Other compensation.

Mere execution and registration of a bond, without proof what money had passed, without documentary evidence to show what sums were advanced, without production of account books, and without any witnesses to prove that money had been advanced, is not conclusive on the point that consideration passed between the parties.

On the other hand, oral evidence to explain the purpose of a registered deed purporting to be a bond, is admissible.

Securities in respect of which there was no consideration ought not to be made securities for other unconnected expenses defrayed for the obligor by the obligee.

LALLU SAHI v. RAJBANS BHARTHI.

Appeal from a judgment and decree of the High Court at Allahabad, dated March 31st, 1910, reversing that of the Subordinate Judge of Gorakhpur, dated November 25th, 1908.

Mr. *De Gruyther, K. C.*, (with him Mr. *Dube*), on behalf of the Appellant, contended that the respondents had failed to establish that the bonds were executed without consideration. That oral evidence should not have been admitted to explain away the bond.

Mr. *Ross, K. C.*, (with him Mr. *O'Gorman*), on behalf of the Respondents, contended that no consideration passed for the documents which ought not to be treated as securities for the expenses of the litigation.

Mr. *DeGruyther* replied.

JUDGMENT.

SIR JOHN EDGE.—The suit, in which these two consolidated appeals have arisen, was brought by Babu Lallu Sahi, the appellant here, in the Court of the Additional Subordinate Judge of Gorakhpur, against Mahant Rajbans Bharthi and Babu Thakur Singh, who are the respondents to these appeals. The suit was brought upon two hypothecation bonds, dated, respectively, the 23rd March 1900 and the 27th April 1901, which were made by the defendant, Mahant Rajbans Bharthi. The first bond was made in favour of Babu Rajdeo Singh, deceased, who, in fact, was in that transaction *benamidar* for the plaintiff, and was the father of the defendant Babu Thakur Singh, a *pro forma* defendant against whom no relief was sought. The second bond was made in favour of the plaintiff. The suit was a suit for sale under section 88 of the Transfer of Property Act of the immoveable property mentioned in the bonds. The consideration for the bonds was alleged in the plaint to have been old and present debts. In his written statement, the defendant, Rajbans Bharthi, denied that any consideration had been given or received for the bonds, and stated his version of the transaction between him and the plaintiff which briefly was that he, Rajbans Bharthi, being involved in a dispute and litigation with one Karya Bharthi, relating to property appertaining to a *math*, it was agreed between the plaintiff and him, Rajbans Bharthi, that in consideration of the plaintiff defraying one-third of the expenses in the case, he should put the plaintiff in possession of an 8-annas share in *Mauza* Sirsia Gotha, and in the event of Rajbans Bharthi succeeding in the litigation, he should execute a sale-deed of the 8-annas share in favour of Babu Gobardhan Sahi, the plaintiff's brother. In his written statement, Rajbans Bharthi further alleged that under a perpetual lease of the 31st December 1898, he put the plaintiff in possession of the 8-annas share in *Mauza* Sirsia Gotha, and that, subsequently, during the pendency of the litigation, the plaintiff, without any consideration, obtained from him four bonds, of which two are the bonds in suit.

At the trial before the Additional Subordinate Judge, the plaintiff gave evidence. His case was that the bonds had been given as security for the re-payment of money which he alleged that he had advanced to or on behalf of Rajbans Bharthi. He stated that the defendant had borrowed Rs. 6,200 from him, but he could not remember the occasions on which he gave the money; he had no documentary evidence to show what sums he had advanced to or on behalf of Rajbans Bharthi; he produced no account-book; he had no witness to prove that he had advanced any money to or on behalf of Rajbans Bharthi; and he swore that no agreement had been made between them for the execution of any sale-deed. It was not proved what the expenses of the litigation amounted to. No money had passed on the registration of the bonds. On the other hand, it was proved by witnesses, whose evidence their Lordships see no reason to doubt, that they were present when it was agreed that the plaintiff should defray one-third of the expenses of the litigation, and that a sale-deed of the 8-annas share in *Mauza* Sirsia Gotha should be executed in his favour by Rajbans Bharthi, when the case was concluded. It was also proved that Rajbans Bharthi agreed to execute a lease of the 8-annas share. Rajbans Bharthi also proved the circumstances under which he made the bonds in suit; that there was no consideration for them; that the bonds were given by him at the request of the plaintiff so that they might be used in case he should not execute the sale-deed; and he swore that he had always been willing to execute the sale-deed, but the plaintiff and his brother Gobardhan were not willing that the sale-deed should be executed, and he was helpless.

The Additional Subordinate Judge did not believe the plaintiff's evidence, but finding that the plaintiff had paid part of the expenses of the litigation in which Rajbans Bharthi had been engaged, the Additional Subordinate Judge gave the plaintiff a decree upon the bonds for part of his claim, and as to the remainder of his claim dismissed the suit.

From that decree, the plaintiff and Rajbans Bharthi, respectively, appealed to the High Court at Allahabad. On the hearing of the appeals, the High Court disbelieved the plaintiff's evidence, and, accepting as true the evidence which had been given on behalf of Rajbans Bharthi, dismissed the plaintiff's appeal, and allowing the appeal of Rajbans Bharthi, dismissed the suit.

Their Lordships do not believe the evidence of the plaintiff; they find that the plaintiff and the defendant Rajbans Bharthi agreed that in consideration of the plaintiff defraying one-third of the expenses of the litigation between the defendant Rajbans Bharthi and Karya Bharthi, the defendant should grant a lease to the plaintiff's brother, Gobardhan Sahi, of an 8-annas share in *Mauza* Sirsia Gotha, and should, when that litigation was concluded, execute a sale-deed of that share to the plaintiff, and that under that agreement, the plaintiff paid such moneys as were paid or advanced by him. Their Lordships find that the bonds in suit were, subsequently to that agreement and before the termination of the litigation, given to be used should the defendant Rajbans Bharthi refuse to execute the sale-deed. Rajbans Bharthi has always been ready to carry out the agreement on his part, and their Lordships agree with the High Court that no consideration passed for the bonds, and that securities in respect of which there was no consideration ought not to be made, as was done by the Additional Subordinate Judge, securities for the expenses which were defrayed by the plaintiff in the litigation between Rajbans Bharthi and Karya Bharthi.

Their Lordships will humbly advise His Majesty that the consolidated appeals should be dismissed and the decrees of the High Court be affirmed. The appellant must pay the costs of these appeals.

Appeal dismissed.

Solicitors for the Appellant: Messrs. *Ranken, Ford, Ford,* and *Chester.*

Solicitors for the Respondents: Messrs. *Barrow, Rogers* and *Nevill.*

PRIVY COUNCIL.

APPEAL FROM THE HIGH COURT AT ALLAHABAD.

December 5, 1912.

Present:—Lord Macnaghten, Lord Moulton, Sir John Edge and Mr. Ameer Ali.

MATHURA PRASAD AND OTHERS—APPELLANTS

versus

SHEIKH MUHAMMAD—RESPONDENT.

*Pre-emption—Custom—*Wajib-ul-arz, *construction of.*

The provisions regarding pre-emption in a village were contained in paragraph 14, Chapter II of the *Wajib-ul-arz.* Chapter II was headed thus:—"Mutual rights of the co-sharers, based on custom or particular contracts." Paragraph 14 was headed "Custom relating to the right of pre-emption." The clause gave a right of pre-emption first to a near co-sharer, then to a co-sharer in the *patti,* after that to a co-sharer in the *thok* and lastly to a co-sharer in the *mahal:*

Held, that the terms of the *Wajib-ul-larz* clearly evidenced a *custom* of pre-emption in respect of the *mahals* to which it related.

Appeals heard *ex parte,* under special leave to appeal and consolidated by orders in Council, from a judgment and two decrees of the High Court at Allahabad, dated February 3rd, 1910, reversing a judgment and two decrees of the Subordinate Judge of Azamgarh, dated May 30th, 1908.

Mr. *DeGruyther, K. C.,* (with him Mr. *Dube*), on behalf of the Appellant, contended that the sale was a real and genuine one, that the plaintiff had failed to prove the existence of the custom of pre-emption and that the property was at first offered to the respondent who refused to purchase it.

JUDGMENT.

MR. AMEER ALI.—These appeals, consolidated by an order in Council, dated the 22nd March 1911, arise out of two suits brought by the plaintiff, Haji Muhammad Salim, since deceased, to establish a right of pre-emption in respect of certain lands situated in the District of Azamgarh in the United Provinces. The properties in question consist of shares in a *patti* called Shah Rajab Ali lying in two *mahals,* Hirapatti and

Azampur; and belonged respectively to one Sadruddin Beg and Shah Ahsanullah, who conveyed to the defendants-appellants their shares by two separate deeds of sale. Sadruddin Beg's conveyance purports to be the earlier of the two in date, the allegation being that it was executed on the 11th of March 1903; whilst the sale-deed of Ahsanullah bears date the 31st of May following.

The suit in respect of Ahsanullah's share was instituted in the Court of the Subordinate Judge of Azamgarh; the other regarding Sadruddin's sale-deed, in consequence of the value of the claim, was brought in the Court of the Munsif whence it was subsequently transferred to the Subordinate Judge and both cases were tried together by that officer.

The plaintiff's claim in both actions is based on the *wajib-ul-arz* of the *mahals* within which the lands in suit are situated. The material part of the document is to be found in paragraph 14, Chapter II, which is headed thus:—"Mutual rights of the co-sharers, based on custom or particular contracts." Paragraph 14 is headed "Custom relating to the right of pre-emption," and under this heading is to be found the following statement:—

"If any of the co-sharers in a village wishes, under necessity, to transfer his share in any particular village or in all the villages, under an absolute or a conditional sale or mortgage or *zar-i-peshgi* lease, or if he wishes to hypothecate the property, it will be incumbent on him to offer it at first to his near co-sharer, after that to a co-sharer in the *patti*, then to a co-sharer in the *thok*, and then to a co sharer in the *mahal*, and if, notwithstanding the publication of the transfer and intimation being given, the aforesaid co sharers are not prepared to purchase the property and to pay a reasonable price for the same with reference to the quality of the property which other persons are prepared to pay or to advance as a loan on the mortgage, etc., then in that case the transferor shall be at liberty to transfer the property to some one else."

The rest of the paragraph is immaterial for the purposes of the present case.

The plaintiff alleged that as a co-sharer in the *patti*, he was entitled to a right of pre-emption against the defendants-appellants who were only co-sharers in the *thok*, or *mahal*, and had no interest in the *patti* itself; and he charged that the conveyance of Sadruddin Beg was fabricated with the object of proving that the defendants held a share in the *patti* when they took a conveyance of Ahsanullah's interest. The defendants-appellants attempted to defeat the plaintiff's claim mainly on two grounds, both based, as the claim was, on the terms of the *wajib-ul-arz*, *viz.*, first, that they themselves were co-sharers in the *patti* and, therefore, the conveyance to them was not open to question; and *secondly*, that the shares sold to them had been offered before to the plaintiff and refused by him. It will be noticed that the first defence put forward by the appellants proceeded on the assumption that the sale-deed executed by Sadruddin Beg was, in fact, prior in date, to the sale by Ahsanullah.

The words "particular contracts" in the heading of Chapter II of the *wajib-ul-arz* seem to have suggested to the defendants' advisors the ingenious plea that paragraph 14 gave expression to a "contract" between the co-sharers, which came to an end with the last Settlement. The Subordinate Judge held in favour of the defendants' contention, but the High Court overruled it, and the objection has not been seriously pressed before this Board. In their Lordships' judgment, the terms of the *wajib-ul-arz* are absolutely clear regarding the existence of the custom of pre-emption in the *mahals* to which it relates.

As already stated, the main dispute between the parties turned on the questions of fact, (1) whether the conveyance by Sadruddin Beg represents a real transaction; and (2) whether the plaintiff refused to take the properties when offered to him by the defendants' vendors.

The Subordinate Judge found on both points in favour of the defendants, and accordingly dismissed the plaintiff's suits. The High Court of Allahabad have reversed the decree of the first Court, and decreed the plaintiff's claim. The learned Judges, after a careful examination of Sadruddin Beg's document and of the evidence relating to its execution on the date it purports to bear, came to the conclusion that it did not represent a genuine transaction, and that it "was fabricated with a view to defeat the claim for pre-emption which the plaintiff was about to bring." The reasons which

they have given for arriving at that conclusion appear to their Lordships cogent and decisive.

But it has been contended before this Board that the defendants had adduced evidence to prove the offer to the plaintiff in the presence of some of his relatives, and that neither he nor the persons, who were alleged to have been present on the occasion, had come forward to contradict the story of the appellants' witnesses; and it is urged that the High Court erred in overlooking this fact. The learned Judges appear to have carefully considered also this part of the defendants' case. They say in effect that he has attempted to prove the allegation of offer by the same witnesses, who spoke to the sale-deed of March 1906, which they found to be fabricated, and that they saw no reason for believing the testimony of witnesses, one part of whose evidence was found to be distinctly false. It is said, however, that there is one witness who did not depose to the deed. In their Lordships' opinion, the learned Judges were perfectly justified, upon a consideration of the whole evidence, in arriving at their conclusion; that it was open to them to take the view they have expressed, and that it would not be right to treat their judgment in the piecemeal manner suggested by learned Counsel for the appellants.

On the whole, their Lordships are of opinion that these appeals should be dismissed, the respondent will have such costs as he may be entitled to.

And they will humbly advise His Majesty accordingly.

Appeal dismissed.

Solicitors for the Appellants: Messrs. *Barrow, Rogers* and *Nevill.*

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 626 OF 1911.

December 10, 1912.

Present:—Mr. Justice Tudball and Mr. Justice Rafique.

BHAGWATI PRASAD—PLAINTIFF—APPELLANT

versus

BHAGWATI PROSAD AND OTHERS—DEFENDANTS—RESPONDENTS.

U. P. Land Revenue Act (III of 1901)—Partition—Guardian of minor not properly appointed—Hindu Law—Joint family—Partition against manager of family—Other members of family bound by it.

Where a partition is fairly and honestly obtained against the managing member of a joint Hindu family, it is binding even on a minor member of that family, although no guardian had formally been appointed for such minor by the Revenue Court during the partition proceedings.

Second appeal from the decision of the District Judge of Gorakhpur, dated the 1st of May 1911.

Dr. *Tej Bahadur Sapru*, for the Appellant.

The Hon'ble Mr. *Sundar Lal* (with him Mr. *Howard*), for the Respondents.

JUDGMENT.—The facts out of which this appeal has arisen are as follows:—

The plaintiff Bhagwati Pershad together with his half brothers Jokhu and Lachman and his uncles Umrao and Ram Nath and the widow of his deceased uncle Nandan constituted a joint Hindu family. The family owned a share in M. Dobaria Buzurg.

The defendant 1st party Bhagwati Pershad No. 2, minor, etc., were also co-sharers and so also were the defendants 3rd party.

These three groups of co-sharers cultivated their separate *sir* lands. The defendants 2nd party are the plaintiff's half brothers and uncles and aunt.

The first set of defendants applied to the Collector under the Land Revenue Act, for partition of their share into a separate *mahal.*

The plaintiff was then a minor and as the names of all the members of the family were recorded in the *khewat*, his name was also recorded therein under the guardianship of his half-brother Lachman. There was no objection to the partition nor is it denied even now that the parties to the partition were not the owners in possession of their recorded shares.

In the *wajib-ul-arz*, there was recorded the express wish of the then co-sharers that at the time of partition, if it occurred in the future, the various co-sharers should be maintained in possession of the various lands which they thus held. This is also in accordance with the provisions of the Land Revenue Act and it is a rule regularly followed in all partitions unless it is not possible to divide

the *mahal* fairly and justly between the co-sharers, in which case the rule has perforce to be broken. Provision is made for this in the Act. In the partition proceeding there was an entry to the effect. That the rule was to be followed.

But apparently the defendants 1st party and the plaintiff's brothers and uncles came to an agreement out of Court, threw their *sir* lands into the *hotch potch* and the whole *mahal* was divided into shares. Fraud, collusion and dishonesty were alleged by the plaintiff in the present suit, against both his own relations and the first set of defendants, but he has utterly failed to prove these allegations and the Courts below have held against him on this point and it is not now put forward. It may, therefore, be taken for granted that the partition was justly and fairly carried out, and it was completed and sanctioned by the Collector on 30th September 1908. The plaintiff, at that time though a minor, was not far from his majority, for he instituted the present suit on 27th May 1910 as being major and of full age. He attained his majority in fact on 25th November 1908. (*Vide* his plaint.).

In the course of the partition, many plots of land which he and his family cultivated as *sir*, were placed in the *mahal* of the first defendants.

In the course of the partition case, the Revenue Court omitted to make any formal appointment of a guardian *ad litem* for the present plaintiff.

The application for partition was made on 19th February 1908.

On 2nd April, a petition was filed by the plaintiff's brothers and uncles to the effect that they had no objection. It was not signed by Lalman but by Jokhu on his behalf and the plaintiff's name was omitted.

On 2nd July 1908, the agreement mentioned above was written and it was filed on 3rd July 1908, and with it a *mukhtarnama* signed with Lachman's name. Plaintiff's name was entered in this application (or agreement).

Jokhu again appears to have signed for Lachman.

On the same day, Jokhu filed an application that the plaintiff was a co-sharer and his share should be entered in Lachman's *patti*. His name was then entered in all papers from which it had been omitted. After the partition lots had been drawn up, the family apparently concluded that it was a mistake not to retain their *sir* plots in their own shares. Accordingly, Umrao and Ramnath, the two uncles, and Jokhu filed a petition of objection on 31st August 1908. This was disallowed.

Thereupon, Lachman and others appealed to the Commissioner and this was also disallowed. The partition was completed.

The present suit was brought by the plaintiff alleging,

(1) fraud and dishonesty on the part of his own brothers and uncles with intent to ruin his interests;

(2) that though Lachman was nominated as a guardian *ad litem*, the Court did not formally appoint him;

(3) that he was unfit to act as guardian and not entitled to the post as the minor's mother was alive;

(4) that he did not, as a matter of fact, look after the minor's interests;

(5) that the Revenue Court did not grant any sanction to the agreement in regard to the mode of partition of the lands and that the said partition had been detrimental to the minor's interests

On these allegations, he asked for a declaration, that the partition was unlawful and void and that defendants 1st party had no right or share in the 5-annas 4-pies share of the family and those plots of land which had been the *sir* and *khudkasht* of plaintiff's family and which had been allotted to them, (the defendants). In the alternative, he asked to be put into possession of those specific plots. The Court of first instance held that the plaintiff was entitled to maintain the suit in respect only to his own share and granted a declaration that the partition was not binding on him and that the defendants 1st party were not entitled to the possession of the plots (of *sir* and *khudkasht*) in dispute belonging to the plaintiff's share. It was further declared that the decree did not affect the rights of the defendants 1st party regarding so much of the lands in dispute as appertained to the share of the defendant 2nd party.

This decree clearly was one which if it were to have any effect would really upset the whole partition. It did not even make the plaintiff restore to the other party those

lands which he received in lieu of his *sir* and *khudkasht* plots in dispute.

On appeal, the District Judge dismissed the suit *in toto.*

He was of opinion that the managing members of the joint family were parties to the partition and as there was no fraud for collusion proved, all members of the family were bound by it and could not go behind it and that the present suit was one brought at their instigation to get behind the partition and to attain the object which they failed to attain in the Revenue Court by their objections and appeal.

The plaintiff appeals. In the beginning, we have to point out:

(1) That no fraud has been established.

(2) That it has nowhere been shown that the partition has been made to the detriment of the plaintiff or that he has not received his fair share of the parent *mahal.*

(3) That his objection to it is directed not to a question of proprietary title but merely to the mode in which the lands have been distributed.

(4) That the Revenue Court is not in any way subordinate to the Civil Court in respect to the mode of distribution of the land. The suit must fail.

Firstly, section 233 clause (*h*) of the Land Revenue Act clearly states that no person shall institute any suit or other proceeding in the Civil Court with respect to the partition of *mahals* except as provided in sections 111 and 112 of the Act. The present suit does not fall under either of these two latter sections. Of course, a person, who was no party, to a partition proceeding in the Revenue Court could hardly be held to be bound by such a partition but the Civll Court, while giving him relief in such a case, could not go behind the partition and re-distribute the land. It would have to take the new *mahals* as they were and give the plaintiff adequate relief. The plaintiff's case is, that by reason of the omission of the Revenue Court to formally appoint a guardian, he was really no party to the partition and that even if this formal defect be not fatal to the partition, his brother Lachman was unfit for the post and did not look after his interests and ought not to have been appointed in the presence of the plaintiff's mother.

But whatever might otherwise have been the result of the Revenue Court's irregularity, there is in the present case a circumstance which is fatal to the plaintiff's case. His family was a joint family, *i.e.*, one legal entirety and it was duly represented by the adult male members. The whole body of adult members was made a party to the proceeding. Their interest and the minor's interests were one and the same. There was no fraud and nothing has been put before the Court to show that the interests of the family or the minor have in any way suffered.

There has, therefore, been a partition fairly carried out between the family on one side and the other defendants on the other. The minor was duly represented either by Lachman or the managing member or members of the family. In regard to Lachman the plaintiff in his evidence stated "Lachman, was master and did all my business after my father's death." We are, therefore, of opinion that even though no guardian was formally appointed for the plaintiff in the Revenue Court, he was duly represented and a partition fairly and honestly obtained against the managing members of the family is binding on him.

We would note here that we allowed the plaintiff an opportunity of taking the matter of the partition on review to the Board of Revenue, the highest Court of Appeal and revision on the Revenue side so that any injustice might, if it exists, be set right. The Board has rejected his application and nothing has been shown to us which goes to prove that the partition was other than just and equitable.

In the circumstances, therefore, we hold that the suit was properly dismissed. We dismiss the appeal with costs including fees on the higher scale.

Appeal dismissed.

CALCUTTA HIGH COURT.

MISCELLANEOUS CIVIL APPEALS NOS. 279 AND 280 OF 1912 AND CIVIL RULES NOS. 3608, 3639 AND 3640 OF 1912.

July 29, 1912.

Present:—Sir Cecil Brett, KT., Judge, and Mr. Justice Chapman.

THE EASTERN MORTGAGE AND AGENCY CO., LD.—PLAINTIFFS—APPELLANTS

versus

IN NO. 279

FAKURUDDIN MAHOMED CHOWDHURY AND ANOTHER—DEFENDAETS—RESPONDENTS

IN NO. 280

GOLAM SATTUR CHOWDHURY AND ANOTHER—DEFENDANTS—RESPONDENTS.

Mortgage—Mortgage-deed providing for appointment of Receiver—Inability of Receiver to pay any interest—Direction by Court to Receiver to pay money to mortgagor to prefer appeal from mortgage-decree—Order of Court, whether justifiable—Order, whether appealable—Appeal—Civil Procedure Code (Act V of 1908), O. XL, r. 1 cl. (1) (d), O. XLIII, r. 1 cl. (s).

A mortgage-deed provided that *G.* was to be appointed manager of the mortgaged properties on behalf of the mortgagors and was to hold charge of them until he had paid off the principal and interest due to the mortgagee, and that if the manager failed to discharge his duties, the mortgagees might appoint a Receiver of the rents and profits of the mortgaged premises.

The manager was unable to obtain possession of the properties, and a suit upon the mortgage was instituted and a Receiver was appointed. A decree was made in the suit.

The mortgagors-judgment-debtors obtained an order from the Court on the Receiver to pay over to them certain sums of money to enable them to appeal from the decree passed against them in the mortgage suit:

Held, (1) that Order XLIII, rule 1, clause (*s*), gave an appeal in the case of an order like the present passed under clause (1) (*d*) of rule 1 of Order XL;

(2) that the mortgage-bond and the order passed for the appointment of the Receiver did not provide for the payment of any sum to the mortgagors for the purpose of instituting appeals from decrees obtained against them on the basis of the mortgage, and the Court below ought not to have allowed them the amounts.

It appeared that the mortgagee had not received anything as interest:

Held, that under the circumstances, the order of the Court below could not be supported.

Appeals from the order of the first Sub-Judge of Backergunge, dated, respectively, May 6th, June 6th, June 4th, June 6th, 1912.

Mr. *B. C. Mitra*, Dr. *Rash Behary Ghose*, Babus *Provash Chandra Mitter* and *Ambika Pada Chowdhury*, for the Appellants.

Mr. *B. Chakravarti* and Babu *Gunada Charan Sen*, for the Respondents.

JUDGMENT.—These two Appeals, Nos. 279 and 280 of 1912, are preferred against orders passed by the Subordinate Judge of Barisal on the 6th May 1912, on applications made to him by the judgment-debtors in two suits, Nos. 358 and 359 of 1910, instituted in his Court and orders passed on the 5th and 6th June 1912, disallowing objections made to those orders by the decree-holders, the present appellants. The appellants, the Eastern Mortgage and Agency Company, Limited, were the plaintiffs in both these suits and, in each suit, they sought to recover money due on mortgage-bonds. In suit No. 358, they sought to recover the principal with interest on a mortgage-bond executed by the defendants, Fakuruddin Mohamed Chowdhuary and others, on the 16th August 1895, for Rs. 1,85,000, and in Suit No. 359, the same Company sought to recover the principal with interest on another charge for Rs. 60,000, created on the same properties as those covered by the mortgage-bond, on the 11th July 1900. The defendants in the second suit were Gholam Sattur Chowdhury and others. On trial, the plaintiffs obtained preliminary decrees against Fakuruddin Mohamed Chowdhury and others, defendants in suit No. 358 of 1910, for Rs. 3,90,104, and against Gholam Sattur Chowdhury and others, defendants in suit No. 359 of 1910, for Rs. 1,20,224. From the mortgage-deed, it appears that the money was lent on the mortgage on certain conditions. The first was that Messrs. Garth and Weatherall were to be appointed managers of the properties on behalf of the mortgagors and were to hold charge of the properties for a certain number of years until they had paid off the principal and the interest due to the mortgagees. The deed then provided for the manner in which the management was to be conducted and the collections of the estate were to be applied. The Government revenue was first to be paid, then the Municipal cesses, then rents for *sikmi* and *patni* tenures of superior landlords and all other charges payable in respect of the mortgaged premises for the defence and

preservation thereof, and then the mortgagees were to be paid half-yearly the interest due on the loan. The deed further provided in paragraph 6 that, if the managers failed to discharge their duties as provided in the deed, the mortgagees might appoint a Receiver of the rents and profits of the mortgaged premises; and it then went on to provide as follows:—"Every Receiver, so appointed, shall be required to give security, etc., and shall be bound to apply and dispose of the rents and profits of the said mortgaged premises as hereinbefore provided in the case of managers by clause V, section 3, save that the salary or other remuneration of the Receiver shall be payable instead of the commission of the managers therein referred to."

The managers, owing, it is said, to obstruction offered on behalf of the mortgagors, were unable to obtain possession of the properties or to carry on the management and, in consequence, Messrs. Garth and Weatherall were appointed trustees for the mortgagors and this arrangement was agreed to by the mortgagees. This arrangement appears not to have been more satisfactory than that which preceded it, the mortgagees receiving nothing by way of interest from the properties, and, in consequence, on the 26th September 1910, a Receiver was appointed on an application by the mortgagees which was consented to by the mortgagors.

The two suits were disposed of in April 1912, and the Receiver, who was in possession from the 26th September 1910 up to that date, appears to have still continued in possession.

After the disposal of the two suits by the Subordinate Judge, two applications were made by the two sets of judgment-debtors in the two cases to the successor-in-office of the Subordinate Judge, who decided the suits, praying for orders from him on the Receiver to pay over to them Rs. 6,000 and Rs. 4,000 respectively in the two cases. The judgment-debtors seem to have asked that these sums should be paid over to them in order to enable them to appeal against the judgment and decree passed against them in each of the two suits.

We understand that the learned Counsel, who now appears on behalf of the present appellants, took exception at the time to any such order being passed by the Subordinate Judge and he was given to understand that no final order would be passed until the learned Counsel had had an opportunity of applying to the High Court. However, no sooner had the learned Counsel left Barisal than the Subordinate Judge called up the two applications and passed orders granting the prayers in both of them. The learned Counsel, on receipt by telegram of intimation of the orders passed, applied to this Court for a temporary stay of the orders of the Subordinate Judge which was granted, and three days afterwards, put in two formal applications applying for rules on the opposite party to show cause why execution of the orders should not be suspended pending the disposal of the appeals.

These two Rules being Nos. 3639 and 3640 of 1912, together with the order directing the stay of delivery of the money by the Receiver to the judgment-debtors which is Rule No. 3608 of 1912, were brought before this Court for hearing on the 17th June last and, at the request of the parties, it was directed that the hearing of the appeals preferred by the present appellants against the orders of the Subordinate Judge, dated the 6th May 1912, directing the delivery of the two sums to the two sets of judgment-debtors should be expedited. The two appeals have, therefore, now come on for hearing before us.

A preliminary objection has been taken to the competency of the two appeals by the learned Pleader for the respondents, who has contended that, having regard to the provisions of Order XL, rule 1, and Order XLIII, rule 1, clause (*s*), Civil Procedure Code, no appeal lies. We hold that this contention is unsound. Clause (*d*) of rule 1 of Order XL, distinctly provides that the Court may, by order, confer upon the Receiver powers for the application and disposal of the rents and profits of the estate under his management. The learned Counsel has suggested that this order must be one passed at the time of the appointment of the Receiver so as to give a right to appeal under Order XLIII, rule 1. This contention is, in our opinion, manifestly unsound; for, no Court could possibly pass orders at the time of the appointment of the Receiver so as to cover the application and disposal of the rents

and profits which might be collected subsequently. We think that there can be no doubt that Order XLIII, rule 1, clause (*s*), gives an appeal in the case of an order like the present passed under clause (*d*) of rule 1 of Order XL.

In the case of *Mohunt Anand Das* v. *Ram Perkash Das* (1), the question was raised whether an appeal lay against certain directions given by the Court under Order XL, rule 1, clause (1) (*d*), and it was held that an appeal would lie by virtue of Order XLIII, rule 1 (*s*). In our opinion, therefore, the preliminary objection taken fails.

In support of the appeals, it has been argued that, under the terms of the mortgage-deed and under the terms of the order appointing the Receiver, the learned Subordinate Judge was not justified in giving directions to the Receiver to pay over to the two sets of judgment-debtors the sums of Rs. 6,000 and Rs. 4,000 respectively for the purpose for which they were applied for. We have already, in this judgment, stated the conditions on which Messrs. Garth and Weatherall were appointed as managers, on behalf of the mortgagors and have referred to the provision in the deed for the appointment of a Receiver with similar powers at the instance of the mortgagees in the event of their failure to carry on the management. Those clauses of the mortgage-deed lay down specifically and distinctly that the duties of the Receiver after collecting the profits are, *first*, to defray the costs of management which are not to exceed 20 per cent. of the gross collection; *secondly*, to pay the Government revenue and cesses and rents due to superior landlords and, in the *third place*, to pay the half-yearly interest due to the mortgagees. The Receiver appears to have been appointed by the Court in these two suits in accordance with the terms of this deed and, in the order appointing him, the Subordinate Judge directs, after providing for the Receiver's remuneration, that he shall meet all collection charges out of his remuneration which is fixed at 12½ per cent. of the actual collection, and he then empowers him to institute and defend all suits regarding these properties whether for collection of rents or for any other purpose, and then goes on to direct him to pay the Government revenue and all rents due to superior proprietors out of the collections, and after doing all this, to deposit the balance in Court. There was a further direction in Case No. 359 of 1910, that the Receiver should pay the mortgagors defendants their maintenance allowance of Rs. 150 per month.

The mortgage-bond and the order passed for the appointment of the Receiver certainly do not provide for the payment of the two sums under appeal to the mortgagors for the purpose of instituting appeals in order to set aside decrees obtained against them on the basis of the mortgage.

The Subordinate Judge, however, in passing the orders allowing the payments holds that, as the decrees in the two mortgage suits are merely preliminary decrees and as no decrees absolute have been passed, the petitioners, the mortgagees, have no absolute right in the properties of the defendants and so have no right to impose on the defendants any conditions as to the application of the profits of the estate. He has further held that, as under the terms of the deed, it was provided that pecuniary grants might be allowed for law expenses, the payments such as he has directed the Receiver to make in these two instances came within the provisions of the bond.

These two reasons which the learned Judge has given for disallowing the objections taken by the present appellants to the payments to the defendants of the sum of Rs. 6,000 and Rs. 4,000 and for directing the Receiver to make the payments do not appear to us to be sound. The fact that the decrees in the mortgage suits were preliminary decrees and not decrees absolute could not, in any way, affect the powers of the Receiver appointed in a suit like the present. The appointment of the Receiver as contemplated by clause (6) of the mortgage-deed and the order in the two suits was clearly for the benefit of the mortgagees. It is alleged on behalf of the mortgagees—and it has not been disputed by the other side—that, ever since the loan was made, the mortgagees have not received one single pice as interest and, in these circumstances, under

(1) 14 C. W. N. 183; 5 Ind. Cas. 69.

the ordinary provisions of the law, the mortgagees would be entitled to apply for the appointment of a Receiver pending the disposal of the suits, and such a Receiver would be appointed as a general rule as a matter of course where the interest payable under the mortgage was in arrear. See Cootes Law of Mortgages, 7th Edition, Volume II, page 946, and the leading cases referred to therein. The appointment of the Receiver having been made in order to protect the interests of the mortgagees, the view taken by the Subordinate Judge that, after such appointment, the mortgagors are entitled to appropriate and dispose of the profits through the Receiver according to their own option is certainly incorrect. Under the ordinary law, it would be the first duty of a Receiver, so appointed for the protection of the interest of the mortgagees, to apply the profits, after defraying all charges and costs necessary for the protection of the properties covered by the mortgage, to the payment of the interest on the mortgage-debt. In the two cases now before us, the Receiver under the provisions of the mortgage-deed and under the order of the Court appointing him was bound, after first applying the profits in the manner directed in the bond and the order, to apply the balance, in the first instance, to the payment of interest on the mortgage-bond. Pending the disposal of the suits and until the decrees should be made absolute, the order of the lower Court was, no doubt, correct that this balance of the profits necessary to pay the interests on the mortgage and any surplus should be paid into Court.

We find, however, that no such payments were ever made by the Receiver since he was appointed and the only information which has been given to us as to his appropriation of the profits is that, on the 14th November 1910, he paid Rs. 250 to the defendants in Suit No. 358 of 1910 and Rs. 200 to the defendants in Suit No. 359 of 1910; that, on the 27th April 1911, he paid Rs. 400 to the former and Rs. 300 to the latter; on the 29th September 1911, he paid Rs. 500 to the former and Rs. 500 to the latter and on the 22nd December 1911, he paid similar sums to both. Further, in February 1912, under orders of the District Judge, he paid Rs. 1,800 and on the 22nd March 1912, he paid a further sum of Rs. 6,000. In addition to these, he paid maintenance allowance to the defendants in Suit No. 358 from July 1910 to July 1912 at Rs. 150 a month amounting to Rs. 3,300. This brings up the total amount to Rs. 14,250.

Of the above, payment of the maintenance allowance is covered by the order appointing the Receiver, but so far as the other sums are concerned, there is nothing to indicate what justification there was for those payments or what reasons the learned Judge had in February and March 1912 for directing the payment of sums amounting to Rs. 7,800 to the defendants. Certain it is that, while those sums were being paid by the Receiver to the two sets of defendants in opposition to the terms of the deed and the order of his appointment, no sums whatever were paid into Court or to anybody, in compliance with the terms of the deed and the order of appointment, to cover the interest due to the plaintiffs mortgagees in the two suits on their mortgage-debts.

We have not in the present appeals to deal with these previous payments but all we have to decide is whether the orders of the Subordinate Judge directing the further payment of Rs. 6,000 and Rs. 4,000 can be supported. In our opinion, on the materials before us, it is impossible for us to sustain these orders. The learned Counsel, who appears on behalf of the respondents, has not attempted to support the orders of the Subordinate Judge on the grounds that, under the terms of the mortgage deed, the two payments might be made for legal expenses; and we think he is right in not making such an attempt. It seems to us idle even to suggest that, in a mortgage-deed, the mortgagees would have agreed to the insertion of a clause to enable the mortgagors to obtain funds to contest the rights of the mortgagees under the mortgage-deeds. We hold, therefore, that the learned Judge was not justified in finding that the two sums should be paid under the terms of the deed as allowances for legal expenses; and we also hold that the view which he took that the plaintiffs decree-holders had no position until the decrees were made absolute to object to the two payments is equally untenable. The

materials, before us, fail to show either that any sum has been deposited in Court or that the Receiver has, in accordance with his first duty as a Receiver appointed for the protection of the mortgagees' interest, appropriated the profits for the payment of interest on the mortgage-debt; and until such sums had been paid into Court sufficient to cover the interest due on that debt, we hold that the Subordinate Judge was not justified in passing the orders directing the Receiver to pay over the sums of Rs. 6,000 and Rs. 4,000 to the judgment-debtors. The result, therefore, is that we decree both the appeals and set aside the orders of the Subordinate Judge, dated the 6th May 1912, directing the payment of the two sums of Rs. 6,000 and Rs. 4,000 in the two Suits Nos. 358 and 359 of 1910 respectively. The appellants, who were the opposite party in the Court of Subordinate Judge, are entitled to their costs in this Court as well as in the lower Court. We fix the hearing fee in this Court at five gold *mohurs* in each case.

The two appeals having been disposed of, it is unnecessary to take up the Rules which accordingly are discharged but without costs.

Appeals allowed:
Rules discharged.

LOWER BURMA CHIEF COURT.
MISCELLANEOUS CIVIL APPEAL No. 81 OF 1912.
July 22, 1912.
Present:—Sir Charles Fox, Kt., Chief Judge, and Mr. Justice Hartnoll.
M. A. J. NOBLE—APPELLANT
versus
BANK OF BURMA, LIMITED—RESPONDENT.

Companies Act (VI of 1882), ss. 140, 169—Appointment of official liquidator—Wishes of creditors—Discretion—Appeal—Powers of Appellate Court.

The appointment of any person as an official liquidator is so entirely a matter for the discretion of the Judge dealing with the winding-up that an Appellate Court will not review his decision except under very special circumstances or unless it can be shown that the Judge had acted on a wrong principle.

Section 140 of the Indian Companies Act does not make it obligatory on the Court to comply with the wishes of the majority of creditors.

Appeal against the order of Mr. Justice Robinson, dated 27th June 1912, in Civil Miscellaneous Case No. 54, appointing Mr. E. R. Holdsworth, sole official liquidator of the Bank of Burma, Limited.

FACTS.—The Bank of Burma suspended payment about the end of 1911. Two liquidators were appointed by the shareholders and depositors and they presented their reports by the end of January 1912. Afterwards, only one liquidator was looking after the Bank accounts. Not satisfied with his work, the applicant, in consultation with the Bombay and Calcutta depositors, applied for a winding-up by the Court and also for the appointment of Mr. B. Cowasjee, Barrister-at-Law, Rangoon, as joint or sole liquidator. The matter came before Mr. Justice Robinson sitting on the Original Side and he passed an order, appointing the previous liquidator as the official liquidator. His order ran as follows:—

ROBINSON, J.—I have now to decide who shall be appointed liquidator, his salary, the security to be required and the matter of an advisory Committee. The Bombay and Calcutta creditors urge the appointment of Mr. B. Cowasjee, Barrister at-law, the Rangoon creditors that Mr. E. R. Holdsworth, the provisional official liquidator, be continued. On behalf of the former, Mr. Giles argues that the practically unanimous wish of the creditors representing very large claims should be recognised and accepted. Section 40 of the Act is pressed on me, and it is pointed out that these creditors are the only persons interested who have bestirred themselves in the matter. I do not deny that the wishes of so large a body of creditors are entitled to great weight, and I have not failed to give it close consideration. Ever since the last hearing, I have been aware of their wishes and have given much thought to the matter. There is, however, no bounden obligation on the Court and I must, therefore, consider the matter from every point of view. If I find no objection or reason to think their wishes would tell against the successful conduct of this liquidation, I should be prepared to fall in with them. But in a case of this magnitude, I am compelled to weigh the matter with great care and not merely to accept the proof of the desire of the majority of

creditors. I do not at present see that it necessarily follows that the share-holders will get nothing and I am of opinion that the appointment of the liquidator is a matter of the gravest moment.

The Bank closed its doors on November 14th, 1911. What happened thereafter is instructive and I consider cannot be overlooked in coming to a decision. From the affidavit of Mr. D. E. Wacha, dated May 7th, 1912, it appears that a meeting was then convened in Bombay. The Directors had called a meeting in Rangoon for December 16th, 1911. The Bombay creditors finding they had no time to instruct any one to appear urged the Directors to appoint Mr. B. Cowasjee, liquidator. The Directors would not accept this suggestion and it was ultimately arranged that Messrs. Ferguson and Holdsworth should be appointed joint liquidators to make a preliminary investigation and report, and that after the report, Mr. Ferguson should retire, Mr. Holdsworth being left as sole liquidator. Mr. Ferguson was a chartered accountant of Bombay of recognized position and experience and I gather he had the absolute confidence of the Bombay creditors. Their report was presented and is dated January, 31st 1912. Thereafter matters proceeded, but the report had raised grave fears and meetings were held both in Bombay and Calcutta and Rangoon. Finally doubts arose, which resulted in one of the creditors, Mr. Noble, filing an application in this Court praying that the Company be wound up under the supervision of the Court. It prayed that Mr. B. Cowasjee be appointed liquidator jointly with Mr. Holdsworth, and if the latter refused to act with another, some one else be joined with Mr. Cowasjee. An affidavit was then filed by Mr. B. De, dated April 19. It set out certain resolutions passed at a meeting in Calcutta and set out that it was the unanimous opinion of the meeting that since Mr. Ferguson had retired, Mr. Holdsworth had done practically nothing and that his work had been far from satisfactory. Then we have Mr. Wacha's affidavit, which is dated May 7, 1912. It makes three complaints against Mr. Holdsworth. These are (1) that he did not apply for a supervision order, (2) that he contemplated the sale of part, if not, all those securities of the Company at low prices, and (3) that he would not give reasonable explanation or information of the financial position of the Bank to the meeting. It was then discovered that at the meeting of December 16, there was not a proper quorum, and the appointment of the liquidators was, therefore, invalid. Mr. Noble's application was then amended on May 20, so as to ask for a compulsory order and prayed that Mr. Cowasjee be appointed sole or joint liquidator with another. Mr. Noble, then, on May 25, 1912, filed an affidavit alleging specific acts against Mr. Holdsworth. The first relates to the payment of Rs. 50,000 with interest to the Bank of India due on a fixed deposit, as that Bank refused otherwise to give up Government pro-notes of the face value of three *lakhs*, which belonged to the Bank of Burma. The second refers to 1,60,000 fully paid up shares of the British Burma Petroleum Co., under lien to the Bank of Burma. The complaint is that the liquidator refused to pay three *lakhs* to clear them, though there were ample funds in hand to do so, and that if they had been thus cleared and then immediately sold, they would have fetched at least Rs. 4,20,000. It alleges that they were on the day of the affidavit worth nine *lakhs*. These two complaints are repeated up to the present time.

Now it is proved that several meetings have been held in Bombay and Calcutta at which many creditors were either present in person or by proxy, representing large claims. I do not deny that their wishes deserve careful consideration, but I must consider all the facts before I pass orders. They oppose Mr. Holdsworth's appointment and desire the appointment of Mr. B. Cowasjee. I must consider why they do so and further, if an order according to their wishes will be for the best interests of this liquidation.

The first complaints were vague in the extreme. They were couched in the most general terms and contained nothing definite. I cannot avoid the feeling that this vagueness was realised and the necessity for allegations of something definite was felt. When we come to the definite allegations, what are they? When Messrs. Ferguson and Holdsworth were appointed joint liquidators, Mr. Ferguson was the nominee of these Bombay and Calcutta creditors. They have never

said anything against him. Both were chartered accountants. Mr. Ferguson was the older and more experienced. The payment of the Rs. 50,000 was when both were acting, and I cannot believe that for this action, Mr. Holdsworth was solely responsible. Moreover, it is at least open to doubt whether their action was not fully justified. As regards the other matter, the liquidators were approached before Mr. Ferguson retired and he must have considered it, at least so I think. But, even if it was Mr. Holdsworth's action alone, does it show him unfit for the post of liquidator? The present unfortunate position of this Bank must, I think, be admitted to be in great part due to an optimism which led the Directors to place too many of their eggs in one basket, or at any rate, in a basket which had several compartments. One of these was filled with shares in the British Burma Petroleum Co. Mr. Holdsworth is blamed because he did not spend three *lakhs* of the inadequate assets in releasing 1,60,000 more shares in this Company. Apparently no thought was given to the effect of unloading so large a block at once on the market. If he had acted, as it is suggested he should have done, and the price had fallen in consequence, surely a howl of criticism would have greeted his action and one which could not have been refuted.

But it is not possible nor is it necessary to decide one way or the other on his conduct. The point that is in my mind is what effect arguments based on such insufficient data had on the minds of those who gave proxies or who voted at the various meetings. I do not know all that was said, nor can I gauge the effect. But it makes me cautious before assuming that the votes were all given after a true understanding of the real position There is another complaint which I have not mentioned. At the meeting on April 17 at Calcutta, a resolution was passed authorising Mr. Holdsworth to apply to this Court to at once sanction the immediate payment of the largest dividend that the funds in his hands will permit. A careful consideration of all the papers in this case raises in my mind the unpleasant suspicion that this failure to declare a dividend really is the cause of dissatisfaction. And yet, could he do so, when the doubtful claims had not been adjudicated on and when the legality of his appointment was open to question? I am going to authorise a dividend and possibly I will do so to-day, but I cannot feel certain that the wishes of the creditors were not expressed without a full and proper understanding and realisation of the possession. For these reasons, I do not feel either bound or inclined to act according to the expressed wishes of the large body of creditors that has been pressed upon me.

There are, moreover, other arguments to be considered. Mr. Cowasjee is a lawyer of very great attainments with great local knowledge; but he is the Managing Director of the Twinzas Oil Co., and a share-holder in the Rangoon Refinery Co. Both these Companies have disputes with the Bank of Burma. They may not be very serious, but it is a disqualification. He may have experience and some business qualifications and they may indeed be great, but he is primarily a lawyer. I do not think this liquidation needs a lawyer. Again Mr. Holdsworth has the benefit of a thorough investigation of the affairs of this Company with the assistance of Mr. Ferguson. He must now be fully acquainted with the details of most, if not, all of the disputed claims and of the assets. All this study and information would be wasted were another appointed, while there must be delay if Mr. Cowasjee had to start afresh to obtain a grip of the whole situation. I see no ground whatever to doubt that Mr. Holdsworth can and will do what is best for the creditors and share-holders, and I cannot find any just cause for removing him. Almost everything he does must be with the sanction of the Court and the order I now propose to pass as to an advisory Committee will provide an adequate safeguard for the full consideration of the views of the creditors in Bombay and Calcutta. I will, therefore, appoint Mr. E.R. Holdsworth, now provisional official liquidator, to be the official liquidator. He must provide security in the sum of five *lakhs* of rupees. I will be prepared to accept security of the same kind as he has already provided. I have fixed the amount at this amount, as I do not think he is likely to have more than this amount in his hands at any one time. It will also be subject to revision hereafter should occasion arise. As to his salary, I fix it at Rs. 1,500 per mensem for the next six months. On the expiry of thsi period, he may apply for an order in continua-

tion. As to his office establishment, I do not think it necessary to fix any definite sum. He may charge what he considers reasonable, the charges being open to consideration, when he submits his accounts. He must submit accounts quarterly, the next accounts being submitted on September 1, 1912.

There remains the question of an advisory Committee. The greatest number of creditors are in Bombay and Calcutta, and though I expressed an opinion in my last order that such a Committee would be advisable, further consideration and the difficulty of dealing with such a Committee, which would probably have to be composed of gentlemen outside Burma, has caused me to modify my opinion. I mentioned my views during the course of the argument, and Mr. Giles on behalf of the Bombay creditors, after consulting Mr. Noble, accepted my views. I am prepared to recognise the six gentlemen mentioned in Mr. Wacha's affidavit of June 11, 1912, to this extent that when the matters come before the Court for decision on which the Court considers their views would be of assistance, it may consult them; and, if they inform the Court of the local Advocate who will represent them, notice will be given to him of the matter or matters to be decided and an opportunity will be given for him to obtain their views and to lay them before the Court for consideration. Matters requiring immediate orders cannot, of course, be sent to them. Nor will this in any way affect the power of the Court to direct meetings of creditors and share-holders to be held.

I will allow one set of costs to be paid out of the assets of the Company to the creditors represented by Mr. Giles and one set to those represented by Mr. Gaunt.

I will allow the costs of the liquidator appointed at the meeting of December 16, 1911, for the hearing of May 20, last, out of the assets. All costs to be as taxed by a Deputy Registrar.

I will now pass orders on the question of dividends, which was one of the matters which the provisional liquidator had referred. I sanction the payment of a dividend of two annas in the rupee. As owing to the liquidation being now by the Court, the interest will have to be calculated up to a later date, and in order to enable the liquidator to make arrangements for the payment locally, I direct it be paid one month from this date.

Messrs. *Giles* and *Burjorji*, for the Appellant.

The applicant then appealed against the above order and the following judgment was delivered.

JUDGMENT.—This is an appeal, under section 169 of the Indian Companies Act, 1882, against an order or decision of a Judge, exercising Original Civil Jurisdiction of the Court, appointing a sole official liquidator of a Company which is being wound-up by the Court. The initial consideration in such an appeal is whether an Appellate Court should interfere in the matter. There are no precedents in the Indian Courts. In England, it has, for a long time, been accepted as an established rule that the appointment of any particular person as liquidator is so entirely a matter for the discretion of the Judge dealing with the winding-up that the Court of Appeal will not review his decision, except under very special circumstances, or unless it can be shown that the Judge had acted on a wrong principle. Lindley on Companies, (6th Ed., page 967).

In the present case, the learned Judge has appointed a chartered accountant, whoh as been acting as liquidator of the Company under a voluntary winding-up resolution, subsequently discovered to have been irregular, in preference to a member of the legal profession whom the large majority of the creditors, who have put their views before the Court, desire to be appointed. He also impliedly decided that more than one liquidator was not desirable or necessary. His order shows that it is not a case of his having had no regard to the wishes of the majority of the creditors. He considered the representation of their views but he did not comply with their wishes. Section 140 of the Act did not impose upon him the duty of doing so. This is distinctly laid down in the case of *In re London Quays and Warehouse Company* (1), a case in which the appointment by the primary Judge was upheld although opposed by the large majority of those interested. I fail to see that the learned Judge acted on any wrong principle, and after perusal of the somewhat voluminous proceedings already before the Court, I cannot come to the conclusion that there are any very special

(1) (1868) 3 Ch. 394; 37 L. J. Ch. 397; 18 L. 195; 16 W. R. 530.

circumstances in the case which would justify a departure from the rule accepted by the distinguished Judges in England, who have adopted it.

In a case in which the suitability of two gentlemen for an office was in question, I think it preferable to advert to no more than is necessary. The learned Counsel for the appellant made one observation in the course of his argument which calls for notice because it may be misleading. He referred to the gentleman appointed by the learned Judge as the nominee of the Directors of the Company who had brought the Company and the creditors into the difficulties in which they were in. The remark may suggest that Mr. Holdsworth was likely to be biased in favour of the Directors. The minutes of the meeting of share-holders, at which voluntary winding-up of the Company was resolved on, shows how Mr. Holdsworth came to be chosen as one of the liquidators. The Chairman stated that the Directors would have preferred to nominate the Company's auditors as liquidators, but they thought it would give general satisfaction if they nominated a firm with which neither the Directors nor the bank had previously any business dealing. Mr. Holdsworth was the representative of such a firm. As a joint liquidator with Mr. A. F. Ferguson of Bombay, he signed a report of the result of their investigation into the Company's affairs. A perusal of that report precluded any idea of there being any bias in favour of the Directors on the part of either of the signatories. If any of the creditors are apprehensive that the liquidation will not be properly and fairly conducted by Mr. Holdsworth, I can only say that so far as anything has been put before the Court up to the present, their apprehensions are unreasonable. In view of the importance of adhering to the established rule of an Appellate Court not interfering in such a matter as the appointment of an official liquidator, I would dismiss the appeal under Order XLI rule 11 of the Civil Procedure Code.

Appeal dismissed.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 563 OF 1911.

July 22, 1912.

Present:—Sir Arthur Reid, KT., Chief Judge, and Mr. Justice Robertson.

NUR MUHAMMAD AND OTHERS—PLAINTIFFS—APPELLANTS

versus

BHAGWAN DAS—DEFENDANT—RESPONDENT.

Muhammadan Law—Gift—Acceptance—Gift by registered deed—Formal possession—Undivided property—Effect of transfer of possession—Mushaa—Wakf—*Written instrument not necessary—Trusts Act (II of* 1882), *ss.* 1, 5.

The Trusts Act does not affect the rules of Muhammadan Law as to *wakf*.

Therefore, it is not necessary to execute an instrument in writing in order to create a valid *wakf*.

A gift under the Muhammadan Law is not invalid merely because there is no formal acceptance by the donee at the time of the execution or registration of the deed of gift.

It is not necessary for the validity of gift that the signification of the acceptance must be at any particular moment of the transaction.

A declaration by the donor in the deed of gift that possession has been given binds the heirs of the donor and possession once taken cannot be invalidated by any subsequent change of possession.

In the case of a gift of undivided property possession given and taken under such gift effectually transfers such property.

Tara v. *Jodha*, 57 P. R. 1882, and *Muhammad Mumtaz Ahmad* v. *Zubaida Jan*, 11 A. 460; 16 I. A. 195 (P. C.), followed.

A gift by a person by means of a registered deed, in favour of his sons, wives and grandson, as to property of which the donor was in joint possession with the donees and of which he made over entire possession to the donees, is valid under the Muhammadan Law.

Second appeal from the order of the Divisional Judge, Multan Division, dated 1st April 1911.

Khwaja *Kamal-ud-Din*, for the Appellants.

Messrs. *Gokal Chand* and *Vaughan*, for the Respondent.

JUDGMENT.—The property in suit was attached in execution of a decree in favour of one Bhagwan Das, defendant No. 1 in this suit, against Walidad, defendant No. 2. Objections were taken to the attachment and were rejected, and the plaintiffs have now brought this suit for a declaration that certain houses and shops are not the property of the judgment-debtor. The plaintiffs are the sons, grandson and wives of the defendant Walidad, and they base their claim to ownership of part of the property upon a deed of transfer (*tamliqnama*)

executed by Walidad and registered on September 16th, 1909, on the occasion of his departure for Mecca. This suit covers certain houses and shops and a wrestling ground. The rest of the property in suit consists of a *sarai*, a mosque and a well said to have been made *wakf* property by him.

With regard to the *wakf* property, the case can be disposed of in a few words. The learned Divisional Judge has held that the *sarai* and well have not been proved to be *wakf* property and gives his reasons in the following words:—

"The first ground, urged by defendant in appeal, is that a *wakf* is a trust, and that no trust in relation to immoveable property is valid unless declared by a non-testamentary instrument in writing, signed by the author of the trust or the trustee and registered or by the Will of the author of the trust or of the trustee (section 5, Trusts Act).

"In this case, there is no registered and signed document, the only writing being on a tablet let into the wall of the *sarai*. This tablet recites that the *sarai*, well and mosque were built by Walidad for the glory of God, and as an alms house for every religion.

"This argument as to the invalidity of the alleged *wakf* appears to me unanswerable.

"I find accordingly that the *sarai* and well have not been proved to be *wakf*."

The Divisional Judge has thus dismissed the suit on the ground that the case is governed by section 5 of the Trusts Act. He has omitted, however, to notice that the third paragraph of section 1 of the Trusts Act itself says, "But nothing herein contained affects the rules of Muhammadan Law as to *wakf*." It is, therefore, clear that the Trusts Act does not govern this case in any way, and the reasons given by the learned Divisional Judge for his decision cannot be supported. Counsel for the respondent admitted that he was unable to support the judgment of the lower Appellate Court on the grounds stated.

As regards the other point, both Courts have found that the alienation by the deed of the 16th September 1909 was not valid. On this point, the learned Divisional Judge says:— "I will take plaintiff's appeal first. The lower Court found that the registered deed of gift was invalid, because there was no proof of acceptance by the donees, and ecause the shares mentioned in the deed had not been partitioned. There was no acceptance in the presence of the writer, Fatteh Muhammad, or of the attesting witness Allah Baksh Khan, nor before the registering officer. On this evidence, the lower Court's finding that there was no acceptance can hardly be challenged.

As to partition it is admitted that separate possession of the shares has not been given. Under these circumstances, the gift is invalid (Wilson's Muhammadan Law, section 312).

I dismiss plaintiff's appeal with costs."

First as regards the facts, there appears to be no doubt that the donor and donees are members of one Muhammadan family living together and occupying jointly the property in question. There can be no doubt that just before his departure for Mecca, the donor executed a deed and took all the necessary measures under the ordinary law of the land for transferring his property to the donees. It is not contended that the deed was not duly executed and registered, and it is found as a fact that the donees were in possession of the property after the gift. We are not at present concerned in any way as to whether the gift was in itself intended for the purpose of the fraudulent deprivation of creditors. *Inter partes*, there can be no doubt that the gift was, unless incomplete under the provisions of the Muhammadan Law, a good and a valid one. It has been found, however, by both Courts that it was invalid according to Muhammadan Law. We have quoted the opinion of the learned Divisional Judge on this point. The first Court gives its decision in the following words:—

"*Issue* No. 3.—Was the rest of the property in suit alienated by valid gift to the plaintiffs by defendant No. 2 in good faith?

Onus on plaintiffs.

This issue is not proved. The *tanliqnama* was witnessed by Allah Baksh Khan, P. W. No. 2, and written by Fatteh Muhamad, deed-writer, P. W. No. 3, and these witnesses show that there was no acceptance of the transfer at the time of the execution of the deed, and the Registrar's note shows that none of the plaintiffs were present at registration. Acceptance is obligatory (pages 79-80 of Mulla's Muhammadan Law, article 114).

Certain shares are also named in the deed, but these were never partitioned off and par-

tition is obligatory (*vide* Wilson's Muhammadan Law, page 353, article 312)."

It will be seen that the lower Courts have based their decision on the ground that there was no specific and formal acceptance of the gift at the time of the execution or registration of the deed. It is also stated that there were certain shares which were not partitioned off, and that their partition was obligatory under the Muhammadan Law. It appears to us that the views taken of Muhammadan Law in these decisions cannot be supported. Here again Counsel for the respondent had to admit that he could not support the decision of the lower Courts on the ground given.

It must be remembered that among the donees are two *pardanashin* women and two infants. No doubt, it is a general principle of Muhammadan Law as regards gifts, that a gift is not valid unless it is both made and accepted. It is not, however, anywhere laid down, as far as we are aware, that the signification of the acceptance must be at any particular moment of the transaction. For instance, we find that in section 303 of Wilson's Muhammadan Law, it is laid down that "no transfer is necessary in the case of a gift by a father to his infant son, the declaration of gift being considered to change the possession by the father on his own account into possession as guardian on his son's account. And the Law is the same in every other case where the donee is a minor in lawful custody of the donor."

In *Humera Bibi* v. *Najmen-nissa Bibi* (1), it is laid down that "It is not necessary according to Muhammadan Law that in all cases where a gift of immoveable property is made, the donor should actually and physically vacate the property, which is the subject of the gift. Where the gift was of a house and other immoveable property, and was made by registered instrument and attended by circumstances of great publicity, the fact that the donor, who was the aunt of the donee, never quitted the house, but continued to reside in it with her nephew, was held to be of no effect in the face of the clearly manifested intention of the donor to transfer possession of the house to the donee."

In *Tara* v. *Jolha* (2), it was held that "According to Muhammadan Law, though there is a difference of opinion between the Doctors as to the validity of a gift to two persons or more of property that admits of partition, such a gift is not void, and possession cures the defect arising from the shares of the donees not being defined." This is a Division Bench ruling of this Court, and, so far as we are aware, has never been traversed since, from which it appears that it expresses the view which we should follow unless very strong reason is shown to the contrary. Baillie's Digest of Muhammadan Law, pp. 515-516, was quoted in support of the view taken in that judgment.

At page 43 of Ameer Ali's book on Muhammadan Law, it is noted that "a gift of specific shares is not open to objection under Muhammadan Law." And further, at page 49, it is stated that a gift of part of a divisible thing is valid. It is also laid down that "a formal and solemn declaration by the donor that he had complied with all the requirements of the law in perfecting the gift would be binding evidence of delivery of possession." See *Muhammad Mumtaz Ahmad* v. *Zubaida Jan* (3). In that judgment of the Privy Council, it was laid down that "whether a gift of undivided property is valid or not under Muhammadan Law, possession given and taken under such gift effectually transfers the property.

A declaration by the donor in the deed of gift that possession has been given binds the heirs of the donor, and possession once taken cannot be invalidated by any subsequent change of possession." The deed of gift in this case contains an unequivocal statement that possession and proprietary rights have been made over to the donees.

In section 115 of Mulla's book of Muhammadan Law, paragraph (3), it is laid down that "a gift of immoveable property in which the donor and the done are *both* residing at the time of the gift may be completed by declaration and acceptance without formal delivery and possession such as are required in sub-section (1) when the donor *alone* is residing in the premises." In this case, before the gift donor and donees appear to have been in joint occupation of the property.

In *Muhammad Mumtaz Ahmad* v. *Zubaida Jan* (3), their Lordships of the Privy Council

(1) 28 A. 147; A. W. N. (1905) 222; 2 A. L. J. 778.
(2) 57 P. R. 1882.

(3) 11 A. 460; 16 I. A. 195 (P. C.).

held that the law relating to the invalidity of gifts of *Mushaa*, *i.e.*, the prohibition of the gift of an undivided part in property capable of partition, ought to be confined within the strictest rules, and the authorities on the Muhammadan Law show that possession taken under a gift, even although that gift might with reference to *Mushaa* be invalid without it, transfers effectively the property given according to the doctrines of both the Shia and the Sunni schools. Possession once taken under a gift is not invalidated, as regards the effect in supporting the gift, by any subsequent change of possession.

The subject of the gift was shares in revenue-paying villages, with land, houses and moveables. Of the greater portion of this property, the donor, a mother giving them to her daughters, had only so far possession that she was in receipt of the rents and profits. In the deed of gift, she declared (thereby making an admission whereby her heir and all claiming through him were bound) that she had made the donee, her daughter, possessor of all the properties, and she directed that the gift should be carried into effect by the daughter's husband, who was manager of estates on behalf of both mother and daughter before then. It was held in a suit for the possession of the property in a sale by the heir of the donor, brought by the vendees against him and joining as defendants the heirs of the daughter, then deceased, that sufficient possession had been taken on behalf of the daughter to render the gift effectual, and to defeat the claim as against her heirs. In Wilson's Muhammadan Law, section 309, it is laid down that the gift of an undivided share in anything which does not admit of a partition, or is of such a nature that it can be used to better advantage in an undivided condition, is valid. This ruling was followed in *Musammat Murad Khatun* v. *Ahmad Ali* (4).

It will be seen, therefore, that in view of the authorities quoted above, the gift in this instance, which was made by the father, who was in joint possession with his sons, wives and grandson, and who made over entire possession to the donees, was valid and in accordance with the Muhammadan Law. As we have noted, Counsel for the respondent admitted his inability to support the view that it was invalid under the Muhammadan Law, though he contended that it was invalid on other grounds. These, of course, can be gone into by the lower Court on remand. As the supposed invalidity of the gift according to Muhammadan Law and the applicability of the Trusts Act are the sole reasons given in both the lower Courts for dismissing the suit, we accept the appeal and remand the suit under Order XLI, rule 23, Civil Procedure Code, to the Court of first instance, for decision on the merits. Court-fee on the memorandum of appeal will be refunded and other costs will be costs in the cause.

This judgment also disposes of the connected Civil Appeal No. 589 of 1911.

Appeal accepted;
Case remanded.

(4) 91 P. R. 1894.

LOWER BURMA CHIEF COURT.
FIRST CIVIL APPEAL NO. 119 OF 1910.
May 15, 1912.

Present:—Sir Charles Fox, Kt., Chief Judge, and Mr. Justice Hartnoll.

RAMAN CHETTY AND OTHERS—PLAINTIFFS—APPELLANTS

versus

MUTUVEERAPPA CHETTY AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 11—Res judicata—Object of doctrine—Cross suits—Appeal from decision in one suit only.

The main object of the doctrine of *res judicata* is to prevent multiplicity of suits and interminable disputes between litigants. The rule of *res judicata* is not limited to the Courts of first instance but it applies equally to the procedure of the first and second Appellate Courts and indeed even to miscellaneous proceedings. The doctrine, so far as it relates to prohibiting the re-trial of an *issue*, refers not to the date of the commencement of the litigation, but to the time when the Judge decides the issue.

Balkishen v. *Kishan Lal*, 11 A. 148 and *Zaharia* v. *Debia*, 33 A. 51; 7 A. L. J. 861; 7 Ind. Cas. 156, followed.

Where there are two cross-suits and a certain issue is common to both suits and no appeal is brought against the decision in the one suit, the finding on the issue cannot be attacked in an appeal from the decision in the other suit.

A decision on a point which is not substantially in issue in a suit cannot operate as *res judicata* in any later suit in which it may be substantially in issue.

RAMAN CHETTY *v.* MUTUVEERAPPA CHETTY.

JUDGMENT.

HARTNOLL, J.—The Chetty firm of S. M. R. M. brought a suit against Abu Backer *alias* Maung Lu Gale and applied for an attachment before judgment of certain paddy said to belong to him. The process-server, Maung Hla Baw, on the 16th February 1905, made an attchment of paddy estimated to be 5,100 baskets. Subsequently, after the S. M. R. M. firm obtained a decree, it applied to attach 8,000 baskets in execution of it and the warrant of attachment shows that 8,000 baskets were attached. Maung Hla Baw says in his evidence that he attached the same paddy as he did before. At the hearing of the appeal, it was not argued that only 5,100 baskets were attached, and the appeal was argued on the supposition that 8,000 baskets were attached at the second attachment and so this judgment will be written on such supposition being a fact. After the 8,000 baskets had been attached, the appellants, the P. M. R. M. firm, applied for removal of attachment on the ground that the 8,000 baskets belonged to them. During the continuance of the proceedings on the 18th November 1905, the attached paddy to the extent of 5,753 baskets was sold and realized Rs. 4,247-8-0. Subsequently on the 1st February 1906, it was found that of the attached paddy, 2,850 baskets belonged to Abu Backer and that the rest of it belonged to the P. M. R. M. firm. Out of the Rs. 4,247-8-0 realized by the sale of the attached paddy, Rs. 2,109-0-0, the money realized for 2,850 baskets, were withdrawn by the S. M. R. M. firm, and the balance was by mistake allowed to be withdrawn by Abu Backer.

The appellants then brought a suit against the S. M. R. M. firm alleging that the 8,000 baskets belonged to them. They alleged that the rate realized at the sale of the attached paddy was too little and that the market-rate was then Rs. 103 per 100 baskets. They, therefore, asked for a decree for Rs. 8,480, or in the alternative for a decree against the S. M. R. M. firm for Rs. 2,109, the sum withdrawn by them,—and for Rs. 4,232-4—the difference between the price of 8,000 baskets at the rate of Rs. 103 per 100 baskets and the sum realized at the Court sale, and for a decree against Abu Backer for Rs. 2,138-12, the sum wrongly withdrawn by him. This suit was filed on the 10th April 1906. On the 24th May 1906, the S. M. R. M. firm brought a suit against the P. M. R. M. firm in respect of the same paddy asking for a declaration that the 5,150 (8,000—2,850) released from attachment belonged to Abu Backer and that they were entitled to get the Rs. 2,038-9 deposited in Court,—*i.e.*, the value of the paddy realized at the Court sale other than the value of 2,850 baskets declared to belong to Abu Backer—and also for a decree for Rs. 1,672-6 the price of 2,260 baskets (8,000—5,740, the quantity said to have been sold at the Court sale) on the ground that after the attachment, the P. M. R. M. firm had taken away and misappropriated this amount. The evidence recorded in the suit brought by the P. M. R. M. firm was taken as evidence in the suit brought by the S. M. R. M. firm and the results of the two suits were as follows.

In the suit brought by the P. M. R. M. firm, it was found that of the 8,000 baskets attached, 5,100 baskets belonged to Abu Backer and that the remainder of the paddy attached belonged to the P. M. R. M. firm; but with regard to this balance, it was also found that the P. M. R. M. firm had no right to recover its value as they could not prove that it was stolen while under attachment and also they had been selling paddy out of the granary where the attached paddy lay that may have been some of that attached. As 5,753 baskets were sold and only 5,100 baskets were found to belong to Abu Backer, they were given a decree for the value of the difference, 673 baskets at Rs. 90 per 100 baskets which was found to be a fair value to take.

In the S. M. R. M. case against the P. M. R. M. firm, it was found that out of the 8,000 baskets attached 5,100 baskets belonged to Abu Backer and that the P. M. R. M. firm took and misappropriated the paddy attached and that was in excess of the paddy sold by the bailiff; and it was decreed that the 5,100 baskets which were released from attachment in the Civil Miscellaneous Case, was the property of Abu Backer and that the S. M. R. M. firm were entitled to get Rs. 2,038-9-0, the balance of the sale-proceeds deposited in Court which were withdrawn by Abu Backer from him and the P. M. R. M. firm.

This decree appears to be wrong in stating that 5,100 baskets were released from attachment in the Miscellaneous case. The order

in that case released no paddy from attachment but declared that 2,350 baskets of the attached paddy belong to Abu Backer.

The P. M. R. M. firm now appeal against the decree that was passed in the suit brought by them, and a preliminary objection was raised to the appeal on the ground that they have not appealed against the decree brought in the cross-suit and so the doctrine of "*res judicata*" comes in and bars this appeal. Our attention was drawn to the cases of *Chajju* v. *Sheo Sahai* (1), *Balkishan* v. *Kishan Lal* (2) and *Mariamnessa Bibee* v. *Joynab Bibee* (3). There has been a later case in which all these decisions have been further considered and that is the case of *Zuheria* v. *Debia* (4).

In order to come to a decision on this objection, it is necessary to set out exactly what the issues were in the two suits and which were common to both, and how the decrees were arrived at. In the suit brought by the P. M. R. M. firm, the main issues were:—

(1) To whom did the 8,000 baskets belong —to the P. M. R. M. firm or to Abu Backer?

(2) If the 8,000 baskets were proved to belong to the P. M. R. M. firm, were the S. M. R. M. firm liable to the P. M. R. M. firm for the difference in baskets of paddy between the 8,000 baskets attached and the amount sold by the bailiff?

(3) If the P. M. R. M. firm were entitled to a decree at all, should they be allowed it at the rate of Rs. 106 per 100 baskets which was a rate far in excess of Rs. 74 the price realised at the Court sale?

In the result, it was found on the first issue that 5,100 baskets belonged to Abu Backer, on the second in favour of the S. M. R. M. firm, and on the third that Rs. 90 per 100 baskets, was a fair value to allow. So the P. M. R. M. firm obtained a decree for 653 baskets the difference between the amount sold 5,753 and the amount held to belong to Abu Backer 5,100.

Their grounds of appeal are that it should have been held that the 8,000 baskets all belonged to them, that the S. M. R. M. firm and not they are responsible for the difference between the 8,000 and the amount sold, and that they should have been allowed Rs. 106 per 100 baskets.

As regards the suit brought by the S. M. R. M. firm, the main issues were:—

(1) To whom did the 8,000 baskets belong —to Abu Backer or the P. M. R. M. firm?

(2) If the 8,000 baskets were found to belong to Abu Backer, were the S. M. R. M. or the P. M. R. M. firm liable for the shortage between 8,000 baskets and the amount sold?

The finding on the 1st issue was that 5,100 baskets belonged to Abu Backer, and on the second that the P. M. R. M. firm took and appropriated the difference between the 8,000 baskets and the amount sold. In view of the finding on the first issue, it was not necessary for the decision of the suit to come to a finding on the second. The shortage owing to the finding as to the amount owned by Abu Backer in any case would be held to belong to the P. M. R. M. firm and so the S. M. R. M. firm could not get it. The decree was based on the 1st issue; but even then it seems to be wrong. The balance of the sale-proceeds Rs. 2,038-9 awarded by it *plus* the sum withdrawn by the S. M. R. M. firm 2,109 comprised together according to the plaint the value of the 5,740 (in reality it was 5,753) baskets sold, and owing to the finding that Abu Backer only owned 5,100, the S. M. R. M. firm should not have been given the whole of the balance Rs. 2,038-9 but only so much of it as went to make up the value of 5,100 baskets. But that decree has not been appealed and it is this fact that, it is urged, renders the present appeal barred as *res judicata*.

Section 11 of the Civil Procedure Code is as follows:—

"No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties, under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court" and Explanation I to the section which is new is:—

(1) 10 A. 123.
(2) 11 A. 148.
(3) 33 C. 1101; 4 C. L. J. 149; 10 C. W. N. 934.
(4) 33 A. 51; 7 A. L. J. 861; 7 Ind. Cas. 156.

"The expression 'former suit' shall denote a suit which has been decided prior to the suit in question whether or not it was insituted prior thereto."

I may say here that I am in complete agreement with the exposition of the law as laid down in *Zaheria* v. *Debia* (4), and with the following passage in Mahmood J.'s judgment in the case of *Balkishan* v. *Kishan Lal* (2):

"It seems to me that the main object of the doctrine of *res judicata* is to prevent multiplicity of suits and interminable disputes between litigants, *ne autem lites immortales essent, dum litigantes mortales sunt.* This saying of Voet is in accord with the maxims *nemo debet bis vexari pro una et eadem causa*, and the broader maxim *interest reipublicæ ut sit finis litium.* This being so, the doctrine so far as it relates to prohibiting the re-trial of an *issue*, must refer not to the date of the commencement of the litigation, but to the time when the Judge is called upon to decide the issue. For even in cases where the Judge has commenced the trial of an issue which is also an issue in a pending litigation, a *final* judgment pronounced meanwhile in such previous litigation by a competent Court (the identity of parties and other conditions being satisfied) should operate as *res judicata* preventing the Judge dealing with the later litigation from adjudicating differently. If this is not done, it seems to me that the evil against which *res judicata* aims would not be removed and the doctrine itself would be defeated. So far as the justification of this view from the provisions of the Civil Procedure Code is concerned, I may say that the rule contained in section 13 is not limited to the Courts of first instance, that it applies equally to the procedure of the first and second Appellate Courts by reason of sections 582 and 587 respectively, and, indeed, even to miscellaneous proceedings by reason of the general provisions of section 647 of the Code." The new explanation to section 11 of the Code may have been added so as to settle the law on the subject.

In that there was no appeal by present appellants in the suit brought by the S. M. R. M. firm, it seems to me that they cannot now again attack in appeal the finding that 5,100 baskets of the attached paddy belonged to Abu Backer. The issue as to the ownership of the paddy was common to both suits. It was decided in both suits. The finding on it has become final in the suit brought by the S. M. R. M. firm and so acts as *res judicata* in the present appeal. If it were allowed to be raised in the present appeal and decided in appellant's favour, there would be a decree in the suit brought by the P. M. R. M. firm, part of which would adjudge to them money, *i.e.*, the value of the balance of the price of the baskets sold by Court after deducting the value of 2,850 baskets already received by the S. M. R. M. firm, which has already been adjudged to the S. M. R. M. firm in a decree which has become final and cannot be set aside. Such a condition of affairs would be contradictory and inconsistent. I would, therefore, hold that as regards the question of ownership of the 8,000, baskets the matter is "*res judicata*" and cannot be further considered.

The second ground of appeal concerns liability for the shortage between the 8,000 baskets attached and those sold 5,753. This issue was common to both suits and was decided in favour of the S. M. R. M. firm: but as it was not necessary to come to a decision on it in the suit brought by the S. M. R. M. firm for the reason which I have already given, it cannot be said to have been substantially in issue in that suit. Though a finding was arrived at with regard to it in the suit brought by the S. M. R. M. firm, such a finding had no influence on the decree that was passed nor was it a finding that the P. M. R. M. firm could appeal as the decree was not affected by it. Immediately there was a finding that only 5,100 baskets belonged to Abu Backer, the issue as to the responsibility for shortage became no longer an issue necessary for the disposal of the suit. The finding on it, therefore, in my opinion, does not act as *res judicata* for the purpose of this appeal. It is necessary, therefore, to consider this ground. Appellants' Counsel could not seriously argue it. Appellants allege that there was a theft while the paddy was under attachment. The evidence as to theft was of the vaguest description. No report was made to the Police. From the evidence not more than some 500 baskets could have been abstracted in this manner. Nga Lun says that appellants' agent sold paddy out of the godown in which the

attached paddy was. The ground cannot prevail.

The third ground is as to the price of paddy that was allowed by the District Court. This matter was not substantially in issue in the suit brought by the S. M. R. M. firm. They only asked for a rate at Rs. 74. It is the P. M. R. M. firm who ask for Rs. 106. For the same reasons as I have given in considering the second ground, I would hold that the decree passed in the suit brought by the S. M. R. M. firm does not bar its consideration in the decision of this appeal. Looking at the evidence, Rs. 90 seems to be a fair price. Rupees 74 were obtained at the auction. Tha Lan says he paid Rs. 85 or Rs. 90 in Kazon or Nayon. Though Maung Pon and Ma Mo depose to a price of Rs. 107 and Rs. 103, I think that Rs. 90 was a fair price to allow.

I would, therefore, dismiss the appeal with costs.

FOX, C. J.—I concur.

Appeal dismissed.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL NO. 346 OF 1910.

July 13, 1912.

Present:—Mr. Justice Shah Din and Mr. Justice Beadon.

Musammat RALLI—PLAINTIFF—APPELLANT

versus

SUNDAR SINGH—DEFENDANT—RESPONDENT.

Limitation Act (XV of 1877), *Sch. II, Arts.* 120, 125 —"*Land*"—"*Alienation of land*"—*Sale of equity of redemption—Declaratory suit—Limitation.*

The word "land" in Article 125 of the Limitation Act does not cover the equity of redemption in immoveable property.

A sale of equity of redemption is not an alienation of land within the meaning of Article 125.

Consequently, a suit for a declaration of invalidity of a sale of equity of redemption by a Hindu female is governed by Article 120 and the period of limitation is six years.

Second appeal from the decree of the Divisional Judge, Gujranwala Division, dated the 18th January 1910.

Bhagat *Gobind Das*, for the Appellant.

Rai Bahadur Lala *Sukh Dial*, for the Respondent.

JUDGMENT.—The facts of this case are clearly and accurately stated by the learned Divisional Judge. By a registered mortgage-deed, dated the 7th February 1874, the property to which the suit relates, *i.e.*, a house together with a courtyard, etc., was mortgaged with possession by one Bala Mal to Amar Singh for Rs. 495. On the 14th April 1880, Amar Singh sub-mortgaged his rights as mortgagee to one Sardul Singh for Rs. 300. On the 15th of June 1896, Amar Singh's widow, *Musammat* Malan, sold to Sunder Singh her right, title and interest in the mortgaged property, *i. e.*, the equity of redemption in respect of her mortgage rights, which were under mortgage with Sardul Singh, for Rs. 1,000, which sum included Rs. 600 due to Sardul Singh on the mortgage of 1880.

In May 1903, the plaintiff, who is a married daughter of Amar Singh, sued her mother and Sunder Singh, for a declaration that the sale of the equity of redemption made by the former in favour of the latter in 1896 shall not affect her reversionary rights. The defendant Sunder Singh pleaded *inter alia*, that the suit was barred by limitation. The Sub-Judge overlooked this plea, but dismissed the plaintiff's suit on other grounds. On appeal, the learned Divisional Judge held that the suit was governed by Article 120 and not Article 125 of the second Schedule to the Limitation Act, and that since the right to sue had accrued to the plaintiff on the 15th June 1896 and the suit had not been brought within six years from that date, it was barred by time.

The plaintiff has preferred a further appeal to this Court and the sole question for decision is whether Article 125 of Schedule II to the Limitation Act governs the case; for if that Article does not govern it; then the only other Article applicable is admittedly Article 120 and the suit has been rightly dismissed.

Article 125 runs as follows:—

"Suit during the life of a Hindu or Muhammadan female by a Hindu or Muhammadan who, if the female died at the date of instituting the suit, would be entitled to the possession of land, to have an alienation of such land made by the female declared to be void except for her life or until her re-marriage."

By the sale-deed of the 15th June 1896, *Musammat* Malan sold to Sunder Singh all her right, title and interest as mortgagee of

the mortgaged property (the house together with the courtyard) subject to the rights of the sub mortgagee Sardul Singh; and the question for decision is whether the aforesaid right, title and interest of *Musammat* Malan is "land" within the meaning of Article 125. Admittedly, *Musammat* Malan was not the owner of the house; she only possessed mortgage-rights therein, which had been sub-mortgaged to Sardul Singh, the equity of redemption in respect of the mortgaged premises still vesting in the original owner Bala Mal. Can it be said under these circumstances that what *Musammat* Malan sold to Sunder Singh in 1896 was "land?" The learned Divisional Judge has answered this question in the negative, and we agree in his view.

The word "land" is defined neither in the General Clauses Act of 1897 nor in the Limitation Act of 1877, which is applicable to the present case, and it must, therefore, be taken in its dictionary sense; and taken in that sense, it is obvious that it does not cover the incorporeal rights which were sold by *Musammat* Malan to Sundar Singh. In the unpublished decision of this Court in Civil Appeal No. 2878 of 1886, on which reliance is placed by the appellant's Pleader, all that was held was that Article 125 of the Limitation Act, 1877, applied to a case in which the property sold was a house *and its site*, and the question whether this Article would govern a case in which the alienation related only to a house pure and simple *apart from the site* was left undecided. In the present case, the property sold is neither a house and its site, nor a house apart from the site but only certain incorporeal rights, which by no stretch of language can be called "land."

The Pleader for the appellant has contended that the word "land" in Article 125 aforesaid must be taken to include "interest in land," that reading Article 125 with Article 141 of the Limitation Act, the only reasonable conclusion that can be drawn is that the Legislature intended to use the word "land" in the earlier Article as an equivalent of the expression "immoveable property" which is used in the later Article; and that since the mortgaged rights sold by *Musammat* Malan to Sundar Singh were rights arising out of a mortgage with possession, they were immoveable property within the meaning of section 3 (25) of the General Clauses Act. We are unable to accept this argument as sound. In three successive Limitation Acts, *i. e.*, Act IX of 1871, Act XV of 1877 and Act IX of 1903, the Legislature has thought fit to use the word "land" in the Article which applies to a case of this kind; and it is difficult to believe that if it had been intended to use this word as meaning "immoveable property" in the sense in which that expression is used in the General Clauses Act, the Legislature would not have substituted that expression for the word "land" in the last amended Act. A similar change of phraseology has been effected in Article 138 of the Limitation Act; for whereas in Act XV of 1877 the word "land" was used in Article 138, in the present Act IX of 1903, the language of Article 138 has been so modified as to apply to "immoveable property" and not merely to "land." We, therefore, think that the word "land" has been advisedly used by the Legislature in Article 125 of the Limitation Act, and that the Courts are not justified in assigning to it the same meaning as to the expression "immoveable property."

The appellant's Pleader has also argued that since the word "land" as used in Regulation I of 1798 and Regulation XVII of 1806 has been held to include "house property," the word "land" in Article 125 of the Limitation Act must also have an extended meaning. In our opinion, this argument has no force. As pointed out in *Ranjit* v. *Tirkha* (1), the language of the Regulations in question is wanting in precision, and the Regulations were obviously intended to apply to mortgages by way of conditional sale of houses as well as of lands properly so called. In any case, if the word "land" in these Regulations includes house property, it by no means follows that it has the same meaning as immoveable property, using this expression in the larger sense in which it is used in the General Clauses Act.

For the above reasons, we agree with the learned Divisional Judge in holding that Article 125 of the second Schedule to the Limitation Act does not apply to the present case; and we accordingly maintain the decree of the lower Appellate Court and dismiss this appeal with costs.

Appeal dismissed.

(1) 117 P. R. 1885.

GHELABHAI *v.* BAI JAVER.

BOMBAY HIGH COURT.

APPEAL FROM ORDER NO. 27 OF 1912.

September 20, 1912.

Present:—Sir N. G. Chandavarkar, KT., Judge, and Mr. Justice Rao.

GHELABHAI BHIKHABAI—APPELLANT

versus

BAI JAVER—RESPONDENT.

Civil Procedure Code (Act V of 1908), *s.* 11—Res-judicata—*Hindu widow representing estate of her husband in first suit—Heirs of her husband bound in subsequent litigation—Withdrawal of appeal in first suit—Effect on question of* res judicata.

On the death of one *A.*, his widow brought a suit against his brother for possession of the property on the allegation that it was the separate property of her husband. The principal issue in the suit was whether the property was the joint property of *A.* and his brother, or whether it was his separate property. The Court held upon the evidence that it was the joint property of the two brothers, but that the widow of *A.* was entitled to remain in possession during her life-time in virtue of her right to maintenance as the widow of a deceased co-parcener. From that decree, the widow appealed. But instead of prosecuting the appeal, she withdrew from it.

Subsequently, the son of the said brother of *A.* sued the daughter of *A.* for possession of the same property. The daughter of *A.* pleaded that the property was the separate property of her father and not joint as alleged by the plaintiff:

Held, that the previous decision operated as *res judicata* as it was given against widow as representing the estate of *A.* and the mere withdrawal of the appeal by the widow was not sufficient to deprive the decision of its operative character in law.

Katama Natchiar v. *The Rajah of Shivagunga*, 9 M. I. A. 539; 2 W. R. 31 (P. C.), distinguished.

Appeal from the order passed by the Joint Judge of Ahmedabad, in Appeal No. 146 of 1911, reversing that passed by, and remanding the case to, the Subordinate Judge at Umreth, in Civil Suit No. 216 of 1910.

Mr. *L. A. Shah*, for the Appellant.

Mr. *G. N. Thakore*, for the Respondent.

JUDGMENT.—The suit was brought by the plaintiff, who is the appellant, to recover possession of the property in dispute on the allegation that it belonged to him and his uncle Vithal as members of a joint Hindu family, and that on the death of Vithal he, *i. e.*, the plaintiff, as the surviving co-parcener, became exclusively entitled to it.

The respondent Bai Javer against whom the suit was brought is the daughter of Vithal, and she contested the claim of the plaintiff upon the ground that the property was the separate property of her father, and that she was on his death heir according to Hindu Law. The plaintiff challenged the defendant's right to the property as Vithal's heir upon several grounds, the principle of which tried in both the Courts below was the ground of *res judicata.*

That question of *res judicata* arose under the following circumstances: On the death of Vithal, his widow, *i.e.*, the present respondent's mother, brought a suit to recover possession of the property on the allegation that it was the separate property of her husband. That suit was brought against the present appellant, plaintiff in the suit, which has led to the present second appeal. The principal issue in that suit was whether the property was the joint property of Vithal and his brother, the present plaintiff's father, or whether it was his separate property. The Court held upon the evidence that it was the joint property of the two brothers, but that the widow of Vithal was entitled to remain in possession during her life-time in virtue of her right to maintenance as the widow of a deceased co-parcener.

From that decree the widow appealed. But instead of prosecuting the appeal, she withdrew it. The result of that was that the decree of the Subordinate Judge's Court was left untouched. It was contended in the Court below, however, that that decree could not operate as *res judicata* in the present suit which was brought by the appellant, who was the defendant in the previous suit against Vithal's daughter; that the daughter does not claim from her mother, the plaintiff in the previous suit, but claims as the heir of her father. The decree would operate as *res judicata* if it was a decree against Vithal's widow as representing the estate of Vithal. There can be no doubt that the widow did represent the estate in the previous suit. The only question is whether, having regard to the decision of the Privy Council in *Katama Natchiar* v. *The Rajah of Shivagunga* (1), the question in the previous suit was prosecuted by her, and the litigation was carried to its end after a fair trial of the question which had led to the previous suit. It is not denied that, so far as the previous suit itself was concerned, the questions raised in it were fairly tried. The only question is whether the withdrawal of the appeal had such an effect

(1) 9 M. I. A. 539; 2 W. R. 31 (P. C.).

upon the decree as to deprive it of its operative power for the purposes of *res judicata*. The withdrawal was by the widow. We are not aware of the circumstances under which she withdrew the appeal. But it is clear that, so far as the suit itself was concerned, the case was fairly contested and the mere withdrawal of the appeal by the widow is not sufficient to deprive the decree of its operative character in law.

Mr. Thakore has contended before us that in *Shivagunga's* case (1), too, there was an appeal, but that the widow having died, their Lordships of the Privy Council said that the decree could not operate as *res judicata* in a subsequent suit. That was because the death of the widow showed that the person who represented the estate having died, the contest was not carried on. In the present case, it is different. The widow having the power to continue the contest withdrew from it, which shows that there is an essential difference between the facts of the present case and the facts in *Shivagunga's* case (1). We must, therefore, hold that the decree in the previous suit does operate as *res judicata*.

But Mr. Thakore has relied upon another ground in support of the decree of the lower Appellate Court, and that ground is this: In the previous suit, the Court in its judgment, no doubt, found that the present appellant's father and his brother had been members of a joint family and that the property in dispute was joint. But in spite of that finding, the Court held that the plaintiff in that suit, *i.e.*, the widow of Vithal, was entitled to possession, as the widow of a deceased co-parcener. Mr. Thakore's argument is that from such a decree, no doubt, the plaintiff could have appealed but only in respect of a finding which was essential for its existence as a decree. The widow could not have appealed against a mere finding when the decree was in her favour. In support of this argument Mr. Thakore has cited *Anusuyabai* v. *Sakharam Pandurang* (2) and *Rajah Run Bahadoor Singh* v. *Musammat Lachoo Koer* (3). It is true, as a matter of law, that where there are two issues and the Court finds on both those issues and a decree is made on the ground of one of those findings, the party in whose favour the decree is made cannot appeal merely because the other finding is adverse to him. Now in the present case, the decree in the previous suit was in favour of the widow, and, therefore, argues Mr. Thakore, the finding on the question of separation or union was unnecessary for the purposes of that decree and did not enter into the case as its essential basis. This argument, however, overlooks the salient feature of the previous litigation. The Court in the previous suit found that Vithal and the present appellant's father were co-parceners and that Vithal's widow was entitled to maintenance, and, therefore, to the possession of the property in dispute as the deceased co-parcencer's widow. Therefore, the two issues decided in the previous litigation really formed part of one case. The right to maintenance could not have accrued to the widow unless she was the widow of a deceased co-parcener, which meant that the family was joint. Therefore, the question of separation or union was the question upon which both the points in the previous litigation depended, and, therefore, entered into the essential basis of the decree which virtually and finally declared that Vithal's widow was entitled to the property only for maintenance, but not as heir of her deceased husband.

On this ground, therefore, we must hold that both the Courts below took a correct view of the previous litigation so far as the representative character of the widow therein was concerned, but differing from the lower Appellate Court on the other point relating to *res judicata*, namely, as to the effect of the withdrawal of the appeal, we must reverse the order under appeal and restore that of the Subordinate Judge with costs throughout upon the respondent.

Order reversed.

(2) 7 B. 464.
(3) 12 I. A. 23 at p. 34; 11 C. 301.

ALLAHABAD HIGH COURT.
SECOND CIVIL APPEAL No. 1355 OF 1911.
July 22, 1912.
Present:—Sir Henry Richards, Kt., Chief Justice, and Mr. Justice Tudball.
KHURSHED-UN-NISSA—PLAINTIFF—APPELLANT
versus
ALIM-UN-NISSA—DEFENDANT—RESPONDENT.

Pre-emption—Provision in decree for payment of purchase-money within certain time—Payment not made—Appeal, maintainability of.

In a pre-emption suit, the plaintiff got a decree on condition of his paying the purchase-money within a month. The plaintiff appealed to the District Judge simply in regard to the condition laid down by the first Court as to payment of the purchase-money. During the pendency of the appeal, the one month time expired and the money was not paid. The District Judge dismissed the plaintiff's suit on the ground that the money had not been paid within one month:

Held, that the suit should not have been dismissed on that ground as the condition of payment of money itself was the subject of appeal.

Second appeal from a decree of the District Judge of Shahjahanpur, reversing that of the Munsif of East Badaun.

Mr. *Muhammad Ishaq Khan*, for the Appellant.

Dr. *Tej Bahadur Sapru*, for the Respondent.

JUDGMENT.—This and the connected Appeal No. 1366 of 1911, arise out of one and the same pre-emption suit. The claim is based upon a custom of pre-emption. The plaintiff challenged the accuracy of the price entered in the sale-deed. The Court of first instance held that the custom was proved and the consideration entered in the sale-deed was correct. It granted a decree conditional on the plaintiff paying into Court the amount of the purchase-money within one month. The plaintiff appealed against that decree simply in regard to the condition laid down by the Court of first instance as to the payment of the purchase-money. The defendant also appealed against the decree pleading that the plaintiff had failed to establish the custom. By the time the appeals came on for hearing in the Court below, the one month allowed in the original decree had elapsed. The plaintiff had not paid into Court the amount as ordered by that decree. The lower Appellate Court thereupon held that as he had failed to do so, the decree of the Court below was one which dismissed the plaintiff's suit, and that, therefore, the plaintiff's appeal must fail and the defendant's appeal must succeed. On this ground alone, the Court below dealt with two appeals. It is urged here with great force that the plaintiff's appeal was against the very condition owing to the non-fulfilment of which (according to the lower Appellate Court) the suit had stood dismissed. We think that this contention is sound. It might, no doubt, have been advisable for the plaintiff to pay the money into Court in view of a possible failure of his appeal, and the refusal of the Appellate Court to extend the time. If his appeal succeeded on the question of consideration, the Court was bound to give him time to pay the amount due.

We, therefore, allow the appeal, set aside the decree of the Court below and remand the case to that Court for re-admission to the file and the decision thereof according to law. The costs of this appeal will abide the result of the case.

Appeal allowed:
Cause remanded.

LOWER BURMA CHIEF COURT.
FIRST CIVIL APPEAL No. 48 OF 1910.
March 11, 1912.
Present:—Mr. Hartnoll, Offg. Chief Judge, and Mr. Justice Ormond.
MAUNG LU MAUNG—APPELLANT.
versus
MAUNG PE—RESPONDENT.

Muhammadan Law—Will—Probate not required—Bequest exceeding one-third of testator's property—Validity of such bequest—Letters of Administration obtained by heir after testator's property dealt with by executor appointed by testator—Effect of such Letters—Probate and Administration Act (V of 1881), ss. 42, 43, 44.

It is not necessary for the executor of a deceased Muhammadan to take out Probate.

Shaik Moosa v. *Shaik Essa*, 8 B. 241, referred to.

A Muhammadan can make a Will. It may be either oral or written. His power of testamentary disposition is limited to the extent of ⅓rd of his estate and any bequest in excess thereof requires the consent of heirs whose rights are infringed by the bequest. Also a bequest to a person entitled to inherit is void unless the other heirs give their consent after the testator's death to its taking effect.

Where, *A.*, an executor appointed by the testator, has dealt with certain properties belonging to the testator and where *B.* has, subsequently, obtained Letters of Administration, the latter will be confined to the

properties other than those dealt with by the executor.

Mr. *Bland*, for the Appellant.

Mr. *Ginwala*, for the Respondent.

JUDGMENT.

HARTNOLL, OFFG. C. J.—In this case, Maung Lu Maung sued Maung Pe under the following circumstances: Maung Lu Maung obtained Letters of Administration to the estate of one U Shwe Waing, who was a Muhammadan and who died on the 10th September 1906. He alleges that after U Shwe Waing's death, Maung Pe took charge of all his properties and effects and also, by virtue of the certificate granted him under the Succession Certificate Act, collected certain debts which were payable to the estate. Maung Lu Maung then obtained Letters of Administration to the estate, the effect of which was to supersede Maung Pe's certificate and he states that Maung Pe has only handed over to him Rs. 1,919-5-0, which sum was found due on an account taken by a Commissioner appointed by the Court. Maung Lu Maung objects to the following items which appear in the account as amounts disbursed by Maung Pe from the proceeds of monies collected by him under the certificate.

	Rs.	a.	p.
Paid for building a *zayat* in the mosque ...	500	0	0
Paid to Ma Pu as requested before death ...	300	0	0
Paid to U Yo, Akunwun	500	0	0
2 Payments on account of interest	39	9	6
4 Payments to five children mentioned in the Will as payable to them	2,062	8	0
Paid to Maung Pe defendant as directed by deceased	300	0	0
Paid to Ma The ditto	200	0	0
Paid to Ma Thet ditto	100	0	0
Paid as costs of proving the Will	73	10	0
Paid as costs in resisting the application for revocation of the succession certificate ...	100	0	0
Total ...	4,175	11	6

Maung Lu Maung alleges that these amounts were never disbursed by Maung Pe, that, if they were disbursed, he had no authority, express or implied, for their disbursement, that they are not chargeable to the estate and that Maung Pe should re-imburse to the estate these amounts. He further alleged that U Shwe Waing left 1255 baskets of paddy as part of his estate which Maung Pe sold for Rs. 2,133-2-0, that Maung Pe has only accounted for Rs. 1,592-0-0 and has misappropriated Rs. 541-8-0 which he should be ordered to re-imburse. He also states that U Shwe left 80 ticals of gold worth approximately Rs. 2,400, which Maung Pe has misappropriated and which he should be ordered to return or to re-imburse the estate to the extent of its value. He further alleged that U Shwe Waing left two houses and that Maung Pe has wrongfully caused the leases covering the sites on which they stand to be transferred to his own name and that he has received and enjoyed the rents thereon. Maung Lu Maung asks for a declaration that the houses form part of the estate and that Maung Pe be ordered to re-imburse to the estate the nett amount of rents received by him, which Maung Lu Maung calculates out to be Rs. 1,165-12-0.

Maung Pe in reply stated that the amounts totalling Rs. 4,175-11-6 have been re-imbursed and expended by him with the consent of Lu Maung and of the heirs. He further alleged that Lu Maung had no right to sue for expenses incurred on account of a litigation carried on on behalf of the estate, and that Maung Pe was not liable for them. With reference to the paddy and its value, Maung Pe stated that he had only received from Ba Kyan and Shwe The Rs. 1,592 which was given to them by Shwe Waing, who said that the money might be spent in purchasing paddy for storing and that they might enjoy the profits which would arise from its sale. Maung Pe further stated that the 80 ticals of gold and two houses had been equally and agreeably divided among five children in the presence of the plaintiff, heirs and witnesses, and that the Deputy Commissioner, on application being made to him to transfer the houses to the names of the five children, had passed orders directing the grant to be transferred to his (Maung Pe's) name on the ground

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that they had not attained the age of majority and that he was their guardian. He alleged that Maung Lu Maung and the heirs had no interest in the houses and 80 ticals of gold as they had ceased to be part of the estate. His meaning evidently is here, as urged at the appeal, that the division alleged caused them to cease to form part of the estate. Maung Pe did not deny that the nett rentals which had reached his hands were Rs. 1,165-12 but pleaded that the rents had been disbursed for expenses incurred by the five children on account of their necessities of life, for repair of the houses and for revenue due and that there was no balance.

The District Court fixed the following issues:—

1. With regard to the items totalling Rs. 4,175-11 6, did Maung Pe disburse them?

2. Whether he had authority, express or implied, to do so?

3. Whether any of the items are chargeable to the estate?

4. If not, what is defendant's liability?

5. With regard to the paddy, did defendant misappropriate any, and if so to what extent?

6. How did defendant dispose of the gold?

7. Had he a right to have the houses transferred to his name?

8. How has he disposed of the rents derived therefrom?

9. Was he right in disposing of them in the manner stated by him?

10. What was the amount of the paddy belonging to U Shwe Waing which defendant received?

11. To what extent has he misappropriated it?

12. To what relief, if any, is Lu Maung entitled?

The District Court found that there was nothing to show that Maung Pe paid anything towards building a *zayat* in the mosque, that Ma Pu acknowledged to have received Rs. 300 which was treated as payment due from her to the estate, that U Yo acknowledged receipt of R. 500 and interest due thereon on account of money borrowed from him by U Shwe Waing, that the Rs. 2,062-8 were not supported by vouchers, and that the payments to Ma Thet and Ma The of Rs. 100 and Rs. 200 had been supported by vouchers. The District Court further found that though U Shwe Waing gave instructions to build a *zayat*, yet the evidence on the point was not convincing and that with the exception of the collection of some materials, there is nothing to show whether a *zayat* was built, who built it and who paid for the labour. The District Court found that with regard to the gifts U Pe had the express consent or direction of U Shwe Waing and that he acted *bona fide* on that instruction, and that as regards the payment to U Yo, it followed that Maung Pe having a succession certificate to collect debts was bound to pay off debts due from the estate, that Maung Pe had sufficient ground for charging this sum to the estate. On the first issue, it was found that U Pe was only liable to the extent of Rs. 2,562-8-0. On the second issue, the District Court held that U Pe had express or implied authority to make the payments he did in that he acted in accordance with the Will of U Shwe Waing and his oral directions, and in that he was a trustee of U Shwe Waing's estate before his death. The Court further considered that all legal expenses incurred by Maung Pe should be chargeable to the estate. On the third issue, the Court found that those items which Maung Pe could prove were chargeable to the estate, and that he was not liable as executor *de son tort*.

The fourth issue was answered in the same manner.

On the fifth issue, it was found that Maung Pe credited the amount which he actually received from those entrusted with the sale of paddy by U Shwe Waing, and that he was not liable for any shortage. On the sixth issue, it was found that Maung Pe had not intermeddled with the gold, and on the seventh it was held that under the circumstances stated, Maung Pe had the right to have the house sites transferred to his name, that such actions by Revenue Officers could not be questioned in Civil Courts and that Maung Pe only holds the lease on behalf of the co-heirs.

On the eighth issue, it was found that Maung Pe disposed of the rents derived from the houses for the benefit of the co-heirs and that there was nothing to show that he had any surplus.

On the ninth, it was found that as he was the guardian of the minors, he was right in maintaining them in the manner stated by him.

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In the result, Lu Maung was given a decree for Rs. 2,562-8-0 with costs on that amount and a declaration that the two houses belonged to the estate of U Shwe Waing.

An appeal has now been filed against this decree by Lu Maung and a cross-appeal by Maung Pe.

Lu Maung urges that Maung Pe had only legal authority to collect debts as specified in the succession certificate and that Maung Pe was liable for all other sums collected by him, that the position of Maung Pe with regard to sums wrongly collected by him is not and cannot be better than that of an executor *de son tort* and that he should be treated as an intermeddler, that Maung Pe had no authority to distribute the assets of U Shwe Waing's estate and that an authority to collect does not include and imply an authority to disburse, that Maung Pe was not justified in carrying out the alleged directions, oral or testamentary, of U Shwe Waing for they are not proved and the document relied on as a Will is not a Will, nor was Probate of it obtained, that the Disirict Court erred in holding that by reason of his trusteeship Maung Pe is saved from the consequence of his wrongful acts inasmuch as although the instrument was so named, no trust was, as a matter of fact, created and the instrument was revocable and was revoked by the death of U Shwe Waing, that Maung Pe should have been held liable to account for the gold.

The grounds of the cross-appeal were that the District Court erred in holding that the sum of Rs. 500 was not spent by Maung Pe towards the building of a *zayat* under instructions left by U Shwe Waing and also erred in holding that Rs. 2,062-8-0 had not been spent by U Pe for the maintenance of the children. It was also urged that respondent should have been awarded the costs on the amount of claim dismissed against him.

Before dealing with the legal aspects of the case, I think that it will be best to consider the evidence and the facts proved by it. There seems to be no doubt that before U Shwe Waing died, he left both written and oral instructions as to the disposal of certain of his properties after his death.

The written instructions are those contained in Exhibit I of Miscellaneous Case No. 45 of 1908 of the District Court. That document begins with a list of Maung Shwe Waing's property as owned by him on the 10th February 1906. It then states that out of this property are to be given as follows to Maung Ba Pu, Me Yan, Ashabi, Pwa Tin and Ma Lon Bu Zaingnabi, five persons—2 houses at Maubin, 50 ticals of gold, Rs. 2,600 in equal proportion; to wife Ma Hmein, diamond earring 24 *rattis*—40 ticals of gold, one ruby ring and Rs. 2,000. It purports to be signed by U Shwe Waing and witnessed by Maung Yo, Mg Po O, and a native. The date at the bottom under Shwe Waing and U Yo's signature is the 28th March 1906. There are also two other documents filed in that case, Exhibits II and III. Exhibit II is a general power-of-attorney granted by U Shwa Waing to Maung Pe authorizing the latter to deal with his property. Exhibit III purports to be a document entrusting certain properties to Maung Pe and executed by Maung Shwe Waing. It is dated the 28th July 1906. It purports to entrust to Maung Pe all Maung Shwe Waing's properties except those directed in Exhibit I mentioned above to be given to Ma Hmein though in the schedule only a parcel of land and three houses are mentioned. I would here state that I agree with the contention of appellant's Counsel that it is not shown that the document Exhibit III creates any trust as it is not shown that any property was handed over in trust to Maung Pe by Maung Shwe Waing. U Yo, a witness, whom there is no reason to disbelieve, deposes to the fact that Maung Shwe Waing caused a list to be made for a division of his properties after his death and that he (Maung Yo) was asked to attest the list.

There seems to me to be no doubt that Maung Shwe Waing meant Exhibit I to operate as a Will with respect to those properties purporting to be given away by it. There is also further evidence of oral directions given by Maung Shwe Waing. Maung Pe states that they were

	Rs.
Burial expenses	250
Feeding guests	250
Making road to cemetery ...	250
Building *zayat* in mosque compound	500
To pay Ma The	300
Do. Lu Maung	300
Do. Maung Pe himself ...	300
Do. Ma Thet	300
Do. Ma Pa	300

and a tank to be dug out of interest received from money loans.

Maung Pe states that instructions were left to him to pay out the oral legacies. Ma Hmein states that Maung Shwe Waing before his death asked Maung Pe to recover the principal from Shwe The and Ba Kyan, and asked Maung Pe and others to repair the cemetery road and build a *zayat* in the mosque, spend Rs. 500 on his funeral expenses, and give Ma The Rs. 500. Though she is Maung Shwe Waing's widow, there is no good reason to disbelieve her. Her story as to the Will is corroborated by the document, Exhiblt I, itself and the fact that after the death she obtained the properties directed to be given her by it. U Yo also gives corroborating evidence as to the oral directions, and so does witness Massulman Maung Pe. It seems to me to be proved that Maung Shwe Waing left the oral directions as stated by Maung Pe and that there is clear and trustworthy evidence to the effect that he meant Maung Pe to be one of his executors if not the only one.

And now as to the evidence as to whether Maung Pe has proved that he has disbursed the items given in paragraph 4 of the plaint:—

Rs. 500 *for building a zayat*:—

Maung Pe has certainly not proved that he has disbursed this sum. Naran states that he supplied certain materials at Shwe Waing's request, that he borrowed Rs. 500 from Shwe Waing and has re-paid it, Rs. 300 to Shwe Waing and Rs. 200 to Maung Pe. Mussulman Maung Pe states that Shwe Waing told him he had advanced Rs. 500 to Naran for supply of materials and that the promissory-note for Rs. 500 taken by Naran was still in the mosque account. I must agree with the District Court in holding that Maung Pe has not proved that he has disbursed Rs. 500 in erecting a *zayat*.

Rs. 300 *paid to Ma Pu.*

It appears from the evidence of Ma Pu and Ma Hmein that Maung Pe never paid Ma Pu Rs 300. Ma Pu owed Rs. 300 to U Shwe Waing and in accordance with his oral instruction, Maung Pe told her that the debt and legacy would set off each other.

Rs. 539-9-8 *paid to U Yo.*

It is clear from U Yo's evidence and promissory-note filed in the Miscellaneous Cas No. 45 that U Shwe Waing borrowed Rs. 700 from him and that after U Shwe Waing's death, the balance and interest owing, *i. e.*, Rs. 539-9-8 was paid of by Maung Pe.

Rs. 2,052 8-0 *paid to the children.*

There is no good evidence adduced to show that Maung Pe has disbursed this sum. The disbursements spoken to by the child, Ba Pu, may well be taken to have come from the house rents.

Rs. 300 *paid to Maung Pe.*

Maung Pe allows that he has paid himself Rs. 300.

Paid Rs. 200 *to Ma The and Rs.* 100 *to Ma Thet.*

Maung Pe allows that he has made these payments. Manug Pe states that these last three payments have all been in accordance with U Shwe Waing's instructions.

Paid as costs for proving the Will Rs. 73-10-0.

Maung Pe allows disbursing Rs. 73-10-0. These were evidently the costs in the Succession Certificate Proceedings.

Paid as costs incurred in resisting application for revocation of the Succession Certificate, Rs. 100.

Maung Pe admits this expenditure. The proceedings in this connection are before the Court.

As regards the allegation that Maung Pe has misappropriated Rs. 541-8-0, balance of sale-proceeds of paddy, there is no evidence to support it. On the contrary, Maung Pe has produced good evidence to show that there has been no such misappropriation by him. From the evidence of Ma Hmein, U Yo, and Ma Shwe The, it is clear that U Shwe Waing advanced money to Ba Kyan and Shwe The and directed that they should only return the principal and take the profits. The principal Rs. 1,592 seems to have been duly returned and which seems to be the subject of this charge taken by them.

As regards 80 ticals of gold and the houses which have been put into Maung Pe's name, the facts seem to be as follows:—

After U Shwe Waing's death, there appears to have been a division of property amongst the heirs and the five children mentioned in Exhibit I and Ma Hmein seem to have received the properties as mentioned in Exhibit I. The evidence as to this division is as follows:—Maung Gyi, a Township eJudge, states that he was present when there

was a proposal to divide the inheritance, that Akunwun, U Yo, Kala Ko Pe and a Moulvi were making arrangements, that he does not know about the Will and that he left before any definite conclusion was arrived at. Pensioned Myook Maung Po O states that he was not present at the final division but that he saw the Will and heirs agreed to a division in accordance with it. He is apparently speaking to some meeting held before the actual division. Ma Hmein states that after the death, U Shwe Waing's estate was divided by U Po O, U Yo and Maung Gyi, that the heirs did not agree to their division, that the estates were then divided by Kala Ko Pe, Kala Saya and others whose names she does not know, and that the five children were given two houses, 80 ticals of gold and Rs. 2,500 or Rs. 2,600, which she made over to Maung Pe after the death of U Shwe Waing. Maung Pe states that he took no part in the division, but that the co-heirs divided the inheritance, that it was done according to the Will. At the end of his evidence, he says that Maung Lu Maung has had his share up to Rs. 900 out of the estate. U Yo states that he was present at the division after U Shwe Waing's death, that all the co-heirs were then present, that Po O and Maung Gyi were present, that the property was divided according to the consent of all the co-heirs, that he advised the heirs to go according to the Will. Mussulman Maung Pe states that he was present when all the co-heirs divided the property by consent, and that Maung Pe did not make the distribution, that the other properties not included in the list were also divided amongst the heirs, that Maung Lu Maung was at the division. Tambi states that he also was present at the division by the co-heirs by mutual consent and that the division was according to the Will or list and that Lu Maung also consented. From this evidence, it seems to be proved that after U Shwe Waing's death the co-heirs collected and divided up his properties and that U Shwe Waing's wishes as declared in Exhibit I were respected and given effect to by them. It further appears that it was not Maung Pe who made the distribution, but it was the co-heirs who did so by mutual consent. It also appears from Ma Hmein's statement that she has handed over the 80 ticals of gold and Rs. 2,600, which fell to the share of the five children to Maung Pe. As regards the rents of the houses—the nett balance of which according to the plaint is Rs. 1,165-12 and which Maung Pe states that he has expended on the children—Ba Pu stated that the fees of himself and his co-heirs and their maintenance had been paid by Maung Pe up to June 1909. U Shwe Waing died in September 1906. Rupees 1,165 12-0 would not be an extravagant sum to allow for expenditure on this account.

The legal aspect of the case remains for consideration. A study of Sir R. K. Wilson's Digest of Muhammadan Law and of Syed Ameer Ali's Muhammadan Law shows that there is no doubt that a Muhammadan can make a Will and that it may be either oral or written, that his power of testamentary disposition is limited to the extent of $\frac{1}{3}$rd of his estate unless any bequest in excess of $\frac{1}{3}$rd is rendered valid by the consent of the inheritors whose rights are infringed and that a bequest to a person entitled to inherit is void unless the other inheritors give their consent after the death of the testator to its taking effect. Further, it is not necessary for the executor of a deceased Muhammadan to take out Probate. This was laid down in the case of *Shaik Moosa v. Shaik Essa* (1).

Returning to the facts, I must hold that both U Shwe Waing's written instructions, as laid down in the Exhibit I already referred to, and his oral directions constitute his Will. His oral directions other than as to his funeral expenses were to spend

	Rs.	a.	p.
On a road	250	0	0
On a *zayat*	500	0	0
Legacy to Ma Th. ...	300	0	0
Do. Maung Pe ...	300	0	0
Do. Ma Thet ...	300	0	0
Do. Ma Pu ...	300	0	0
Total ...	1,950	0	0

and a tank to be dug out of interest received from money loans. He appointed Maung Pe to be one of his executors if not his only executor. It was not necessary for U Pe to take out Probate and, therefore, as far as he concerned himself in carrying out the provisions of U Shwe Waing's Will, I am unable to hold that he was an intermeddler, since he was acting in his capacity as exe-

(1) 8 B. 241.

cutor. It is of no concern to him that Maung Lu Maung has obtained Letters of Administrations for they will be confined to the properties other than those dealt with by the Will. Such a position is recognised in England (Williams on Executors, 10th Edition, p. 413) and it is provided for in this country by sections 42 to 44 of the Probate and Administration Act. The question further arises whether U Shwe Waing's Will was a valid one in that it does not bequeath more than $\frac{1}{3}$rd of his estate and in that in any case it should take effect as the heirs have given consent to its taking effect. These points have not been specifically raised in the pleadings nor in the trial of the suit. Five of the heirs—the five children mentioned in Exhibit I—are said to have been minors at the time of U Shwe Waing's death. Two of these are now said to be of age and two dead. If these children were minors at the time of the division, it is clear that they could not consent to validate an illegal Will; but as regards the adults, I must hold that even supposing the Will did dispose of more than $\frac{1}{3}$rd of the estate, they consented to it and so they cannot be heard further. There is absolutely no doubt to my mind that they consented to the directions given in Exhibit I and I think that there is sufficient evidence to show that they consented to the oral directions. Owing to the legal position not having been well understood, the case has not been very well tried. However, Ma Hmein deposes to knowing of the oral instructions and from her evidence and that of U Yo Kala, Maung Pe and Thambi, they were evidently widely known. Maung Po O stated that the heirs agreed in the dedication of the paddy land to the mosque out of the properties mentioned in the list. Maung Pe was allowed without any objection being made to take out a succession certificate. There accordingly seems to me to be sufficient evidence to draw the conclusion that the adult heirs assented to both the oral as well as the written instructions. As regards the minors, if they consider that owing to the Will they have not had their legal rights, since the point I am now discussing has not been raised before, I would leave it to them by themselves, if of age, or by a properly constituted guardian, if under age, to take further action to get them. There is another position that Maung Pe takes up and that is that the division of the property by the co-heirs after the death of U Shwe Waing caused all such properties as were divided at that time to cease to be of the estate of U Shwe Waing and to become the separate properties of those to whom they fell as their share. As far as the adult heirs are concerned, this contention seems to me to be correct. Whether the Will was a valid one or not, by their assent they validated it and they now cannot be heard again. As regards minor heirs if Maung Pe allowed them to be deprived of any of their right shares, it may be that he was wrong; but I would, as I have said above, allow this matter to be dealt with by separate action.

Applying the arguments and findings that I have arrived at above to each item as shown in the plaint, I would arrive at the following conclusions:—

Rs. 500 *for the zayat.*

This is a matter that concerns Maung Pe in his capacity as executor. Whether the sum has been expended or not, it is not a matter that concerns Maung Lu Maung in his capacity as legal representative of U Shwe Waing.

As holder of Letters of Administration, he has no concern with matters to which Maung Pe is executor.

Rs. 300 *paid to Ma Pu.*

No Rs. 300 were ever paid to Ma Pu in this capacity. As executor Maung Pe had power to set off her debt against her legacy.

Rs. 509-9-6 *paid to U Yo.*

It is proved that the sum was owing to U Yo by U Shwe Waing and so was payable out of his estate, and that Maung Pe paid it. In his capacity as executor, the payment, in my opinion, was correct.

Rs. 2,062-8 *payment to the children.*

These payments have not been proved by U Pe; but the money evidently relates to the children's share under the Will Rs. 2,600. With this money, Maung Lu Maung has no concern as administrator of the estate and he cannot call on Maung Pe to account for it or any of it in such capacity. It is open to the children by themselves, if adults, or by a properly con-

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stituted guardian if minors, to call on him to account.

Rs. 300 paid to Maung Pe.
Rs. 200 do Ma The.
Rs. 100 do Ma Thet.

As they were paid in his capacity as executor under U Shwe Waing's Will, Maung Lu Maung in his capacity of administrator cannot call on him to account.

Rs. 73 *Law expenses.*

Since Maung Pe had legacies to pay out and was U Shwe Waing's executor, it is not for Lu Maung in his capacity as administrator to call on him to account.

Rs. 100 *Law expenses.*

The order in the case shows that Maung Pe was justified in resisting the revocation of the succession certificate. The sum could be reasonably charged to the estate.

The charge of misappropriation of Rs. 541-8-0 has fallen to the ground.

If Maung Pe has the 80 ticals of gold, the same remarks apply to it as to the Rs. 2,600.

The same remarks apply to the two houses. As regards the rents, considering that Maung Pe had charge of the children for so long, I think that he should be believed when he says that he has spent as much as the rents on them.

Moreover, the rents do not concern Maung Lu Maung as legal representative of U Shwe Waing's estate since they are the rents of the children's separate property. In the result, I consider that Maung Lu Maung's appeal should be dismissed.

As regards Maung Pe's counter-appeal, it must fail on the first two grounds advanced ; but having regard to the provisions of Order XLI, rules 3 and 33, it would seem right and equitable to give Maung Pe relief. I have found that the sums for which he has been found liable to account to Maung Lu Maung have nothing to do with the latter and, therefore, the decree with regard to such should never have been made. I would, therefore, set aside the decree of the District Judge and dismiss the suit.

As regards costs, neither of the parties seems to have understood the legal position and I would direct that they each bear their own costs in both Courts.

ORMOND, J.—The plaintiff-appellant is the administrator to the estate of the deceased U Shwe Waing. The deceased left a Will partly in writing and partly oral ; and the defendant (respondent) is the executor under that Will.

A Muhammadan can dispose of one-third of his property by Will to a stranger without the consent of the heirs ; but if he makes bequests in favour of his heirs, thereby altering the shares to which they would otherwise have been entitled to by devolution, the assent to such bequests of the other heirs whose shares are thereby diminished, is necessary for the validity of such bequests. And as minors cannot consent, it follows that the share of a minor heir cannot be less than the share he would take by devolution in the whole estate, less a proportionate share of bequests to a stranger, such bequests being limited to one-third of the estate.

The property of the deceased was divided amongst the heirs in accordance with the Will, with the consent of all the adult heirs, including the plaintiff. At that time, the only minor heirs were the five children, two of whom are now of age and the two youngest have since died. They were in fact grand-nephews and grand nieces of the deceased. The defendant, therefore, not being the executor of their paternal grandfather, would not be the guardian of their property. The defendant, however, took over the children's share in the estate on their behalf. The children are not parties to this suit.

The plaintiff's Advocate states that this suit is brought in the interests of these children ; but neither he nor the Advocate for the defendant can say what share of the estate they would be entitled to as heirs. If the share given by the Will to the five children was not less than what they would have been entitled to by devolution, the Will is valid, by reason of the consent, since the death of the deceased, of all the other heirs and of the executor. The plaintiff was an heir and consented. I think it must be presumed, therefore, in this case that the share given by the Will to the children was not less than their share would have been as heirs ; and that the Will, therefore, is valid.

The defendant as executor was the

proper person to pay the debts of the deceased:—(*e.g.*, the debt of Rs. 500 to U Yo which payment is objected to by the plaintiff)—to carry out the directions in the Will and to administer the estate generally. The plaintiff, who sues as administrator to the estate and not as guardian of the minors, would at most be entitled only to such portion of the estate as to which the deceased died intestate. He has not shown that there was any such property and, therefore, I think on this ground his claim should have been dismissed.

The District Judge has given a decree to the plaintiff as administrator for Rs. 2,562-8-0, being Rs. 500 which defendant failed to prove that he had spent on a *zayat* and Rs. 2,062-8-0, which defendant failed to prove he had paid to the children. But both these payments were directed to be made by the Will; and the plaintiff as administrator is not entitled to this money. The defendant in this appeal admits that he is in possession of the houses on behalf of the children and that he received the 80 ticals of gold on their behalf. It is for the Trustees of the mosque (in the compound of which the *zayat* was to be built) to enforce the building of the *zayat* and if necessary, the children can sue the defendant for the recovery of their share under the distribution which was made in accordance with the Will; or if that share is less than the share they would be entitled to by law, they could sue for their full share.

I would dismiss the plaintiff's appeal; and set aside the decree of the lower Court and dismiss the suit. The defendant in the lower Court pleaded payment (to the rightful parties) of the Rs. 500 and Rs. 2,062 8 0; and did not contend that the plaintiff would not be entitled to these sums in any event, inasmuch as he (the defendant) was executor—and he does not raise this ground in his grounds of appeal. The District Judge, I think, rightly found that these two payments were not made, but in my opinion, the fact whether such payments were made or not, is irrelevant in the present suit.

I would direct that each party do bear their own costs in both Courts.

Appeal dismissed.

BOMBAY HIGH COURT.

FIRST CIVIL APPEAL No. 46 OF 1912.

September 24, 1912.

Present:—Mr. Justice Batchelor and Mr. Justice Rao.

NAGINLAL CHUNILAL—APPELLANT

versus

THE OFFICIAL ASSIGNEE—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 80—Suit for injunction against public officer—Notice not necessary.

Where the object of the suit is to obtain against a public officer, not the Secretary of State in Council, an injunction to restrain what would otherwise be an irreparable injury, the suit is not subject to the notice required by section 80 of the Code of Civil Procedure.

First appeal from the decision of the District Judge of Surat, in Civil Suit No. 12 of 1910.

Mr. *L. A. Shah*, for the Appellant.

Mr. *Ratanlal Ranchhoddas*, for the Respondents Nos. 1 and 2.

JUDGMENT.—The appellant before us in this first appeal was the plaintiff in the Court below. The first defendant is the Official Assignee and the third defendant is a declared insolvent. According to the plaintiff, he had purchased certain furniture from the third defendant, and had hired it back to him before the insolvency, but when thereafter the third defendant was declared an insolvent, the Official Assignee seized the furniture in dispute, as well as other property which admittedly belonged to the insolvent and was in the insolvent's possession. The plaintiff made a claim in respect of this furniture, but the Official Assignee refused to recognize the claim, and on or shortly after the 15th September, for the exact date cannot be ascertained, the Official Assignee ordered this furniture to be sold by auction on the 25th September. On the 23rd September, or two days before the threatened sale, this suit was brought by the plaintiff.

The whole question involved in the appeal is whether the learned Judge below was right in his view that the plaintiff's suit was bad because no notice was served on the Official Assignee under section 80 of the Civil Procedure Code. It is necessary, therefore, to consider what section 80 requires, and what is the real character of the present suit. Section 80 lays down, so far as its provisions are immediately relevant, that no suit shall be

instituted against a public officer in respect of any act purporting to be done by such public officer in his official capacity, until the expiration of two months next after notice in writing has been delivered to the public officer.

In this suit, the plaintiff prayed for a declaration that he was owner of the goods in question, and for a permanent injunction restraining the defendants from disposing of them by the sale. In the alternative, it was prayed that the furniture should be restored to the plaintiff, or if restoration was impossible, that plaintiff should receive compensation equal to the value of the goods. The question is whether to such a suit as this, the provisions of section 80 apply. It appears to us that that question should be answered in the plaintiff's favour. It must be observed, in the first place, with reference to the phraseology of section 80, that this is a suit brought against a public officer, other than the Secretary of State for India in Council. This observation is important since the language of the section lends colour to the view that the Secretary of State for India in Council occupies in respect of the required notice a more favourable position than any other public officer; and this view of the meaning of the section was adopted by Mr. Justice Chandavarkar in *Secretary of State* v. *Gajanan Krishna Marlinkar* (1).

In the present case, it is unnecessary for us to consider what would be the plaintiff's position if he were suing the Secretary of State for India; and the only question before us is whether notice was required upon the Official Assignee. We are of opinion that upon that question, a correct explanation of the meaning and extent of section 80 is to be found in Mr. Justice Cunningham's judgment in *Shahebzadee Shahunshah Begum* v. *Fergusson* (2), where, after referring to *Attorney-General* v. *Hackney Local Board* (3), the learned Judge observes that the object is, that if a public body or officer entrusted with powers happens to commit an inadvertence, irregularity or wrong, before any one has a right to require payment in respect of that wrong, he shall have the opportunity of setting himself right, making amends, restoring what he has taken, or paying for the damages he has done. In that view of the case before him, Mr. Justice Cunningham decided that no notice was required. The case then under judgment was, moreover, on its facts very similar to that now before us. It was a suit in which the plaintiff claimed to be entitled to a share in a certain trust fund, and no notice of the suit had been given to the defendant who was the Official Trustee and admittedly a public officer within the definition in the Civil Procedure Code.

We think that this construction of section 80 receives support from the decision of the Court of Appeal in England in *Flower* v. *Local Board of Low Leyton* (4). It is true, of course, that that decision, which turned upon the meaning of section 264 of the Public Health Act, 1875, cannot be read as a direct authority for the ascertainment of the meaning of section 80 in the Civil Procedure Code of India; but it does seem to us to be of high authority as to the manner in which and the principle upon which the Courts ought to approach the task of interpreting such sections. In terms, the section of the Public Health Act, which was before the English Court for construction, was wider and harsher than is section 80 of our Code, for whereas section 80 of our Code limits the requirement of notice to the case of an act purporting to be done by a public officer, the English Act required notice in respect of anything done or intended to be done or omitted to be done under its provisions. In spite of that, however, the Court held that no notice was needed where the suit was one for an injunction to restrain an immediate and otherwise irreparable injury. Sir George Jessel, M. R., said that the section was intended to apply to an action at law for damages and its object was to give an opportunity to the local authority to make payment or tender of compensation for the damage sustained. It could not be intended to apply to a case where the local authority was pulling down a house, or stopping a sewer. If that were so, it would amount to a license to every local board to do what injury they pleased

(1) 35 B. 362; 13 Bom. L. R. 273; 10 Ind. Cas. 639.
(2) 7 C. 499.
(3) (1875) 20 Eq. 626; 44 L. J. Ch. 545; 33 L. T. 244.
(4) (1877) 5 Ch. D. 347; 46 L. J. Ch. 621; 36 L. T. 760; 25 W. R. 545.

while the notice was running. It may be observed that this comment exactly agrees with the view which Mr. Justice Cunningham took in explaining section 80. *Flower's* case (4) was the subject of notice by a Bench of this Court in *Secretary of State* v. *Gajanan Krishna Maclankar* (1), where we agree generally with the observations of Mr. Justice Heaton on this point.

If this is the true way in which to read section 80, it appears to us clear that the present suit is outside that section. The suit is brought, not in regard to the wrongful seizure by the Official Assignee, but in regard to the threatened sale, and the primary relief claimed is by way of injunction to restrain that sale. The real object of the suit is to obtain relief by injunction against an act, not done, or purporting to be done, but merely threatened, namely, the act of causing the furniture to be sold by auction. It is true that in the alternative, the plaintiff seeks an award of compensation equal to the value of the goods, but that, in our opinion, is only a subsidiary prayer; and the main purpose of the suit is to obtain the injunction. As Vice-Chancellor Malins said in *Flower's* case (4), the Court must look at all the circumstances to see whether the necessity really exists for an injunction, or whether the real claim is not for compensation in damages. In this case, we think, that the really substantial claim in the suit is the claim for the injunction.

Now the learned Judge himself by granting a temporary injunction has admitted the immediate necessity for the institution of this suit, since only by filing the suit could the plaintiff obtain that temporary injunction, which the learned Judge himself has considered the plaintiff entitled to obtain. We think that, seeing that the object of the suit is to obtain against a public officer, not the Secretary of State in Council, an injunction to restrain what would otherwise be an irreparable injury, the suit is not subject to the notice required by section 80.

Mr. Ratanlal for the respondents called our attention to several cases, but none of them, we think, is really in conflict with the opinions we have expressed. In *Ram Pitam Shah* v. *Shoobul Chunder Mullick* (5) and in *Bakhtawar Mal* v. *Abdul Latif* (6), the primary object of the suits was to recover back either monies or moveable property which had wrongly been taken. In *The Collector of Bijnor* v. *Munuvar* (7), which Mr. Ratanlal also referred to, the suit was a suit for damages. In *Talukdari Settlement Officer* v. *Ishwardas* (8), to which one of us was a party, the suit was, we think, decided on its own facts, and the point there argued was, not that the suit did not require a preliminary notice, but that notice had been furnished and the notice furnished was good in law.

For these reasons, we must reverse the decree under appeal and remand the suit for trial on the merits; and we must express the hope that the plaintiff having since the 23rd of September 1910 been baulked of reaching the merits of his suit by a decision upon one preliminary point after another, the District Judge will now go into the merits of the suit irrespective of any opinion which he may form upon any other preliminary point. The appellant must have his costs here and in the Court below.

Decree reversed.

(5) 15 C. 259.
(6) 29 A. 567; A. W. N. (1907) 170.
(7) 3 A. 20.
(8) 14 Bom. L. R. 577; 16 Ind. Cas. 445.

LOWER BURMA CHIEF COURT.

SPECIAL SECOND CIVIL APPEAL No. 62 OF 1911.

June 13, 1912.

Present:—Mr. Justice Parlett.

VEERAPPA CHETTY AND OTHERS—APPELLANTS

versus

KANNAPPA CHETTY AND OTHERS—RESPONDENTS.

Transfer of Property Act (IV of 1882), *s.* 65—*Purchase from mortgagor—Duty to pay revenue—Land Revenue Sale—Fraudulent purchase—Burma Land and Revenue Act (II of* 1876), *ss.* 37, 44, *r.* 80.

The implied covenant under section 65 of the Transfer of Property Act for the mortgagor to pay land revenue extends to the purchaser of a property subject to a mortgage.

Ranga Srinivasa Chari v. *Gnanaprakasa Mudaliar*, 30 M. 67; 2 M. L. T. 36, distinguished.

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Where such purchaser has failed to pay revenue and the land has been sold for default and purchased by him free of mortgage, the property is not freed from the mortgage but continues to be subject to it, as the omission to pay revenue is in defraud of the mortgagee.

JUDGMENT.—The circumstances of the case are sufficiently set out in the judgments of the Courts below. This appeal is brought in order to free from the mortgage the 34 acres of land bought by appellants and held by the Divisional Court to be subject thereto. It is argued that the revenue fell due on the 15th February before appellants purchased the land, and that at the date of their purchase, it was Po Hlaing who was in default, and that they were not bound to pay the revenue, nor was it their duty to do so under section 65, Transfer of Property Act. The case of *Ranga Srinivasa Ohari* v. *Gnanaprakasa Mudaliar* (1) has been quoted as authority for holding that the implied covenant on the part of the mortgagor under section 65, Transfer of Property Act, to pay the public charges on the properties mortgaged, does not extend to the purchaser of the equity of redemption from the mortgagor, and that such purchaser, in omitting to pay such charges, does not fail to discharge any obligation owing from him to the mortgagee. But the present is not a case of sale of a mere equity of redemption. Appellants purchased the land outright subject to the respondent's mortgage. They thereby stepped into the shoes of the original mortgagor and became subject to his obligation to the mortgagee to pay the public charges accruing on the land. But I think that on other grounds also, the appellants were bound to pay the revenue. It fell due, it is true, on 15th February 1906 (rule 81) but the year of assessment for which it was payable was from 1st July 1905 to 30th June 1906, (rule 80). By section 37 of the Land Revenue Act, the revenue is due jointly and severally from all persons who have been in possession of the land at any time during the year of assessment, and by section 44, when any revenue has fallen due and a written notice of demand for it has been served on any one of the persons liable for it and ten days have elapsed from the service of such notice without such revenue having been paid, every person liable for it shall be deemed to be a defaulter. Appellants purchased this land on 16th February 1906 and have not denied that they have been in possession ever since. It is clear from his order in the revenue proceedings that the Myook regarded appellant as also a defaulter for part of the revenue and it is strange he did not make him pay it and only proceed against the rest of the land. Indeed, I am not sure that allowing a defaulter, as he did, to buy in his own land, on which the arrear was due, amounted in point of fact to a sale or to anything more than acceptance of payment of the arrear, without the possibility of affecting any encumbrance on the land. It appears that the last entry in Form XXI, page 2 of his proceedings was completely cut out by scissors or a knife and a fresh piece of paper pasted in, on which the Myook wrote the present entry. It would be interesting to know what the original entry was. That the Myook was fully aware of there being a mortgage on the land, is clear from his proceedings and it is inexplicable how the land came to be sold free of it except on the supposition of carelessness or ignorance. I hold that appellants were liable for the payment of the arrear on the 34 acres of land they purchased both personally as defaulters and in the capacity of mortgagors. That their omission to pay was wilfully in defraud of respondents, I feel no doubt. I consider the decree of the Divisional Court was correct and dismiss this appeal with costs.

Appeal dismissed.

(1) 30 M. 67; 2 M. L. T. 36.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 716 OF 1911.

August 7, 1912.

Present:—Sir George Knox, KT., Judge.

PADARATH AND OTHERS—DEFENDANTS—APPELLANTS

versus

DULAM AND OTHERS—PLAINTIFFS—RESPONDENTS.

Malicious prosecution—Suit for damages—Reasonable and probable cause.

In a suit for damages for malicious prosecution what the Court has to see is what was the conduct of

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the complainant before and after making the charge and whether the charge was false to his knowledge.

The mere fact that one Criminal Court has believed in the truth of the complaint is not sufficient evidence of the existence of reasonable and probable cause.

Jadubar Singh v. *Sheo Saran Singh*, 21 A. 26, distinguished.

Second appeal from a decree of the District Judge of Azamgarh, confirming that of the Munsif.

Mr. *M. L. Agarwala*, for the Appellants.

Mr. *Muhammad Ishaq*, for the Respondents.

ORDER.—This appeal arises out of a suit brought by one Dulam and others. Their allegation in the plaint is that the defendants merely through enmity without any reasonable cause made a report against them in bad faith and lodged a false complaint in the Criminal Court, charging them with theft and assault. The defendants admitted having made the report of theft and assault and further, that they prosecuted the plaintiff, but they urged that the charge brought by them was a true one. Both the Courts below have found that the report and the charge were false, that the defendants were actuated by malice in bringing them and granted the plaintiffs a decree for damages. The defendants come here in appeal and say that under the circumstances of the case, no suit for fasle prosecution lies. Moreover, they added that there was reasonable and probable cause for the prosecution which they started. The learned Counsel, who appeared for the appellants, supported his contention on these grounds, by reference to the case of *Jadubar Singh* v. *Sheo Saran Singh* (1). In that case, from one point of view, the circumstances were very similar to those in this case, the Court before which the prosecution was instituted, having in both cases, convicted upon the charge laid before it. But the Court above, both in that case and in this, set aside the conviction of the Criminal Court of first instance. But there it seems to me the resemblance begins and ends. It is true that in the case of *Jadubar Singh* v. *Sheo Saran Singh* (1), my brother Banerji, J., appears to have laid down that where a Magistrate believes in the truth of the complaint brought by any one, that alone is sufficient evidence of the existence of reasonable and probable cause. Later on in the judgment, he returns to the same point and changes the words "sufficient evidence of the existence of reasonable and probale cause" to "strong evidence to show that a case was not brought without reasonable and probable cause." What we have to see in cases of this kind is what is the conduct of the complainant before and after making the charge and was the charge false to his knowledge. When a person finds that an offence has been committed against him or his property, he may have either direct personal knowledge of the person who committed the offence or not having such direct and personal knowledge, he may from other causes draw an inference as to who the offenders were. In the latter case, when he thinks fit to put the law in motion, he should be careful to state that he acts upon suspicion which he considers justified on such and such grounds. In the present case, the defendants, here appellants, stated that they had seen the robbery committed by the plaintiffs. This is what the Court of first instance says. I cannot, however, find from the record any copy either of the complaint or of the first report, and I think it most important before I decide this appeal that those papers should be before me. I direct that the record in the case of *King-Emperor* v. *Dulam*, decided by the Court of Session of Azamgarah on December 22, 1909, together with the Magistrate's record be sent for. Upon the arrival of the record, let the case be put up for hearing.

JUDGMENT.—The report has now been found, it is paper No. 33, on file B of 126 of 1909. It is a very positive document, stating that Dukhi saw the thieves and that they were persons who are now respondents. Under these circumstances, the appeal fails and is dismissed with costs.

Appeal dismissed.

(1) 21 A 26.

RAJANI KANT MUKERJI v. RAM DULAL DAS.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEALS NOS. 1836 AND 2145 TO 2152 OF 1907.

August 2, 1912.

Present:—Mr. Justice Sharf-ud-din and Mr. Justice Coxe.

RAJANI KANT MUKERJI AND OTHERS —PLAINTIFFS—APPELLANTS

versus

RAM DULAL DAS AND OTHERS—DEFENDANTS—RESPONDENTS.

Issues—Object of framing issues—Several issues should not be tried together—Tenant suing to recover his holding from person settled by landlord—Regulation VII of 1822 *and Regulation IX of* 1825—*Settlement proceedings—Collector's jurisdiction to decide disputes as to title between* raiyats—*Decision whether "award" —Regulation VII of* 1822, *s.* 14—*Limitation Act (XV of* 1877), *Sch. II, Arts.* 14, 46.

The whole object of framing issues is to keep the various points arising for decision separate and distinct; and to lump them all up together in the judgment defeats the object of the law and cannot but lead to confusion. The practice of dealing with all the issues in a case together is, therefore, condemned.

Under the decision in *Binad Lal Pakrashi* v. *Kalu Pramanik*, 20 C. 708, a proprietor may not be able to eject tenants settled on the land by his rival, even though his rival is found to be a trespasser. But this principle could never be applied and was never intended to be applied to a tenant seeking to recover his own holding.

It was not intended by the provisions of Regulation VII of 1822 that Collectors should decide disputes as to title between *raiyats*, in which the *zemindars* or *Sadar Malguzars* had no interest, and which could in no way affect the assessment.

A decision by a Collector, therefore, as to the title between two *raiyats* is not an award under the Regulation or within the meaning of Article 46 of Schedule II of the Limitation Act of 1877.

Section 14 of Regulation VII of 1822 gives the Collectors jurisdiction to decide, not all disputes but disputes in regard to the *nature* of any tenancy. But the section does not apply to a case in which rival tenants claim, not only a tenancy of the same nature, but the same land under the same nature of tenancy.

An order of the Collector by which the lands belonging to the plaintiff have been given to the defendant without any warrant of law, does not require to be set aside by the plaintiff, and, therefore, Article 14 of Schedule II of the Limitation Act of 1877 does not apply to a suit by the plaintiff for possession of the lands.

Appeal from the decree of the District Judge of Noakhali, dated June 6th, 1907, reversing that of the Munsif of Feni, dated June 30th, 1903.

Babu *Jogesh Chandra Roy*, for the Appellants.

Babu *Harendra Narain Mitra*, Moulvi *Nur-ud-din Ahmed*, Babus *Biraj Mohan Majumdar* and *Romesh Chandra Sen*, for the Respondents.

JUDGMENT.—These appeals were heard by our learned predecessors on this Bench. On consideration, they desired to hear argument on a point which was not discussed before them, namely, whether the suit was barred by Article 46 of the Limitation Schedule. They were not able, however, to hear this point argued, before one of them left the Court on leave. The appeal has accordingly been re-heard by us in full.

The lands in suit in the present cases are situated in Char Khandkar. It appears that this *mehal* was let in farm from 1289 to 1298. It was again let in farm for 1299 and again for 1300. From 1301 to 1305, it was kept in the direct possession of Government, and it was again let in farm in 1306. The farmers in 1295 settled a holding known as No. 63 with the plaintiffs. But it is alleged by the plaintiffs that in the Settlement proceedings of 1301, a portion of the lands covered by No. 63 was excluded from that holding. They complained to the Settlement Officer who, however, seems to have wholly or almost wholly rejected their claim. The order runs:—"The lands recorded by *amins*, as comprised in *jote* No. 63, consist of the *hasil* lands in their possession, and about 500 *bighas* of *laikabad*, the remainder being *milany*. These lands I consider sufficient, and I order that in the names of the five men in paragraph 2 (*i.e.*, the present plaintiffs) be recorded all those lands. I also hereby reject their claims to any other land." It would also seem from the proceedings that the bulk of the lands, for which the plaintiffs' claims were rejected, was claimed as accretion. Be that as it may, the plaintiffs' claim now is that the lands which they unsuccessfully claimed were part of their holding and were wrongly included in the defendants' holdings. They served Government with notice of a suit under section 424 of the then Civil Procedure Code, and Government finding that the order for the inclusion of the land in the defendants' holdings was wrong, cancelled it in 1311. The defendants, however, dispossessed the plaintiffs and hence this suit. It has been found, however, that the defendants have been in possession since 1301.

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The Munsif decreed the suit by what the learned District Judge rightly calls a long discursive rambling judgment. We may take this opportunity of expressing our concurrence with the learned District Judge's condemnation of the practice, now not unusual, of dealing with all the issues in a case together. The whole object of framing issues is to keep the various points arising for decision separate and distinct and to lump them all up together in the judgment defeats the object of the law and cannot but lead to confusion. The learned District Judge allowed the appeal and dismissed the suit on the ground that the settlements with the defendants were valid and, consequently, could not be extinguished by the plaintiffs. The plaintiffs appeal to this Court.

A preliminary objection is taken that certain of the respondents have died in each of the appeals and that the appeals have, consequently, abated. The appeals are analogous and have been heard together by consent. Except in the case of Appeal No. 2148, all these deaths occurred after the passing of the Code of 1903. Under Order XXII, rule 4, the appeals have abated only as against the deceased respondent. In No. 2148, the respondent died in April 1903 and under section 368 of the old Code, the whole appeal must be regarded as having abated.

Dealing with the cases on the merits, we do not think that the decision of the learned District Judge can be sustained on the grounds given. If, as a matter of fact, the land in suit was a part of the plaintiffs' holding, the landlord, who in this case was the Government, could not give it away to another tenant, and the proper question to be tried in such circumstances was not whether the plaintiffs could avoid the defendants' settlement, but whether the land did or did not belong to the plaintiffs and so could not or could be given by Government to the defendants. *Prima facie*, therefore, the case should go back to the lower Appellate Court for re-consideration.

The decision of the learned District Judge, however, has been supported on five grounds. The first is that it is right as it stands. This is based on the argument that if the land really belonged to the plaintiffs, Government may have been a trespasser but still could create a valid tenancy in the defendants. Reliance is placed on *Binad Lal Pakrashi* v. *Kalu Pramanik* (1). That case, however, seems to us quite different. No doubt, under that decision a proprietor may not be able to eject tenants settled on the land by his rival, even though his rival is found to be a trespasser. But this principle could never be applied and was never intended to be applied to a tenant seeking to recover his own holding.

Secondly, it is argued that the learned District Judge's findings of fact are conclusive. The finding on issue No. 9 is not, in our opinion, conclusive because on the face of it, it is a mere deduction from the finding on issue No. 8, and if the lower Appellate Court erred in law in deciding the appeal on issue No. 8, the finding on issue No. 9 must fail with that on issue No. 8. It is also argued that the lower Appellate Court has found that "the actual lands intended to be covered by *jote* No. 63 were after all settled with the plaintiffs by Government as *jote* No. 38." It is said that this is a finding of fact that the plaintiffs have obtained all the land included in the *jote* No. 63, which is all they claim. But, in our opinion, the meaning of this passage is not that the lands of *jote* No. 63 and of *jote* No. 38 are as a fact identical but that *jote* No. 38 includes all the lands which, in the opinion of the Settlement Officer, were covered by *jote* No. 63. The passage does not touch the question of accretion at all and is not intended, in our opinion, to be a decision of fact.

It is argued, *thirdly*, that the suit is barred by Article 46 of the Limitation Schedule. This is the principal point in dispute. The learned Vakil for the respondents relies on section 14 of Regulation VII of 1822 which was made applicable to *khas mehals* by Regulation IX of 1825.

The preamble of Regulation VII, omitting what is unnecessary for our present purpose, runs as follows:—"Whereas it has become necessary to declare and enact the manner in which future settlements and revisions of settlement are to be conducted and whereas it is the wish and intention of Government that in revising the

(1) 20 C. 708.

existing settlements, the efforts of the Revenue Officer should be directed to the objects of ascertaining, settling and recording the rights, interests, privileges and properties of all persons and classes, owning, occupying, managing or cultivating the land, and whereas it is the desire of Government that the proceedings held and the records formed by the Collectors, when making settlements, should be such as that all demands, claims and suits, may be adjudged and determined according to the facts therein stated, until the same shall have been formally altered, or it shall be shown, by the result of a full investigation in a regular suit, that the proceeding or record of the Collector was erroneous, for the objects above specified the following rules have been enacted."

Then in section 6 it is made lawful for the Collectors to take measures for the procuring and recording the fullest possible information in regard to the rights, interests, privileges and properties of the agricultural community and to determine the same, with the same powers and authority as they now are or may hereafter be entitled to exercise in forming the settlement of estate open to re-assessment.

Section 9 makes it incumbent on Collectors to unite with the assessment "the object of ascertaining and recording the fullest possible information in regard to landed tenures, the rights, interests, and privileges of the various classes of the agricultural community. For this purpose, their proceedings shall embrace a specification of all persons enjoying the possession or property of the soil, care being taken to distinguish the real nature and extent of the interest held. The information collected on the above points shall be so arranged and recorded as to admit of an immediate reference hereafter by the Courts of Judicature." The Collectors are also empowered to grant *pattas* to *raiyats*, and a register of the *pattas* is to form a part of the *rubokary* of Settlement.

Section 14 authorises Collectors "in cases, in which any dispute may exist in regard to the nature of the tenure of any person occupying the soil, to declare in an official proceeding the nature and extent of the interests actually possessed by such occupant;" and these decisions are to be upheld by the Courts "unless on investigation in a regular suit, it shall appear that the possession held under such a decision is wrongful." The section also gives the Collectors powers to try claims to recover possession, leaving the question of title to the Courts.

These are all the provisions of the Regulation that bear on the question now before us and we are not prepared to hold that it was intended by them that the Collectors should decide disputes as to title between *raiyats*, in which the *zemindars* or *Sadar Malguzars* had no interest, and which could in no way affect the assessment. No doubt, the Collectors had to collect all possible information and had to record who was in possession; and for this purpose, they were obliged to come to some conclusion as to who was in possession and perhaps as to who was entitled to possession. But there is nothing to show that these conclusions were to be regarded as formal adjudications or, to use the phraseology of Article 46, as awards. Section 9, after enacting that this record is to admit of an immediate reference by the Courts, goes on to lay down, not that all decisions, but that decisions on the demands of the *zemindars* shall be regulated by it. Section 14 also gives the Collectors jurisdiction to decide, not all disputes, but disputes in regard to the *nature* of any tenancy. Such disputes are common between landlords and tenants and may affect the assessment; but the section does not appear to us to apply to a case in which rival tenants claim, not only a tenancy of the same nature, but the same land under the same nature of tenancy. There is no dispute here as to the nature of the plaintiffs' tenancy. They were in 1301 simply non-occupancy *raiyats*. The learned Vakil for the respondents relies on the cases of *Kanto Prashad Hazari* v. *Asad Ali Khan* (2) and *Abdul Kadir* v. *Hamlu Miah* (3). The former case, however, was not a dispute between rival *raiyats* and in the latter, it does not seem to have been in controversy that the suit was one to set aside the Collector's order. The only question was whether it came under Article 14 or Article 45.

It appears to us that the Settlement Officer's order was not an award under the

(2) 5 C. L. R. 452.
(3) 12 C. W. N. 910.

Regulations and that the suit is not barred by Article 46.

Next it is contended that the suit is barred by Article 14. But the plaintiffs need not have the order set aside, if really their land has been given to another without any warrant of law. As a matter of fact, the order has been set aside and they have gained nothing thereby.

Finally, it is argued that the suit is barred by the Schedule to the Tenancy Act. But this contention must fail having regard to the fact that the suit was instituted before the amendment of the Act and that the plaintiffs were not occupancy *raiyats* in 1301.

Accordingly, with the exception of Appeal No. 2148 which has abated, the appeals are allowed, the decisions of the District Judge are set aside and the cases will go back to him for a decision of the other issues of the case. Costs will abide the result. We allow no costs in Appeal No. 2148.

Appeals allowed.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CIVIL MISCELLANEOUS APPEAL NO. 31 OF 1911.

July 16, 1912.

Present:—Mr. Stanyon, A. J. C.

WASUDEO—APPELLANT

versus

HIRALAL—RESPONDENT.

Civil Procedure Code (Act V of 1908), ss. 2, 47, 104, 121, O. XLIII, r. 1—Decree—Sale in execution—Order allowing or rejecting application for setting aside sale—Appeal, second—Limitation Act (IX of 1908), Sch. I, Art. 166—Starting point—Date of sale Civil Procedure Code (Act XIV of 1882), ss. 2, 244, 588.

No order, appealable as such, under section 588 of the former Civil Procedure Code, or under Order XLIII, rule 1, of the present Code, is a decree even though it may be an order which also falls within the purview of section 244 of the former, or section 47 of the latter Code, or is otherwise within the general definition of a decree contained in section 2 of either Code.

No second appeal lies from an appellate order passed on appeal from an order allowing or rejecting an application for setting aside a sale in execution.

Under Article 166 of the Limitation Act, time begins to run from the date of sale and not from the date of the confirmation of sale.

Miscellaneous appeal against the order of the District Judge, Hoshangabad, dated the 5th July 1911, reversing that of the Munsif, Seoni-Malwa, dated the 15th January 1910.

Mr. *S. R. Pandit*, for the Appellant.

Messrs. *Ramdas Chhabildas* and *P. S. Kotwal*, for the Respondent.

JUDGMENT.—This appeal is manifestly unsupportable. The contention that, under Article 166 of the Limitation Schedule, time begins to run from the date of the confirmation of sale, is sufficiently repelled by the plain language of the Article itself.

Moreover, notwithstanding the view adopted in *Hira Lal Ghose* v. *Chundra Kanto Ghose* (1) and with due respect for the learned Judges who decided that case, I am of opinion that no second appeal lies in this case. The appellant is a judgment-debtor, who applied to set aside a sale of his property made in execution of a decree. The first Court allowed the application. On appeal by the decree holder, the lower Appellate Court reversed that order, and dismissed the application as barred by time, it having been filed one month and four days after the date of the sale. The present appeal is against this decision. The *ratio decidendi* in the Calcutta case, which was governed by the Code of 1882, seems to have been this, that, inasmuch as the setting aside of a sale was a matter relating to the execution, discharge or satisfaction of the decree, an order in respect of it, made *inter partes*, fell under section 244 of the former Code, and was, therefore, a decree, and appealable as such. This reasoning necessarily involves the proposition that every order which was within the purview of section 244 aforesaid, *ipso facto*, was a decree. With this proposition, I record my respectful dissent. Section 244 of the 1882 Code has been re-placed by section 47 of the 1908 Code, but, on the particular point now before us, the law has remained unchanged. Section 588, sub-section (16), of the former Code, allowed an appeal against an order setting aside or refusing to set aside an auction sale. Order XLIII, rule 1 (*j*), repeats that provision. The same section of the 1882 Code prohibited, and section 104 (2) of the 1908 prohibits, a second appeal. But if the order is a decree

(1) 26 C. 539; 3 C. W. N. 403.

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because it falls under section 47 of the present Code, or its prototype, section 244 of the 1882 Code, then the law becomes inconsistent with itself. In my opinion, there is no such inconsistency, even though it is, undoubtedly, the fact that an order of the kind under consideration is an execution order within the limits of one or other of the above sections. The solution to the problem is to be found in the definition of a 'decree' contained in section 2 of each Code. With reference to the particular part of that definition which is material to the question under discussion, it will be found that there is a general definition subject to a special exception. It may be stated thus:—

Every order upon a question within section 244 (now section 47) is a decree, except where it happens to be included in section 588 (now Order XLIII, rule 1).

The maxim *specialia generalibus derogant* clearly applies, and no order, appealable as such under section 588 of the former Code, or under Order XLIII, rule 1 of the present Code, is a decree, even though it may be an order which also falls within the purview of section 244 of the former, or section 47 of the latter Code, or is otherwise within the general definition of a decree contained in section 2 of either Code.

I, therefore, hold that no second appeal lies in this case. It is obvious that there exists no justification for treating this appeal as an application for revision. It is, therefore, dismissed with costs.

Appeal dismissed.

CALCUTTA HIGH COURT.
SECOND CIVIL APPEAL No. 159 OF 1910.
September 2, 1912.
Present:—Mr. Justice Holmwood and Mr. Justice Chatterjee.
GIRHI RANI MISRANI AND OTHERS —DEFENDANTS—APPELLANTS
versus
CHANDRA LAL KANTH—PLAINTIFF —RESPONDENT.

Hindu Law—Means of creating title—Treating near relation without title as co-sharer for many years—Title of that relation—Family arrangement—Registered document, absence of.

Transfer by way of gift is not the only means of creating title under the Hindu Law apart from inheritance or succession.

If the persons actually entitled to a property agree to treat a near relation as a co-sharer out of affection, and abandon their claim to an exclusive right, they may do so without a registered deed. If the act is unequivocal, it will create title in favour of the person who is taken in as a co-sharer.

On the death of a Hindu widow, her husband's estate came into the possession of five persons, three of whom were the actual reversioners and the other two one degree lower in descent. The reversioners treated the other two on an equal footing and they possessed the property in equal shares for several years, short, however, of the statutory period necessary to give them title by adverse possession. The appellants were the purchasers at an execution sale of the interest of one (P.) of those two persons:

Held, that the conduct of the actual reversioners was a family arrangement, and one of the legitimate means of acquisition of property under the Hindu Law, and that it created title in P. and, consequently, in his transferees the appellants.

Appeal from the decree of the District Judge of Durbhanga, dated October 12th, 1909, reversing that of the Additional Munsif of Madhubani, dated August 25th, 1908.

Babus *Umakali Mukhejee* and *Abani Bhushan Mukhejee*, for the Appellants.

Babus *Mohini Mohan Chatterji* and *Biraj Mohan Majumdar*, for the Respondent.

JUDGMENT.—It is quite clear from the findings of the learned District Judge that on the death of Sheobati Koer, the estate of her husband came into the possession of five persons three of whom were the actual reversioners, being the nearest *sapindas* of her husband, and the other two one degree lower in descent. The two latter persons were not the actual reversioners but those that were, treated them on an equal footing and they possessed the property in equal shares for several years, short, however, of the statutory period necessary to give them title by adverse possession. The appellants are the purchasers at an execution sale of the interest of one of those two persons, named Pitambar, and the respondents who were the plaintiffs are the purchasers from two of the actual reversioners. The question is whether the appellants have acquired any title by their purchase to the property in suit. As Pitambar was not one of the actual reversioners, he did not acquire any title by succession. He was, however, made a co-sharer by the actual reversioners and placed

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in possession. The appellants were the lessees of the disputed property and for several years, they paid rent to Pitambar as the owner of one-fifth share and the actual reversioners treated him in various transactions as the owner of one-fifth share. It is contended on the one hand, that this conduct of the actual reversioners could not under the law create any title in favour of Pitambar inasmuch as there was no registered deed of transfer and on the other, that it was a family arrangement and one of the legitimate means of the acquisition of property under the Hindu Law. Manu Chapter X, section 115 enumerates seven approved means of the acquisition of property. The first is *dayâ*, succession or inheritance, and the second is *labha* or receipt from friend, etc. Gautama says:—"an owner is by inheritance, purchase, partition seizure or finding" Chapter X, § 39. Transfer by way of gift, therefore, is not the only means of creating title apart from inheritance or succession. If the persons actually entitled to a property agree to treat a near relation as a co-sharer out of affection and abandon their claim to an exclusive right, they may do so without a registered deed. If the act is unequivocal, it will create title in favour of the person who is taken in as a co-sharer. Although it would be safer to have registered deeds, it cannot be said that such arrangements amongst near relations create no title. This being so, Pitambar had a valid title which passed to the appellants.

In this view of the case, it is not necessary to consider the question of estoppel as a source of title.

As the case, however, is decided on a view of the law discussed in neither of the Courts below, each party will bear its own costs in all Courts. The appeal is accordingly allowed.

Appeal allowed.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CIVIL MISCELLANEOUS APPEAL No. 15 OF 1912.

September 12, 1912.

Present:—Mr. Drake-Brockman, J. C.

KOTHIRAM—APPELLANT

versus

GANPATI—RESPONDENT.

Jurisdiction—Valuation of suit—Suit for foreclosure of mortgage—Presumption—Pleadings—No objection to jurisdiction in first Court—Objection in appeal—Central Provinces Courts Act (II of 1904), ss. 13, 15.

In a suit for foreclosure of a mortgage, when the value of the mortgaged property is not less than the amount of the charge, the value of the suit for purposes of jurisdiction is the total sum claimed as due for principal and interest under the mortgage.

In questions of jurisdiction, the presumption is in favour of giving jurisdiction to the highest Court.

A party cannot be heard to object, in appeal, to a valuation which he did not question at the trial of the suit and by virtue of which the suit had necessarily to be tried in a higher Court.

Miscellaneous appeal against the order of the Divisional Judge, Nagpur Division, dated the 19th February 1912.

Mr. *Atmaram Bhagwant*, for the Appellant.

Mr. *J. Mitra*, for the Respondent.

JUDGMENT.—This is an appeal from an order by the Divisional Judge, Nagpur Division, returning a memorandum of appeal for presentation to this Court on the ground that the value of the suit for purposes of jurisdiction exceeds Rs. 5,000.

The suit was filed in the District Court, Nagpur, on the 1st March 1909, and tried by the Additional Judge of that Court. The plaintiff sought to redeem a prior mortgage to his own securing a principal amount of Rs. 3,339-2-6 and also to foreclose his own mortgages. Under the last mentioned transactions, the mortgage-money came to Rs. 2,151-12 6, being Rs. 1,200 for principal and Rs. 951-12-6 for interest. The defendants, one of whom is the appellant here, raised no objection to the valuation for purposes of jurisdiction, which the plaintiff put at Rs. 5,490-15-0. A decree was passed against all the defendants other than the prior mortgagee.

It is common ground that the valuation of the suit, so far as the prior mortgage is concerned, was correctly put at Rs. 3,339-2-6. The only question is whether the valuation of the claims to foreclose

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should be according to the principal amount (Rs. 1,200) secured or should include the interest claimed.

The learned Divisional Judge declined to apply to suits for foreclosure the principle laid down for redemption suits in *Deosthan of Sonegaon* v. *Mukunda* (1) and mentioned that in the three divisions of these Provinces in which he has served, the invariable practice is to determine the value of a foreclosure suit for jurisdictional purposes by the mortgage-money claimed. In this Court, it is again urged that redemption and foreclosure suits should be treated on the same principle, because they are so treated in the Court Fees Act: see paragraph IX of section 7.

In my opinion, it is suits for sale and suits for foreclosure which should be treated as governed by the same principle for purposes of valuation for jurisdiction. An arbitrary rule is required for redemption suits because the value of the suit to the plaintiff may be said to vary inversely as the amount due on the mortgage: the less the plaintiff has to pay the more valuable is the property to him. In practice, mortgagors seeking to redeem are apt to allege that the mortgage-debt has been wholly satisfied and often they are unable to ascertain the true balance either because the mortgagee has kept no accounts or withholds what he has kept. In rare cases, the mortgagor may put the balance at a figure exceeding the principal money secured, and in such, there may be room for a contention that he should seek a jurisdiction corresponding to that balance; see the *obiter dictum* of Stanyon, A. J. C., in *Ghulaji* v. *Fakir Shah* (2). But in cases where sale or foreclosure is sought, there seems to be no reason why the value of the suit should not be put at the amount of the charge sought to be enforced. A difficulty may arise where in a foreclosure suit the value of the property is less than the amount of the charge, but that is admittedly not the case here: where the point arises, it can be dealt with as in *Krishnama Chariar* v. *Srinivasa Ayyangar* (3).

In the earlier of the Central Provinces decisions above cited, Ismay, J. C., remarked:—

(1) 14 C. P. L. R. 154.
(2) 17 C. P. L. R. 139 at p. 143.
(3) 4 M. 339.

"It also seems reasonable to hold that when a particular subject-matter is valued in one Act, the same value ought to be adopted in respect of the same matter in another Act unless contrary to some special provision or unless there is manifest inconsistency in so doing."

In the present case, the plaintiff may reasonably be regarded as in much the same position as one suing for sale of mortgaged property, and, so far as I am aware, it has never been doubted that in the latter class of cases, jurisdiction is determined by the amount of the claim. In questions of jurisdiction, the presumption is in favour of giving jurisdiction to the highest Court: *per* Mahmood, J., in *Amanat Begam* v. *Bhajan Lal* (4). I would also refer to *Kristo Indro Saha* v. *Huromonee Dossee* (5) as lending support to the view that the present appellant cannot well be heard to object to the valuation which he did not question at the trial and by virtue of which the suit had necessarily to be tried in the District Court.

The appeal fails and is dismissed with costs. I allow Rs. 15 as legal practitioner's fee in this Court.

Appeal dismissed.

(4) 8 A. 438 at p. 445.
(5) 1 I. A. 84.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 277 B OF 1911.

August 31, 1912.

Present:—Mr. Justice Stanyon, A. J. C.

SONBA—APPELLANT

versus

GANESHA—RESPONDENT.

Civil Procedure Code (Act XIV of 1882), ss. 325-A, 323—Void transfer—Collector leasing property for premium satisfying decree—Subsequent disposal of property by judgment-debtor—Civil Procedure Code (Act V of 1908), Sch. III, para. 11.

Where a party seeks to have a transfer of property declared void under section 325-A of the old Code, or paragraph 11, Schedule III, of the present Code, he is bound to show that on the date of such transfer, the Collector was exercising or performing in respect of such property some power or duty conferred upon him by the Code for the purpose of executing a decree which was still unsatisfied on that date.

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Murray v. *Murat Singh*, 3 N. L. R. 171, explained.

The incompetency created by the section exists only for the period during which the execution of the decree remains in the Collector's hands.

Where the Collector gives a lease of the property on payment of a premium sufficient to satisfy the decree forthwith and satisfaction in full is certified to the Civil Court, the judgment-debtor can dispose of the property subject to the lease.

Appeal against the decree of the Additional District Judge, East Berar, Amraoti, dated the 3rd July 1911, confirming that of the Subordinate Judge, Morsi, dated the 15th January 1910.

Mr. *N. M. Bedarkar*, for the Appellant.

Mr. *M. R. Dixit*, for the Respondent.

JUDGMENT.—The facts of this case are simple. One Dalpat was the owner of the field in dispute. The field was attached in execution of a decree against him, and execution having been transferred to the Collector, that authority, under the powers vested in him by section 323 of the Civil Procedure Code, 1882, as applied to Berar, leased the field for 12 years, from 1st April 1886 to 1st April 1898, to one Chimansa, evidently on payment of a premium which at once satisfied the decree. Apparently, Chimansa died in 1893, for, on the 17th April 1894, Dalpat mortgaged the field by a registered deed (Exhibit D 2) to the present defendant, and, on the 10th February 1896, the same Dalpat sold the field by another registered deed (Exhibit D-1) to the defendant, and caused mutation of names in his favour by *razinama* and *kabuliat*. The sanction of the Collector was not obtained to these transactions.

The plaintiff No. 1, Sonba, is the son of Dalpat, and the plaintiff No. 2, Krishna, is the son of Sonba. The present suit was lodged in the Court of the Subordinate Judge of Morsi on the 16th January 1909. Possession of the said field was claimed upon allegations which may be summarised thus:—

(1) That the term of the Collector's lease extended to the 1st April 1898, *i. e.*, within 12 years of this suit.

(2) That, therefore, the deed of sale executed on the 10th February 1896, *i. e.*, during the term of the Collector's lease, was void under section 325-A, Civil Procedure Code, 1882, as applied to Berar.

(3) That on expiry of the lease, Dalpat took possession of the field, but was unlawfully dispossessed by the defendant.

(4) That Dalpat subsequently died, and the plaintiffs are his legal representatives.

The defendant raised various pleas which may be placed under the following heads:—

(1) the sale-deed of February 1896 is not void;

(2) the plaintiffs are estopped because the plaintiff Sonba attested the mortgage-deed of 1894;

(3) the plaintiffs are bound to perfect the title which their predecessor professed to transfer in 1896;

(4) the defendants have been in adverse possession for more than 12 years.

The suit has failed in both the lower Courts, and the plaintiffs have now made this second appeal. The Subordinate Judge laboured to find for the defendant a title by prescription upon artificial and academic grounds. The lower Appellate Court was upon firmer foundation by holding that after the death of the Collector's lessee, Chimansa, Dalpat took unlawful possession of the field, and put the defendant in possession thereof as owner in 1896, since when the defendant's prescriptive title began. Both Courts have summarily held that the deed of sale executed in February 1896 is void under section 325-A aforesaid, because it was executed *during the term of the Collector's lease*. They profess to find authority for this view in *Murray* v. *Murat Singh* (1) The Subordinate Judge wrote:—"This suit would probably have never been instituted but for the recent ruling in *Murray* v. *Murat Singh* (1), which the plaintiff is advised to take advantage of." If any such advice was given to the plaintiffs, they must have had a very poor adviser. The Courts below did not read the ruling with sufficient care, but apparently in that hasty and superficial way which leads to so much misapprehension as to, and misinterpretation of, the published decisions of High Courts. *Murray* v. *Murat Singh* (1) is no authority whatever for the proposition that when, in execution, of a decree, the Collector has granted a lease of the property of a judgment-debtor, the latter is incompetent for the whole term of that

(1) 3 N. L. R. 171.

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lease to effect any valid transfer of the property. The ruling lays down that every alienation made in contravention of the provisions of section 325-A is absolutely void and of no effect against any person whatsoever. The incompetency created by the section exists "so long as the Collector can exercise or perform in respect of the judgment-debtor's immoveable property, or any part thereof, any of the powers or duties conferred or imposed on him by sections 322 to 325 (both inclusive)." This means the period during which the execution of the decree remains in the Collector's hands. The moment the decree is satisfied, in or out of Court, the Collector's power is at an end, and the incompetency to transfer created by section 325-A of the 1882 Code ceases: *Khushalchand* v. *Nandram* (2). Where the Collector gave a lease of the property under section 323 of the 1882 Code, he could grant it under clause 2 (*a*) on payment of a premium sufficient to satisfy the decree forthwith. In such a case, he certified satisfaction in full to the Civil Court, and his powers and duties came to an end. Thereafter, the lease given by him remained binding on the judgment-debtor, but the incompetency imposed on the latter by section 325-A also came to an end, and, subject to the lease, he could dispose of the property irrespective of that section. But where the Collector gave a lease of the property under clause 2 (*d*) of section 323 aforesaid, whereof the income was to be applied as it came in towards a progressive satisfaction of the decree, then the conduct of the execution might remain in the Collector's hands during the whole term of the lease, and, while it so remained, the incompetency of the judgment-debtor would remain with it. This was the case in *Ganga Prasad* v. *Ganga Bakhsh Singh* (3). This difference was recently pointed out by a Bench of this Court in *Balwant* v. *Ganeshdas* First, Appeal No. 8 of 1911. Where a party seeks to have a transfer of property declared void under section 325 A of the 1882 Code or Schedule III, Paragraph 11 of the present Code, he is bound to show that on the date of such transfer, the Collector was exercising or performing in respect of such property some power or duty conferred upon him by the Code for the purpose of executing a decree which was still unsatisfied on that date. There is nothing in the present case to show that such a state of things prevailed on the 10th February 1896 in respect of the field now in dispute. It is evident that the decree was satisfied with a premium paid by Chimansa in 1886, and with its satisfaction, Dalpat's incompetency to transfer under section 325-A of the 1882 Code was removed. Therefore, the mortgage of 1894 and the sale of 1896 cannot be questioned under that section, and there is an end of this case.

For the above reasons, this appeal fails and is dismissed with costs.

Appeal dismissed.

(2) 13 Bom. L. R. 977; 33 B. 516; 12 Ind. Cas. 572.
(3) 29 A. 415; A. W. N. (1907) 112.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 308-B OF 1911.

September 26, 1912.

Present:—Mr Batten, A. J. C.

KASHIBAI—APPELLANT

versus

LADURAM—RESPONDENT.

Burden of proof—Occupancy rights—Transfer—Transferee in possession—Suit for declaration—Defendant admitting transfer by lease—Plaintiff pleading sale—Evidence Act (I of 1872), ss. 101, 102, 110, 114.

A. transferred certain occupancy rights in unalienated land in Berar to *B.*, who was put in possession. *B.* sued *A.* for a declaration that he was entitled to be the registered occupant as *A.* had sold the occupancy rights to him. *A.* denied the sale, alleging that the occupancy rights were only leased to *B.* for a term of years:

Held, that the burden of proving that the transfer was a sale and not a lease, lay on *B.*

Appeal against the decree of the Additional District Judge, West Berar, Akola, dated the 31st August 1911, reversing that of the Munsif, Basim, dated the 30th November 1910.

Mr. *V. D. Sathe*, for the Appellant.

The Hon'ble Mr. *M. B. Dadabhoy*, for the Respondent.

JUDGMENT.—The case of the plaintiff-appellant, as stated in the plaint, is that she is in possession as owner of two survey numbers in the Basim Taluq in Berar, but that the '*khata*' of the fields stands in the

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name of the defendant-respondent, and the defendant refuses to take steps to get the '*khata*' transferred to the name of the plaintiff. She prays for a declaration that she is the owner of the fields, and is, therefore, entitled to have the '*khata*' transferred to her name. In other words, the plaintiff seeks for an adjudication that she is entitled to be the registered occupant and to be recognised as such by the Deputy Commissioner according to the provisions of section 73 of the Berar Land Revenue Code. From the pleadings, it appears that the plaintiff admits that the defendant was formerly both owner of the occupancy right and registered occupant, but that she claims that the defendant sold the occupancy right to the plaintiff by an oral sale accompanied with delivery, about $5\frac{1}{2}$ years before the institution of the suit, for Rs. 225, of which Rs. 175 were paid in cash, and Rs. 50 in the form of a promissory-note on which the defendant sued her and got a decree; while the defendant contends that he leased the fields to the plaintiff on an annual rent of Rs. 50, for a period of five years which expired shortly after the institution of the suit, the promissory-note for Rs. 50 representing the rent for the first year. The defendant says that the plaintiff paid rent for two years and has brought this suit in order to evade payment for the other three years. Oral evidence was adduced in support of the respective cases, and the Munsif held the sale proved and the lease not proved. The transaction, whatever was its nature, took place before the application of the Transfer of Property Act to Berar, and the sale and lease could each have been effected without a deed of transfer. On appeal, the Additional District Judge held that the plaintiff's evidence was insufficient to prove that the transaction was a sale, but did not dissent from the Munsif's finding that the lease was not proved. He dismissed the suit on the ground that "even supposing that the story of the lease is not established, the plaintiff's case must fail as her story of the sale is not substantiated."

The evidence on both sides is unsatisfactory and the lower Courts were justified in finding neither sale nor lease to be proved. Under these circumstances, the decision of the suit depends on whom the burden of proof lies, in the circumstances admitted by both parties, namely, that the occupancy right in the fields belonged to the defendant, and that he made a transfer of some kind of those rights to the plaintiff. I may say that as the plaintiff is in possession, she seems to have been ill-advised in adopting the position of a plaintiff merely with the object of getting the '*khata*' transferred to her name, considering the small value that can as a rule under present conditions in Berar be attached, as pointed out in *Kisin* v. *Hira Lal* (1), to the mere status of *khatedar*.

I am asked in appeal to apply section 110 of the Evidence Act and to hold that as the plaintiff is in possession of the fields, the burden of proving that she is not the owner lies on the defendant. But in this case there are difficulties in the way of applying that section, *firstly*, because the fields are unalienated land which are the property of Government, and *secondly*, because up to the date of the transfer, the nature of which is in dispute, the defendant admittedly was the owner of the occupancy rights. No doubt, occupancy rights in Berar are alienable, and those in the survey numbers concerned in this suit were unconditionally alienable, and the ownership of such rights is for practical purposes equivalent to the ownership of the land subject to the payment of Government Revenue; but at the same time, I have considerable doubts whether the provisions of section 110 are strictly applicable to such cases. Then it is admitted that the defendant was the owner of the occupancy rights, and having regard to the principles of section 114 of the Evidence Act it would ordinarily lie on the plaintiff to prove that he had ceased to be so. But the special feature of this case is that the defendant admits that he transferred the possession of the fields to the plaintiff, and this being so, the question is whether there is any presumption that the transfer was a transfer by sale rather than a transfer by lease.

I have been able to find no ruling bearing on the case; there are numerous cases, some of which have been cited before me, under the Tenancy Acts of various Provinces, in which the burden of proving that he is a tenant is held to lie on the person asserting

(1) 8 N. L. R. 76; 15 Ind. Cas. 899.

it; but they have no applicability to a case in which the superior holder is alleged to have parted with his rights as such. The present case is more analogous to that of a dispute as to whether a person is a *thekadar* or a vendee of proprietary rights, but I cannot find any ruling of assistance in this case. The facts in *Swarnamayi Raur* v. *Srinibash Koyal* (2) are somewhat similar to the present ones, for there the question in dispute was whether the defendant in possession was the owner or not; the case was decided in favour of the plaintiff who was able to produce the title-deeds. The position of the plaintiff there was somewhat similar to that of the defendant here, but there is this important difference that the present defendant admits having made a transfer of some kind to the plaintiff. After full consideration, I am of opinion that there is no special provision of the Evidence Act as to the burden of proof bearing on the facts of the case, and that when it is admitted that there was a transfer of some kind to the person in possession by the former admitted owner of the occupancy right, there is no presumption one way or the other whether that transfer was by way of sale or by way of lease, the possession being consistent with either alternative. We must fall back on the general provisions as to the burden of proof contained in sections 101 and 102 of the Evidence Act, and as the plaintiff's suit must fail unless the transfer was a sale and not a lease, and as the nature of the transfer is not proved, I consider that the learned District Judge was right in dismissing the plaintiff's suit. The appeal is dismissed with costs.

Appeal dismissed.

(2) 6 B. L. R. 144.

BOMBAY HIGH COURT.

APPEAL FROM ORDER No. 29 OF 1911.

September 30, 1912.

Present:—Mr. Justice Batchelor and Mr. Justice Rao.

NAROTTAM RAJARAM—APPELLANTS

versus

MOHANLAL KAHANDAS—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XLI, r. 23—Order of remand—Power of the Court of Appeal—Civil Procedure Code (Act XIV of 1882), s. 564, effect of removal—Construction of statutes.

Plaintiffs sued for accounts and redemption of certain mortgaged property; the trial Court after taking accounts decreed possession to the plaintiffs. In appeal, however, the Appellate Court differed from the trial Court's findings as to certain items of the account and as to whether one particular parcel of the land mortgaged had been proved to have been in the mortgagee's possession. Thereupon, the original decree was reversed and the case remanded for taking fresh accounts:

Held, that the order of remand could not be lawfully made.

Order XLI, rule 23, read together with other rules in the same order, clearly shows that the intention of the Legislature is to avoid remands wherever they can be avoided, and to ensure that in all cases where the Court of appeal is in possession of sufficient materials to form a judgment, that Court shall record its own judgment on the materials before it and shall not waste time and put the parties to further costs by remanding to a Subordinate Court.

The removal of section 564 of the old Civil Procedure Code had no other object but to withdraw those restrictive provisions of that section which in practice had been found so embarrassing, such restrictions occurring for instance in cases where the Appellate Court has allowed an amendment of the pleading or has added a party to the record.

Appeal against an order passed by the first class Subordinate Judge, with Appellate Powers, at Broach, in Appeal No. 94 of 1909, reversing that passed by, and remanding the suit to, the Subordinate Judge at Anklesh war, in Civil Suit No. 463 of 1903.

Mr. *L. A. Shah*, for the Appellants.

Mr. *G. N. Thakore*, for the Respondent.

JUDGMENT.—The appellants before us are the plaintiffs, and they sued for accounts and for redemption of certain mortgaged property under the Dekkhan Agriculturists' Relief Act. The trial Court took careful and elaborate accounts under the Act from a period so far removed as *Samvat* 1926. As a result, it found that the mortgage, which was a mortgage with possession, had been paid off, and, therefore, decreed that possession should be restored to the plaintiffs on their payment of the mortgagee's costs.

The defendant appealed, and the learned first class Subordinate Judge differed from the trial Court's findings as to certain items of the account and as to whether one particular parcel of the land mortgaged had been proved to have been in the mortgagee's possession. He thereupon reversed the original decree and remanded the case for taking fresh accounts with reference to the observations in his judgment.

NAROTTAM RAJARAM v. MOHANLAL.

It is from this order that the plaintiffs bring this present appeal. The question, therefore, before us is, whether in the state of facts which we have described, an order of remand can lawfully be made. That is the sole question before us and it must be understood that our judgment is confined to a decision on these facts.

Now the authority under which a Court of Appeal is entitled to remand a case is to be found in Order XLI, rule 23, which provides that such remand may be made by the Appellate Court when the trial Court has disposed of the suit upon a preliminary point and the decree is reversed in appeal. This rule 23 corresponds to section 562 of the former Procedure Code. In that former Code, there was also a section 564, which enacted that an Appellate Court should not remand a case for a second decision except as provided in section 562. This section 564, however, does not appear in our present Code.

The question is raised, what is the inference to be drawn from the Legislative removal of section 564? It is argued for the respondent that the inference should be that the Legislature intended to confer on Appellate Courts an indiscriminate power of remanding cases, or at least a power so wide as to include and justify a remand in the particular case before us. We are, however, unable to draw that inference. In the first place, it may be doubted whether section 564, when it stood in the Code, was at any time anything more than a provision inserted *ex majori cautela* for the guidance of the Courts; for if the only power of making a remand is conferred by section 562, it would appear superfluous to provide also that there should be no power of remand beyond that conferred by the section. However this may be, we think that sufficient reason for the removal of section 564 is to be found in the fact, to which the Reports testify, that that section was found in its working to be awkward and embarrassing. Reference may be made to the decisions in *Habib Bakhsh* v. *Baldeo Prasad* (1) and *Perumbra Nayar* v. *Subrahmanian Patter* (2), as instances of the lengths to which the Courts were driven to go in order to avoid the imperative restrictions imposed by section 564. It would appear, therefore, that the removal of section 564 had no other object but to withdraw those restrictive provisions of that section which in practice had been found embarrassing, such restrictions occurring, for instance, in cases where the Appellate Court had allowed an amendment of the pleadings, or had added a party to the record. This opinion seems to derive support from the remaining rules in Order XLI, for those remaining rules seem to us to provide adequately that no unnecessary remands should be made by the Court of Appeal. We refer, for instance, to rule 24, which provides that where the evidence on the record is sufficient, the Appellate Court may determine the case finally: and in rule 33 the Appellate Court is armed with the power to pass any decree and make any order which ought to have been passed by the lower Court. These rules seem to us to show that the intention of the Legislature is to avoid remands wherever they can be avoided, and to ensure that in all cases where the Court of Appeal is in possession of sufficient materials to form a judgment, that Court shall record its own judgment on the materials before it and shall not waste time and put the parties to further costs by remanding to a Subordinate Court.

In the case before us, the only difference between the two Judges was in small particulars of accounts, and the only necessary alteration consequent upon the Appellate Judge's view would have been a slight re-adjustment of the decree flowing from a small re-calculation of the amounts due. There was indeed no reason why the first Court's decree as such should have been reversed, for that decree provided that possession should be restored to the plaintiffs, and even upon the lower Appellate Court's finding, possession would also go to the plaintiffs, though possibly only upon condition of a certain payment by the plaintiffs to their mortgagee.

As to section 151, which Mr. Thakore relied upon, we think that it has no relevance to the present argument. It was not, in our opinion, necessary for the ends of justice to withdraw the decision of the case from a Court of higher jurisdiction and to hand it over to a Court of lower jurisdiction. Nor do we feel pressed by the provi-

(1) 23 A. 167; A. W. N. (1901) 39.
(2) 23 M. 445.

sions of section 99 of the Code, to which also Mr Thakore appealed. The object of that section, as we read it, is to prevent higher Courts from reversing the substantive decrees of lower Courts on merely technical grounds: and the section supplies no reason why we should not now reverse precisely one of those orders of remand against which section 99 is itself directed.

On these grounds, we must reverse the order of the lower Appellate Court and remand the appeal to that Court to be decided there on its merits.

The appellants must have their costs of the appeal.

The cross-objections by the respondent are dismissed with costs.

Order reversed.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION PETITION No. 75-B OF 1911.

September 13, 1912.

Present:—Mr. Stanyon, A. J. C.

BALAJI—PLAINTIFF—APPLICANT

versus

HASTIMAL—DEFENDANT—RESPONDENT.

Contract (Act IX of 1872), s. 134—Surety, discharge of—Principal debtor sued but not proceeded with owing to want of address.

The inability of a creditor to proceed with his suit against the principal debtor by reason of the disappearance of the latter, and his consequent demand of relief against the surety only, does not operate as a discharge of the surety under section 134 of the Contract Act.

Shaik Alli v. *Mahomed*, 14 B. 267, followed.

Gopal v. *Ganpat*, 7 N. L. R. 122; 11 Ind. Cas. 911, relied upon.

Petition for revision against the order of the Subordinate Judge, with powers of a Court of Small Causes, Morsi, dated the 29th April 1911.

Mr. *V. D. Kale*, for the Applicant.

JUDGMENT.—The suit out of which this application has arisen was brought by a creditor against his principal debtor and a surety. Two attempts to serve the summons upon the principal debtor proved abortive. He had disappeared and the plaintiff was unable to discover his address. He, therefore, asked for a decree against the surety only, but the Court below (the Court of Small Causes at Morsi) regarded this procedure as a discharge of the principal debtor by the creditor which, under section 134 of the Indian Contract Act, as applied to Berar, has also discharged the surety, and dismissed the suit. Under the Berar Small Cause Court Law, the plaintiff has applied for revision of this decree. The surety, though duly served with notice of these proceedings, has not appeared to contest the application. The case was well argued before me.

I have no doubt that the view taken by the learned Judge of the Court below is wrong. He professes to have found authority for it in the case of *Mahomed Shareef* v. *Chaittu* (1), which followed several rulings of the Allahabad High Court ending with *Ranjit Singh* v. *Naubat* (2). But those cases deal with the absolutely different question whether the omission of a creditor to sue his principal debtor within the priod of limitation discharges the surety. It is noteworthy that there was even then a conflict of opinion on the point, as noted by the learned Judicial Commissioner in the case first above cited; and that the contrary view has very recently been affirmed by the Madras High Court, following the High Courts of Calcutta and Bombay, and expressly dissenting from the Allahabad view, in *Subramania Aiyar* v. *Gopala Aiyar* (3). But the present is a case of an entirely different kind, and there is clear authority for the proposition that the inability of the creditor to proceed with his suit against the principal debtor by reason of the disappearance of the latter, and his consequent demand of relief against the surety only, does not operate as a discharge of such surety: *Shaik Alli* v. *Mahomed* (4). That decision seems to me to be correct, and I follow it. I do not think it is in conflict with the decision in *Mahomed Shareef* v. *Chaittu* (1). In my opinion, where, by disappearance or other method at which the creditor has not connived, the principal debtor avoids payment or suit to enforce payment, it is of the very essence of the contract that the creditor should fall back on the surety. This was the *ratio decidendi*

(1) 2 N. L. R. 42.

(2) 24 A. 504; A. W. N. (1902) 161.

(3) 33 M. 303; 20 M. L. J. 633; 7 Ind. Cas. 898; 8 M. L. T. 321.

(4) 14 B. 267.

in *Gopal* v. *Ganpat* (5), with the judgment in which I concur.

There is no dispute as to the correctness of the claim. I, therefore, reverse the decree of the Small Cause Court and order that the defendant Hastimal do pay the plaintiff the sum of Rs. 34-6-0, and all the costs of the suit amounting to Rs. 23-2-0, with future interest on the whole decretal sum of Rs. 57-8-0 at 6 per cent. per annum from the date of institution of the suit to the date of payment. As the said defendant did not contest the suit, and has not contested this application for revision, I make no order as to costs in this Court.

Decree reversed.

(5) 7 N. L. R. 122; 11 Ind. Cas. 911.

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 229 OF 1912.

November 7, 1912.

Present:—Mr. Justice Sadasiva Aiyar.

A. M. CHOKALINGAM MUDALIAR—PLAINTIFF—PETITIONER

versus

G. MAHOMED SHERIFF SAHEB AND OTHERS—DEFENDANTS—RESPONDENTS.

Master and servant—Contract of service for definite term—Discontinuance of service by the servant during term—Right to claim compensation for period of work—Contract Act (IX of 1872), ss. 39, 64, 65, 73 and 74.

The plaintiff entered defendant's service under an engagement to work for a period of one year on a salary of Rs. 18 per month, the same being payable in a lump sum at the end of the year. He discontinued his services just 10 days before the expiry of the year without any justification and sued to recover the wages for the period during which he had actually worked:

Held, that the plaintiff was entitled to recover for that period.

A servant who without excuse abandons his employment before the expiry of the term may, after its expiration, recover the value of the services performed less the master's damages for the breach of the contract.

Where one party hires himself to another for a given period of time and leaves his services before the expiration of the term without any fault on the part of the employer, the former may recover the value to the services performed as upon a *quantum meruit* without showing that he performed his entire contract or that he left the services of his employer without any good cause.

In cases between master and servant, Courts should not be too strict in treating the contracts of service for a certain period and for a certain wage as indivisible unless the nature of service raises a strong presumption that the servant intended not to claim wages for a broken period.

In calculating the reasonable remuneration for the broken period, the broken contract is admissible to prove the nature of the service for the broken period.

Petition, under section 25 of Act IX of 1887, praying the High Court to revise the decree of the Court of the Subordinate Judge of Nilgiris (Ootacamund), in S. C. S. No 303 of 1911.

Mr. *V. Visvanatha Sastry*, for the Petitioner.

Messrs. *K. Naraina Rao* and *R. Kuppuswami Iyer*, for the Respondents.

JUDGMENT.—The plaintiff is the petitioner in revision. He brought this Small Cause Suit in the Nilgiri Subordinate Judge's Court for the salary due to him from 1st April 1908 to 20th March 1909 at Rs. 18 a month or Rs. 216 a year. His engagement was for one year from 1st April to 31st March 1909. The Subordinate Judge has found that the plaintiff left the defendant's service without justification on 20th March 1909. He also found that though the salary was fixed at Rs. 18 a month, the engagement was for one full year and his salary was agreed to be payable in a lump sum of Rs. 216 at the end of the year. On these findings, he held that according to the rule of law established by English decisions and followed in *Dhumee Behara* v. *Sevenoaks* (1), the plaintiff lost all right to wages for the 11 months and 20 days during which he actually worked. The principle of the rule, as stated in the English cases, is that the contract must be deemed an entire indivisible contract and the performance of the services for the whole time agreed upon was in the nature of a condition precedent to the right to recover even a portion of the wages. "It is a general rule applicable to all contracts, that where the plaintiff has contracted to do an entire work for a specific sum, he can recover nothing unless the work be done or it can be shown that it was the defendant's default that the work was incomplete or that there is something to justify the conclusion that the parties have entered into a fresh contract." The leading English case on this question is *Cutter* v. *Powell* (2). That was the case of a sailor who agreed to serve as second mate for a sum of 30 guineas during the voyage of a ship between Kingston and

(1) 13 C. 80.

(2) 6 Term. Rept. 320; 3 R. R. 185; Smith's Leading Cases, Vol. II, p. 1.

Liverpool. He did duty as mate between 31st July 1793 and 20th September 1793 but died during the voyage and before the ship's arrival at Liverpool. The suit was brought in *assumpsit* for work and labour done by the deceased. The suit was dismissed on the ground that no contract can even be implied making the master liable to pay on a *quantum meruit*. Lord Kenyon said that the contract was "a kind of insurance." The learned Judges who decided the case also put it upon the custom of the commercial world. In the notes to that case, there are learned disquisitions as to whether suits in particular cases lie in *indebitatus assumpsit* or in *quantum meruit* or on the case and so on. But the learning connected with the nature of the action to be brought is not of much use in these days. Two exceptions are mentioned to the general rule laid down, the exceptions being (*a*) cases in which the special contract being unperformed, a new contract has been implied from the conduct of the parties to pay remuneration commensurate with the benefit derived from partial performance, and (*b*) where the party to be made liable has absolutely refused to perform or has incapacitated himself from performing his side of the contract, the other party may treat the contract as rescinded and sue for what he has already done under it upon a *quantum meruit*. So much for English Law. I am, however, strongly of opinion that in cases between master and servant, Courts should not be too strict in treating the contracts of service for a certain period and for a certain wage as indivisible unless the nature of the service (like that of a sailor for a particular voyage or a servant engaged for domestic service during a particular pilgrimage) raises a strong presumption that the servant was intended not to be entitled to claim wages for broken periods. Even in such cases, if the servant was unable to perform his duty through illness or death, I would allow a suit for the value of work actually performed for the broken period. Courts in India are not always bound by the technicalities of English Law or even by the precedents established by the English cases. The Subordinate Judge in this case says that he was at first surprised when the contention was advanced on behalf of the first defendant that the plaintiff was not entitled in law to any wages at all by reason of his having quitted the service of his employers ten days before the stipulated period of one year had elapsed. He also says that "the rule of English Law works great hardship in a case like the present one where the servant fell short of his year of service by only 11 days.' Though there are some cases decided by the Bombay and Calcutta High Courts following the rule of English Law [See *Ramji Manor* v. *F. D. Little* (3); *Dhumee Behara* v. *Sevenoaks* (1) and *Aryodaya S. & W. Co.* v. *Sivi Virchand* (4)], no Madras case has been quoted to me which follows the strict rule of English law. Even in Calcutta, I came across an old case in *Rughoonath Doss* v. *Mr. T. Halle* (5), where Norman, C. J. and Ainslie, J. refused to follow the rule of English Law. That was a case of a dismissed servant who sued for wages for the broken period during which he served. The defendant, on the authority of English cases, contended that the plaintiff could not demand his pay for the broken period but ought to have brought an action for wrongful dismissal. But the High Court held that the plaintiff was clearly entitled to payment for the time during which he had served according to the rate of wages he was earning when dismissed The presumption of a yearly hiring is capable of rebuttal and it is necessary to consider the circumstances of each case in order to find out whether the presumption has been rebutted in that case. See Laws of England by Halsbury, Volume 20, page 92. In England, it seems to have been held that the question whether a contract of service for a term was indivisible or divisible might also be decided on the nature of the service. I am of opinion that in India where payments of wages are usually made monthly, Courts should be more ready than in England to hold that servants are entitled to wages for the full months at least, during which they did service though in some particular cases, the servant might have agreed to take his wages at the end of the year. Of course, the master who, where the servant breaks his contract before the end of the period for which he agreed to serve, has sustained damages owing to such breach of contract is

(3) 10 B. H. C. R. 57.
(4) 13 Bom. L. R. 19; 9 Ind. Cas. 348.
(5) 16 W. R. 60.

entitled to claim the damages caused by the breach and to set off such damages against the wages claimed by the servant for the broken period. But to hold in India that the servant loses his entire wages because he left the service without cause a few days before the expiry of one year or to hold, as in *Cutter* v. *Powell* (2), that the servant's legal representative cannot recover even a single pie because the servant died before the expiry of the year, would, in my opinion, be against justice, equity and good conscience. Even taking the question as a pure question of law, Indian Courts are bound by the provision of the Contract Act in all these matters. Section 39 of the Contract Act is as follows:—"When a party to a contract has refused to perform, or disabled himself from performing, his promise in its entirety, the promisee may put an end to the contract, unless he has signified, by words or conduct, his acquiescence in its continuance." Accepting the findings of the Subordinate Judge, the plaintiff, no doubt, broke his contract when he absented himself from work on the 21st March 1909. The defendants were entitled to rescind the contract between them and plaintiff, such contract consisting of the plaintiff's promise to work for one year and the defendant's promise to pay Rs. 216 for one year's service. What result follows after the contract was rescinded? Section 64 of the Contract Act says: "The party rescinding a voidable contract shall, if he have received any benefit thereunder from another party to such contract, restore such benefit, so far as may be, to the person from whom it was received." Section 65 and its illustration (*c*) are as follows:—"When an agreement is discovered to be void, or when a contract becomes void, any person who has received any advantage under such agreement or contract is bound to restore it, or to make compensation for it, to the persons from whom he received it. *A.*, a singer, contracts with *B.*, the manager of a theatre, to sing at his theatre for two nights in every week during next two months, and *B.* engages to pay her a hundred rupees for each night's performance. On the 6th night, *A.* wilfully absents herself from the theatre, and *B.*, in consequence, rescinds the contract. *B.* must pay *A.* for the five nights on which she had sung." This illustration (*c*), in my opinion, is almost conclusive in plaintiff's favour in this case. In the present case, the plaintiff agreed to serve for one year just as *A.*, the singer in the illustration, agreed to sing during the nights of two months. Here, the defendants agreed to pay Rs. 18 a month as salary just as *B.* in the illustration agreed to pay Rs. 100 for each night's performance. The only difference between the two cases is that it is not expressly said in the illustration that the remuneration to the singer *A.* for all the nights' performances should be paid at the end of the two months. But the conclusion that *B.* must pay *A.* for the five nights on which she had sung implies that the remuneration was not to be paid at the end of each performance, for if that was the understanding, *B.* must have broken it by not having paid for the five nights at the end of each night and *A.* could not be said to have wilfully absented herself on the 6th night.

That the strict rule of English Law would work injustice and would be inequitable if applied to all cases has been felt in many of the American States and has also been felt by some Judges in England itself. In cases of death or illness of the servant and the consequent rescission of the contract, American Courts always allow *quantum meruit* on the ground that a contract may be implied between the master and the servant that on such contingencies happening, proportionate wages should be paid. In the American Cyclopædia (Vol. XXVI, page 1045), it is said that the more equitable rule which prevails in many States is that the employee is entitled to recover *pro rata* for the reasonable value of his services not to exceed the contract price, up to the time of the discharge, taking into consideration the damages resulting to the employer and in note 48, numerous cases decided in 10 different States are quoted to support this proposition.

In the said Cyclopædia (Vol. XI, page 2833), it is stated: "There are, however, a number of cases in which it is held that where an entire contract for services has been only partially performed, the party in fault may nevertheless recover from the other party for the actual benefit resulting to him from such partial performance." Then under note 43, several cases are quoted decided in several States. Of course,

if the services rendered have been of no benefit whatever for the employer, the master or principal cannot be made to pay anything to the servant or contractor. For instance, in the case of building contracts, if the incomplete building built by the contractor and the material used by him are of absolutely no use and the building has to be wholly pulled down, the principal cannot be asked to pay the cost incurred by the contractor in the construction of the useless building. In Missouri, it has been held that one who contracts to do work on a building but fails to complete his contract after partially performing it is entitled to the reasonable value of the work done, not exceeding the contract price less whatever damages the other contracting party has suffered through the non-completion of the contract. In Kansas, it has been held that a recovery may be had in all cases where the other party has received benefit from the partial performance of the contract whether he has so received the sum and retained it from choice or *from the necessities of the case.* This last clause and the illustration (c) to section 65 meet fully, in my opinion, the contention put forward in the able arguments of Mr R. Kuppuswami Aiyar, who appeared for the respondents in this case, *viz.*, that as the defendants could not exercise any choice now in respect of the benefit which they had obtained from the plaintiff's services during the 354 days during which he has served them, they are under no obligation to remunerate him for the 354 days' service. As regards the reasonable remuneration for the broken period, the broken contract is admissible to prove the value of the services for the broken period. See American Cyclopædia, Volume XI, page 2849. As I said in the beginning, the presumption that the work agreed to be done is indivisible and the wages to be given for such work is also indivisible is not in most cases in conformity with equity. Numerous exceptions have been grafted upon the rule and I think that whereas in the present case, the salary is calculated as so much per month in the agreement between the parties though it is payable at the end of the year, equity requires that the contract should be deemed divisible at least so far as to allow of division into entire monthly periods. As I have also said already, Indian Courts are not absolutely bound by English precedents. In 34th Century Digest, pages 544 to 555, the cases *pro* and *con* on this question are digested and several cases are quoted where the following two propositions have been laid down:—(*a*). "A servant who, without excuse, abandons his employment before the expiration of the term may, after its expiration, recover the value of the services performed, less the master's damages for the breach of the contract" and (*b*) "Where one party hires himself to another for a given period of time, and leaves the service before the expiration of the term, without any fault on the part of the employer, the former may recover the value of the services performed as upon a *quantum meruit*, without showing that he performed his entire contract, or that he left the service of his employer for good cause." No doubt, the cases which establish these two propositions are decidedly less numerous than the cases which establish the contrary propositions. But I might be permitted to repeat again that the Contract Act and the principles enacted by its provisions are more binding on the Indian Courts than the majority of English and American precedents. Reading sections 39, 64, 65, 73 and 74 of the Contract Act together, I am clearly of opinion that the two rules enunciated in the minority of the American cases already referred to are much more in conformity with the Contract Act than the majority of such cases decided in England and America. Mr. Shephard in his commentary to section 65 of the Contract Act admits that "that section is a departure from the English Law." He says:—"A right to compensation under the section exists although, according to English Law, apportionment would be said to be impossible. Thus when the plaintiff paid a lump sum by way of rent for a godown let to him from 12 months and during that period, the godown was destroyed by fire it was held that as the lease had become void, the plaintiff was entitled to recover a proportionate part of the sum paid *Dhuramsey* v. *Ahmedbhai* (6)." In Tennessee the law has gone so far as to say that even where the employee has been guilty of a gross violation of duty and has even been discharged for embezzlement, he

(6) 23 B. 15.

can still recover compensation for the service actually rendered by him. See *Massey* v. *Taylor, Wood and Co.* (7). It is said by Lord Coleridge in *George* v. *Davies* (8) that Lawrence, J, in one of his judgments, distinguishing *Cutter* v. *Powel* (2), which related to a sailor's contract for wages, from the ordinary contract relating to the hiring of an ordinary servant, used the following words:—"With regard to the common case of a hired servant to which this has been compared, such a servant, though hired in a general way, is considered to be hired *with reference to the general understanding upon the subject* that the servant shall be entitled to his wages for the time he serves, though he did not continue in the service during the whole year." Thus there has at least been one English Judge who has taken the view which, in my opinion, is both the Common Law in India and the statute law enacted by the Contract Act. (This case in 2 K. King's Bench Division contains some other instructive remarks on this question). I believe that I have dwelt at sufficient length on the question of law involved in this case and differing from the learned Subordinate Judge I hold that the plaintiff is entitled to recover wages for the 11 entire months during which he did service, there being no allegation in the written statements that by reason of his not working during the last 10 days of the stipulated period of one year, the defendants have sustained any damages which they are entitled to set off. Defendants Nos. 2 and 3 as the 1st defendant's partners, who authorised the 1st defendant to employ the plaintiff as a servant of the partnership, are also liable for the plaintiff's claim. In the result, judgment is given for the plaintiff for Rs. 198 and proportionate costs of suit with interest at 6 per cent. per annum on Rs. 198 from date of suit till date of payment against the defendants. The defendants will also pay the plaintiff's proportionate costs of this revision petition.

Petition allowed.

(7) 98 Am. Dec. 429; 5 Cold. 447.

(8) (1911) 2 K. B. 445 at p. 449; 80 L. J. K. B. 924; 104 L. T. 648; 55 S. J. 481; 27 T. L. R. 415.

LOWER BURMA CHIEF COURT.

SECOND CIVIL APPEAL No. 44 OF 1911.

June 18, 1912.

Present:—Mr. Justice Parlett.

MAUNG PU AND ANOTHER—APPELLANTS

versus

MA GYAUK THAY AND OTHERS—RESPONDENTS.

Civil Procedure Code (Act V of 1903), O. XLI, r. 31—Judgment—Appellate Court, duty of—Conflicting evidence—Grounds of appeal.

The memorandum of appeal in the lower Appellate Court contained seven grounds out of which the Court referred to one only in the judgment and as regards that also, all that the Judge said was that he saw no sufficient reason for differing from the first Court's decision; there was conflicting evidence to be discussed:

Held, that the appeal had not been disposed of according to law and that the judgment and decree should be set aside and the lower Court directed to re-hear the appeal and decide it according to law upon such of the seven grounds contained in the memorandum of appeal as might not be specifically abandoned at the hearing.

Where evidence conflicts, it is the duty of the Appellate Court to weigh and discuss it and come to its own conclusion on it and give its own reasons for that conclusion.

Mg Myo v. *Mg Hme*, U. B. R. 1892-96) II, 371, referred to.

JUDGMENT.—The first point urged in this appeal is that the judgment of the Divisional Court does not fulfil the requirements of rule 31 of Order XLI. That Court in its judgment writes:—"The only point for determination is—was the land rented by appellants for 700 baskets as alleged?" Turning to the grounds of appeal filed before it, however, I find that they were seven in number, of which perhaps the first and 7th may be taken to be covered by the sentence from the Divisional Court's judgment quoted above. I find nothing in the record to indicate that any of the other five grounds were specifically abandoned at the hearing, and in view of their nature and of the fact that some at least appear to have substance in them, it is in the highest degree improbable that all of them would be abandoned. For instance, the second ground is pertinent and important. The plaintiffs were husband and wife and sued for rent due to them jointly. During the trial, the husband died: it does not appear that the right to sue survived to his widow alone, but she alone proceeded with the case in her personal capacity without any legal representative of her husband being joined, and obtained a

decree for rent due to him as well as to herself. This ground of appeal raises the question that on his death, the suit abated as regards his share of the rent. If so, the decree was clearly wrong; but the ground was not considered, though not shown to have been abandoned.

Even as regards the one point it professes to decide, the Divisional Court did not discuss the very conflicting evidence given for the parties, but merely said it saw no sufficient reasons for differing from the lower Court's decision. This is not sufficient compliance with the law: where evidence conflicts, it is the duty of the Appellate Court to weigh and discuss it and come to its own conclusion on it and give its own reasons for that conclusion [See *Mg Myo* v. *Mg Hme* (1)]. I hold that the appeal has not been disposed of according to law and set aside the judgment and decree of the Divisional Court and direct that it proceed to re-hear the appeal and decide it according to law upon such of the seven grounds contained in the memorandum of appeal as may not be specifically abandoned at the hearing. I may remark, however, that now that both the old folk are dead, it is highly desirable that this disgraceful family feud be healed, and that the parties settle their differences among themselves amicably without any further foolish waste of money and trouble, an end which can easily be attained if both sides approach it in a fitting and conciliatory spirit. The costs of this appeal will follow the further result of the case, if any.

Appeal re-heard.

(1) U. B. R. (1892—96) II, p. 371.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION PETITION NO. 44 OF 1912.

August 31, 1912.

Present:—Mr. Drake Brockman, J. C.

MADHO—APPLICANT

versus

AKAJI—NON-APPLICANT.

Tort—Trespass—Animal—Damage done to crops by cattle—Liability of owner—Negligence—Property adjoining highway—Fencing.

The owner of an animal is liable for any injury or damage committed by it by trespassing on the land of another; it is immaterial whether the animal escapes by reason of the negligence of the owner or in spite of his most diligent care.

An exception from the general rule above stated exists when damage is done by cattle passing along a highway to property adjoining the highway.

In such cases, the sufferer cannot recover damages without proof of negligence or want of skill.

The rule is also inapplicable to a case where the sufferer is bound to fence but has failed to do so. In India, the complete fencing of fields with a view to exclusion of cattle is impracticable owing to the immense expense involved.

Civil revision against the decree of the Judge, Small Cause Court, Wardha, dated the 31st January 1912.

Messrs *J. Mitra* and *B. K. Bose*, for the Applicant.

Rao Bahadur *V. R. Pandit*, for the Non-Applicant.

JUDGMENT.—This application arises out of a suit brought by the applicant against a fellow villager to recover damages done to his *tur* and cotton by the latter's cattle. The lower Court has found that the non-applicant's cattle trespassed on the applicant's field and did damage to the extent of Rs. 390, but it has dismissed the claim on the ground that the non-applicant employed servants to look after the cattle and cannot legally be held liable for damage arising out of their neglect of duty.

In this Court, it is conceded by the non-applicant's learned Counsel that the lower Court's view of the law is incorrect. In *Cox* v. *Burbidge* (1), Erle, C. J., laid it down as a perfectly clear proposition that the owner of an animal is liable for an injury of any kind committed by it if he knows that the animal is likely to commit such an injury, but if he has no such knowledge, then he is not liable. The owner of cattle, whether in England or in India, necessarily knows that they are inclined to stray if not carefully confined or watched and to consume grass or crops growing in any field they may enter. In the case just cited, the general rule of law applicable was laid down by Williams, J., in the following terms:—

"If I am the owner of an animal, in which by law the right of property can exist, I am bound to take care that it does not stray into the land of my neighbour, and if it does so, I am liable for the trespass, and for the ordi-

(1) (1863) 32 L. J. C. P. 89; 13 C. B. (N. S.) 430; 9 Jur. (N. S.) 970; 11 W. R. 435.

nary consequences of the trespass; and it is perfectly immaterial whether the animal escapes by reason of the negligence of the owner, or in spite of his most diligent care. In each case, he is liable for the trespass, and the ordinary consequences of it, subject to a distinction, which is to be found in the earliest books, that the animal is one in which the owner can have property. If, therefore, a man's cattle or poultry stray on to his neighbour's land, and do such damage there as they may be from their nature expected to do, the owner is liable for it."

The rule was similarly stated by Brett, J., in *Ellis* v. *The Loftus Iron Co.* (2). The position is different where the plaintiff is bound to fence and has failed to do so. Similarly, an exception from the general rule above given exists when damage is done by cattle passing along a highway to property adjoining the highway. The reason for this exception is that the owner of property adjoining a highway must take the precautions necessary for guarding against risks to which he is necessarily exposed by the lawful use of the highway: in such cases, therefore, the sufferer cannot recover damages without proof of negligence or want of skill. In *Goodwyn* v. *Cheveley* (3) and *Tillett* v. *Ward* (4), this exception was laid down, the general rule being at the same time affirmed. In India, the complete fencing of fields with a view to exclusion of cattle is impracticable owing to the immense expense involved, and it is not suggested that the non-applicant in the present case neglected any duty laid upon him by the law.

On behalf of the non-applicant, it is urged that the evidence for the applicant is not that of persons sufficiently skilled in appraising the value of standing crops to give a reliable estimate of the damage done. It is also said that the lower Court has failed to make proper allowance for the fact that some cotton had already been picked when the trespass was committed. As to the second point, I notice that Vithu, the plaintiff's first witness, expressly mentioned that one picking of cotton was over, while the defendant's written statement alleged that the cotton crop was "almost over." I see no reason then for assuming that any essential circumstance was omitted from consideration. With regard to the other point, I find that neither of the witnesses (Aka and Bikram) specially relied on by the lower Court was cross-examined at all. It is, moreover, obvious that no evidence as to the extent of damage done could be worth much unless the witness had seen the crops immediately before the trespass. Here 28 buffaloes appear to have wandered about a field for a considerable part of a night and the damage must necessarily have been extensive.

The decree of the lower Court is set aside and in lieu thereof it is decreed that the defendant pay the plaintiff Rs. 390. Costs in that Court will follow this result. Costs in this Court will be paid by the non-applicant. I allow Rs. 15 as Counsel's fee.

Decree set aside.

(2) (1875) 44 L. J. C. P. 24; L. R. 10 C. P. 10; 31 L. T. 483; 23 W. R. 246.

(3) (1859 28 L. J. Ex. 298; 4 H. & N. 631; 7 W. R. 631; 118 R. R. 658.

(4) (1883) 52 L. J. Q. B. 61; 10 Q. B. D. 17; 47 L. T. 546, 31 W. R. 197; 47 J. P. 438.

LOWER BURMA CHIEF COURT.

CIVIL REVISION PETITION No. 171 OF 1910.

February 29, 1912.

Present:—Mr. Justice Twomey.

LIEUTENANT COLONEL STEWART, I.M.S.—DEFENDANT—PETITIONER

versus

SIMON GONSALVES—PLAINTIFF—RESPONDENT.

Master and servant—Monthly servant—Wages for broken period—Pleadings—Case not set up in plaint.

A monthly servant who leaves without notice is entitled to be paid down to the date when wages were last due but not for the broken period he has served since that date.

Raja Shaw Bax Boogla v. *Pirumal*, U. B. R. (1904-06) Civil, Master and Servant p. 1, followed.

Dhumee Behara v. *C. Sevenoaks*, 13 C. 80; *Ramji Manar* v. *F. D. Little*, 10 B. H. C. R. 57, referred to.

In a suit by a monthly servant, the Court cannot make out a case of wrongful dismissal, not set up in the plaint, and not supported by plaintiff's witnesses.

JUDGMENT.—The plaintiff respondent was the defendant-petitioner's cook at Rs. 27 a month, and the case set up in the plaint was that the plaintiff-respondent was "compelled to leave owing to the conduct of the defendant's wife." He left on the 29th July, admits receiving his wages up to the end of June, and sues for the amount due for the broken period 1st to 29th July.

FAIZ MUHAMMAD v. SECRETARY OF STATE.

The Township Court granted a decree on the ground that the plaintiff was turned out by the defendant's wife. The learned Judge overlooked the fact that the plaintiff did not allege wrongful dismissal at all in the plaint. From the evidence of his own witnesses, it appears that he left because Mrs. Stewart was dissatisfied with his cookery and threw away the breakfast ordering him to cook another. It need hardly be said that Mrs. Stewart had every right to give such an order, and it was the respondent's duty to obey it. He seems to have left merely because his professional *amour propre* was wounded. Only one witness, his *mali*, supports his statement that he was dismissed. This witness left at the same time as the cook and is probably entirely biased in the plaintiff-respondent's favour. It is clear that the lower Court erred in making out a case of wrongful dismissal which was not set up in the plaint and which is not supported by the plaintiff's own witnesses.

The law applicable to the subject was fully considered in the Upper Burma case *Raja Shaw Bax Boogla* v. *Pirumal* (1). It was held that a monthly servant who leaves without notice is entitled to be paid down to the date when wages were last due, but not for the broken period he has served since that date. This is the English law as explained in Smith on Master and Servant (page 182) and it has been adopted in India [see *Dhumee Behara* v. *C. Sevenoaks* (2) and *Ramji Manar* v. *F. D. Little* (3).]

The respondent was admittedly paid his wages up to the date when wages were last due. He has no claim to wages for the period during which he served in July as he left abruptly without notice and without any fault on the part of his employer before that month was finished.

The decree of the lower Court is, therefore, set aside and the plaint is dismissed with costs in both Courts.

Decree set aside.

(1) U. B. R. (1904-06), Civil, Master and Servant, p. 1.
(2) 13 C. 80.
(3) 10 B. H. C. R. 57.

PUNJAB CHIEF COURT.

FIRST CIVIL APPEAL No. 722 OF 1911.

July 20, 1912.

Present:—Sir Arthur Reid, Kt., Chief Judge, and Mr. Justice Robertson.

FAIZ MUHAMMAD—OBJECTOR—APPELLANT

versus

THE SECRETARY OF STATE FOR INDIA IN COUNCIL, THROUGH THE COLLECTOR OF LAHORE—OPPOSITE PARTY—RESPONDENT.

Pleader's fees—Appeal—Land Acquisition award—Claim of objector absurdly exorbitant—Ad valorem *fee.*

Where the claim of an objector to a Land Acquisition award is found to be exorbitant, speculative and absurdly extravagant, the Counsel's fees for the Secretary of State should be allowed *ad valorem* on the amount in appeal.

First appeal from the order of the Additional Divisional Judge, Lahore, dated the 31st March 1911, awarding Rs. 15 per *kanal* to the appellant.

The Hon'ble Mr. *Muhammad Shafi*, for the Appellant.

The *Government Advocate*, for the Respondent.

JUDGMENT.—This is an appeal from an award by the Divisional Judge, Lahore, in a land acquisition case. The land acquired measured 36 *kanals* 19 *marlas*, situate between the Railway line and land belonging to the Canal Department, a portion being accessible at one end from other land.

The Land Acquisition Officer assessed the value at Rs. 15 per *kanal* for part of the land and Rs. 10 a *kanal* for the rest. This with 15 per cent. for compulsory acquisition, and interest, and *jagir* compensation amounted to Rs. 640-13-3. The Divisional Judge has recorded cogent reasons for holding that this amount is adequate. We concur with him in holding that sales in Garhi Sahu village, about two miles from the land in suit, of building sites on roads and building sites suitable for factories do not afford material for assessing the value of the land in suit, which is practically useless. We have inspected it and have no hesitation in rejecting the plea that it would be valuable to the owner or the purchaser from him as a site for houses to be occupied by men employed at the Railway Workshops close by. The land in suit is, in our opinion, absolutely unsuitable for this purpose. A

large area of land suitable for the purpose is available and lying vacant, a good deal of it having already been acquired for the Railway. Had the land in suit not been required for a Railway siding, it would doubtless have lain waste and the owner would have secured no return from it. We are unable to hold that any probable use of the land in suit would have given the appellant a better return than he has secured under the learned Divisional Judge's award, and *Hira Nand* v. *Secretary of State for India* (1) does not help him.

The appeal fails and is dismissed with costs.

Although the amount to be allowed as Counsel's fee is discretionary, we see no reason for not allowing the usual *ad valorem* fee on the amount in appeal, *viz.*, Rs. 6,466-4.

The learned Divisional Judge has remarked that the appellant's claim is the most absurdly extravagant claim that he ever had before him.

It is not denied that the appellant was awarded for a plot of land between the two plots now in suit, compensation at the rate now awarded, and his claim was exorbitant and speculative.

Under such circumstances, owners have only themselves to thank if they are heavily mulcted in costs, and Counsel's fees paid by the Secretary of State are usually assessed on the value of the appeal.

Counsel's fee is decreed at 5 per cent. on Rs. 5,000 and 2 per cent. on the balance.

Appeal dismissed.

(1) 21 P. R. 1905; 132 P. L. R. 1905.

LOWER BURMA CHIEF COURT.

CIVIL MISCELLANEOUS APPEAL No. 121 OF 1911.

May 9, 1912.

Present:—Sir Charles Fox, KT., Chief Judge, and Mr. Justice Hartnoll.

P. W. RIPLEY—APPELLANT

versus

V. J. NAHAPIET—RESPONDENT.

Arbitration Act (IX of 1899), s. 11 (2)—Award—Appeal from order setting aside award—Civil Procedure Code (Act V of 1908), ss. 104 (1) (f), 89, 4.

No appeal lies unless it is given by law. There is no provision in the Arbitration Act giving an appeal from an order setting aside an award. Section 89 of the Civil Procedure Code especially excepts the procedure of the Code from arbitrations under the Arbitration Act and section 4 does the same generally. Section 104 (1) (f) applies only to arbitrations under the Code.

Appeal against the order of Mr. Justice Young in Civil Miscellaneous No. 103 of 1911, setting aside an award.

Mr. *Noyce*, for the Appellant.

Mr. *J. R. Das*, for the Respondent.

JUDGMENT

FOX, C. J.—The parties who are residents of Rangoon referred a dispute between them to an arbitrator without the intervention of the Court.

The arbitrator made his award and, in pursuance of sub-section (2) of section 11 of the Indian Arbitration Act (IX of 1899), caused it to be filed in Court. The respondent on this appeal applied to the Court to set it aside, and after hearing the parties, the Court set it aside.

The appellant, in whose favor the award was passed, appealed against the order.

Objection has been taken by the respondent that no appeal lies against an order under the Arbitration Act setting aside an award. For the appellant, it has been urged that clause (f) of sub section (1) of section 104 of the Civil Procedure Code gives an appeal because the order was in effect an order refusing to file an award.

The section, however, only applies to arbitrations under the Code. The procedure for filing an award under the Arbitration Act is different from that under the Code: under the former, the arbitrator files the award, under the latter the Court files it.

Section 89 of the Code especially excepts the procedure of the Code from arbitrations under the Arbitration Act, and section 4 of the Code does the same thing generally.

No appeal lies unless it is given by law. There is no provision in the Arbitration Act giving an appeal from an order setting aside an award. We, consequently, hold that this appeal does not lie: it is dismissed with costs.

HARTNOLL, J.—I concur.

Appeal dismissed.

ROSHNAI KHANAM *v.* NAWAB KHAN.

PUNJAB CHIEF COURT.
FIRST CIVIL APPEAL No. 329 OF 1911.
May 11, 1912.
Present:—Mr. Justice Kensington and Mr Justice Chevis.
Musammat ROSHNAI KHANAM AND ANOTHER—PLAINTIFFS—APPELLANTS
versus
NAWAB KHAN AND OTHERS—DEFENDANTS—RESPONDENTS.

Custom—Succession—Widow—Daughter—unmarried—Khattars *of Fatehjang*—*Maintenance, form of.*

Among *Khattars* of Fatehjang, Attock District, there is no custom by which a widow or an unmarried daughter takes a share of inheritance with the sons of the propositus.

In such a case, a widow or an unmarried daughter is only entitled to maintenance which may be awarded by setting aside certain land for her.

First appeal from the order of the District Judge of Attock, dated the 22nd day of December 1910, decreeing plaintiffs' claim.

Mr. *Jalal ud-Din*, for the Appellants.

Bhagat *Gobind Das*, for the Respondents.

JUDGMENT.—This judgment will cover the connected Appeals Nos. 934 and 935 of 1911.

Maula Dad had three wives, Roshnai, Bhagbhari and Gauhar Khanam.

The genealogical tree is:—

MAULA DAD,

- *Musammat* Roshni (plaintiff), — Daughter *Musammat* Nur Khanam.
- *Musammat* Bhagbhari,
  - Nawab (defendant) (minor).
  - Muhammad Nawaz (minor) (defendant).
  - *Musammat* Sarwar Jan (married).
  - *Musammat* Chand Bibi (now married).
- *Musammat* Gauhar Khanam, — Daughter *Musammat* Rahmat Sultan.

The plaintiffs, *Musammat* Roshnai, and her daughter, *Musammat* Nur Khanam, sue for 1/4th of the estate, alleging that by custom of the *Khattars* of that part of the Panjab, Fatehjang Tahsil, (now in the Attock District but formerly in the Rawalpindi District), widows and unmarried daughters inherit equally with sons. Apparently at date of institution, there were three widows, three unmarried daughters and two sons, and so the claim was for 2/8th of the estate, but we are informed that *Musammat* Gauhar Khanam has re-married and *Musammat* Chand Bibi is also married now.

The first Court held the alleged custom unproved, but gave a decree for 1/8th of the cultivated land as maintenance.

The plaintiffs lodged an appeal direct to this Court (First Appeal No. 329 of 1911) but the defendants lodged an appeal to the Divisional Judge who held that the value of the suit was under Rs. 5 000 and disposed of the defendant's appeal, stating that he expressed no opinion on the question whether a widow took an equal share with sons as that appeal would probably come before him at a later stage, and that the only question before him was whether the lower Court had given an excess amount as regards maintenance or whether it should be given in another form and also as to whether *Musammat* Nur Khanam was entitled to any maintenance at all in the presence of her mother. But later on, the Divisional Judge speaks of the burden of proof as to succession of widows and unmarried daughters amongst *Khattars*, lying on the plaintiffs. The Divisional Judge held that both daughter and widow had a separate claim to maintenance and that the form of maintenance given by the first Court was likely to lead to trouble in the future, and so the Divisional Judge allowed as maintenance to each plaintiff 10 maunds of wheat and Rs. 75 at each *rabi* harvest and 10 maunds of *bajra* and Rs. 75 at each *kharif* harvest. Against this decision of the learned Divisional Judge, cross-appeals have been lodged (Nos. 934 and 935 of 1911).

The course adopted by the learned Divisional Judge does not commend itself to us. He seems to have been aware that the plaintiffs had preferred an appeal to this Court, and assuming that that appeal would be returned for presentation in the Divisional Court, the Divisional Judge would have acted wisely had he delayed action until both appeals were before him. Had the plaintiffs' appeal afterwards came before him and had he found himself driven to accept it on the merits, he would have had to pass a decree for ¼th of the estate, a decree which would have been quite at variance with the decree passed on the defendants' appeal.

The first question to consider is whether

appeal from the decree of the first Court lies direct to this Court or to the Divisional Court. The amended plaint gives up the claim to the uncultivated portion of the land, and considering how considerable a portion of the estate is uncultivated and how slightly the value of the suit, even if the uncultivated land be included, exceeds Rs 5,000, we think there can be no reasonable doubt that the value of the suit, excluding the uncultivated land, is under Rs. 5,000, and that the proper course of appeal is to the Divisional Court. But the course already taken by the Divisional Judge renders it extremely inconvenient for us to send the plaintiffs' appeal to him for decision, for, as already pointed out, he could not accept that appeal without passing a decree which would be utterly at variance with the decree which he has already passed on the defendants' appeal. We proceed, therefore, to treat the plaintiffs' direct appeal to this Court as one presented to the Divisional Court and transferred to the pending file of this Court. The appeal to this Court was filed within the period allowable for appealing to the Divisional Court, so no difficulties as to limitation arise, though if it had been necessary, we should have been prepared to allow an extension of time.

The first question for consideration is whether by custom amongst *Khattars* of the Fatehjang Tahsil, widows and unmarried daughters get an equal share along with sons. This is certainly not in accordance with the general custom of the Province and the burden of proving the special custom set up, lies on the plaintiffs.

Oral evidence of the usual class has been produced, but plaintiffs' Counsel has not touched on it, and simply relies on the printed Customary Law of the Rawalpindi District, prepared by Mr. Robertson in the second revised Settlement. According to questions 19 and 20, unmarried daughters take equally with their brothers and a widow shares equally with her sons. But we must see how far this is corroborated by instances. Turning to pages 42 and 43, we find the instances of daughters. In the first three instances, it would appear that the last male owner left no sons. The next two are cases of *Musalla Nashins* (women vowed to celibacy). The sixth is certainly a case of a daughter sharing with her three brothers, but this is a case amongst *Gakkhars* and the tahsil is not mentioned. The seventh is a case of a *Musalla Nashin*, and apparently she had no brothers. The eighth is the only case of *Khattars*; here too, the girl was vowed to celibacy and apparently she had no brothers and took her father's whole estate. In fact, all through the list, there appear only three cases of daughters sharing with their brothers, and the only case amongst *Khattars* is, as already noted, one of a *Musalla Nashin*, who apparently had no brothers.

Turning to pages 44 and 45, we get several instances of widows sharing equally with sons, but only one instance amongst *Khattars* is cited, and that is a case in the Rawalpindi *Tahsil*.

Turning now to the Customary Law of the Attock District prepared by Mr. Kitchin at the recent Settlement, it may be noted in the first place that though the Rawalpindi and Attock Districts adjoin, there seems to be a considerable difference of custom generally, *e.g.*, on page 2, we read that the *chundawand* custom has a considerable following in the Rawalpindi District, whereas in the Attock District the *pagwand* custom has the field almost entirely to itself.

On page 20, we read that the replies of the various tribes as to the rights of unmarried daughters to share in the inheritance are not satisfactory, but that there is a preponderance of opinion in favour of the view that, in the presence of male issue, daughters, whether *Musalla Nashins* or not, do not share in the inheritance, though unmarried daughters are entitled to maintenance, and a few cases are quoted in which *Musalla Nashins* shared equally with their brothers. Excluding *Musalla Nashins*, not a single case is quoted of a daughter sharing with her brothers.

On page 21, the right of the widow to share with her sons is dealt with, and it is stated that it is doubtful "if any really well-established custom exists, so varied are the opinions of the tribes, but that as a general rule the question scarcely arises, the widow living, as a matter of course, with her sons, the property in such cases may be entered jointly in the name of mother and sons or only in the names of the sons; but the practical effect is the same. When the

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question does arise, the majority of tribes agreed at last Settlement that the widow will share for life equally with her sons but without power of alienation. The majority are now in favour of allowing her maintenance only, a portion of the property being specially set aside for this purpose. Examples are quoted in favour of both theories and Courts will have to consider the circumstances of each case in the absence of well-established custom on this point."

On page 23, five instances relating to *Khattars* are cited, of which the fourth is not in point as there was no male issue. In three out of the other four cases, the widow got only maintenance (in two cases a portion of land was assigned, and in one case the form of maintenance is not specified), while in the fourth case it is simply said that the widow resided with the sons. Not a single instance is cited of a *Khattar* widow taking a share along with the sons.

It is sufficient to state that we find there is no proof of any custom amongst *Khattars* whereby a widow or an unmarried daughter takes a share with the sons. The case of a daughter vowed to celibacy is a peculiar case with which we are not now concerned; plaintiff's Counsel states that *Musammat* Nur Khanam is not a *Musalli Nashin*.

That the widow and daughter are entitled to maintenance is not denied, and the only question remaining for decision is the form and extent of this maintenance. In our opinion, the best way of avoiding trouble is to set aside certain land for the maintenance of the plaintiffs and this is the course which is locally approved, to judge by the remarks already quoted from Mr. Kitchin's volume of Customary Law. In addition, we think a small regular cash allowance should be made to meet occasions when the ladies require a little ready money.

The estate is a considerable one, and the ladies of the family should be maintained in fitting circumstances; it is not sufficient to provide them simply with the bare necessaries of life. On the other hand, we must not burden the estate too heavily.

It is pointed out that *Musammat* Gauhar Khanam has a large claim for dower; this matter has become the subject of litigation, and an appeal is now pending, so we are told. Then there is the other unmarried daughter *Musammat* Rahmat Sultan, at present an infant, who has a right to maintenance until marriage. Then there is *Musammat* Roshnai's own claim to dower (her dower is said to be Rs. 22,000), which may possibly be advanced. And *Musammat* Bhagbhari has as good a claim on the estate as the other widows, though presumably she will continue to reside peaceably with her sons. We propose to allow suitable maintenance for each of the plaintiffs, but on the understanding that *Musammat* Roshnai is not going to burden the estate with a heavy claim for dower, as *Musammat* Gauhar Khanam has done; if she should advance such a claim, the maintenance now allotted to her will cease.

The land is situated in several villages. The plaintiffs are residing in Fatehjang village, and we think it well to allot to them some land in that and in neighbouring villages together with a cash allowance.

We dismiss the present appeal and on the two Appeals (Nos 934 and 935) from the decision of the Divisional Judge, we vary the maintenance provided, and in supersession of the orders of the lower Courts, we now decree to the plaintiffs as provision for their joint maintenance the land in suit situated in the villages of Fatehjang, Kasyana, and Hatar, excluding

(1) the land shown in the lists filed with the plaint as uncultivated;

(2) the land held by the defendants as mortgagees in Fatehjang; and

(3) the land shown in the lists filed with the plaint as held by occupancy—tenants in village Hatar. We also decree a cash allowance of Rs. 100 per harvest to be paid on 1st January and 1st July in each year; the 1st allowance of Rs. 100 to be payable on 1st July 1911.

We direct that *Musammat* Roshnai's right to maintenance will cease on her death or re-marriage or bringing a suit for dower, and that *Musammat* Nur Khanam's right will cease on her death or marriage. When the right of one lady ceases, the maintenance will be reduced to maintenance in favour of the other as follows, *i. e.*, she will hold the cultivated land in Fatehjang, excluding that held by the defendants as mortgagees, and receive an allowance of Rs. 50 per harvest, payable on 1st January

and 1st July. The lands will be strictly inalienable by both or either of plaintiffs.

The whole affair is a foolish family quarrel and we leave the parties to bear their own costs in all Courts.

Decree varied.

LOWER BURMA CHIEF COURT.

SECOND CIVIL APPEAL NO. 176 OF 1910.

March 18, 1912

Present:—Sir Charles Fox, Kt., Chief Judge, and Mr. Justice Hartnoll.

T. A. SITHAMBARAM CHETTY—APPELLANT

versus

U KHA GYI AND OTHERS—RESPONDENTS.

Limitation—Suit by mortgagee for compensation for injury to specific moveable property—Limitation Act (IX of 1908), Sch. I, Arts. 36, 49.

A suit by a mortgagee to recover compensation from a third person for injury to specific moveable property mortgaged to the former is governed by Article 49 of Schedule I, Limitation Act.

Article 36 of the Act relates to such cases as are not specially provided for in the Schedule.

Essoo Bhayaji v. *The Steamship 'Savitree'*, 11 B. 133, dissented from.

Surat Lal Mondal v. *Umar Haji*, 22 C. 877 and *Mangun Jha* v. *Dolhin Golab Koer*, 25 C. 622; 2 C. W. N. 265, followed.

Mr. *Doctor*, for the Appellant.

Mr. *Ba Dun*, for the Respondents.

JUDGMENT

HARTNOLL, J.—The appellant brought a suit against one Ko On Ywe and the respondents alleging that Ko On Ywe had borrowed from him Rs 2,500 on interest and as security for the loan had mortgaged to him a house and compound with trees thereon and also a country boat He made the interest due Rs. 2,850 but relinquished Rs. 1,950 of it. He, therefore, asked for a mortgage decree against Ko On Ywe for Rs. 3,400. He further alleged that the servants of the respondents had caused their barge to collide with Ko On Ywe's boat which was pledged with him and by negligence had sunk it, so that it became a total loss. He, therefore, sued the respondents to recover from them Rs. 3,000 out of Rs. 3,400, and he desired from Ko On Ywe Rs. 3,000 being the value of the boat. A mortgage decree for Rs. 3,400 was passed against Ko On Ywe; but the claim against the respondents was dismissed by the District Court on the ground that it was barred by limitation. This decision was upheld on appeal by the Divisional Court. This further appeal has now been laid and the sole point for determination is whether Article 36 or Article 49 of the first Schedule of the Limitation Act is applicable to the case. If Article 36 is applicable, the claim is barred by limitation; if Article 49 is applicable, it is not. On behalf of the respondents, the case of *Essoo Bhayaji* v. *The Steamship 'Savitree'* (1) is relied on; but amongst others, the appellant relies on the cases of *Surat Lal Mondal* v. *Umar Haji* (2) and *Mangun Jha* v. *Dolhin Golab Koer* (3). I am unable to agree with the decision of Farran, J. in, the Bombay case and I agree with the reasoning of the majority of the Calcutta Judges. Article 39 only relates to such cases as are not specially provided for in the Schedule. Article 49 seems to me to specially provide for a case such as the present. It runs "for other specific moveable property, or for compensation for wrongfully taking or injuring or wrongfully detaining the same." The boat pledged was specific moveable property using the word 'specific' in its ordinary sense and meaning. I am unable to import into the Article the meaning, which Farran, J., does, namely, that the specific moveable property which is injured must be in the possession of some third party for it to apply. On construing the meaning of Article 49, I do not think that we should consider to what cases Article 36 is meant to apply. Article 49, in my opinion, should be given its natural meaning. It provides for compensation for injury to specific moveable property other than that referred to in Article 48 and, therefore, in my opinion, to a case like the present.

I would, under Order XLI, rule 23, set aside the decree of the lower Courts as regards the respondents and remand the case to the District Court to be decided on its merits—costs to follow the final result. I would also, under the provisions of section 13 of the Court Fees Act, grant appellant a certificate authorizing him

(1) 11 B. 133.
(2) 22 C. 877.
(3) 25 C. 692; 2 C. W. N. 265.

KAMIRA v. LALU.

to receive back from the Collector the full amount of the fees paid by him on the memorandum of appeal in the Divisional Court and this Court.

Fox, C. J.—I concur.

Case remanded.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL NO. 368 OF 1910.

May 15, 1912.

Present:—Mr. Justice Robertson and Mr. Justice Rattigan.

KAMIRA AND OTHERS—PLAINTIFFS—APPELLANTS

versus

LALU AND OTHERS—DEFENDANTS—RESPONDENTS.

Punjab Tenancy Act (XVI of 1887), s. 77 (3) (j)—Jurisdiction of Civil or Revenue Court—Suit between rival claimants of village dues and cesses—Specific Relief Act (I of 1877), s. 42, proviso—Suit for declaration of right to collect dues—Custom—Proprietary body—Settlers acquiring right to sites by adverse possession—Right to collect due.

Clause (j) of section 77 (3) of the Punjab Tenancy Act applies only to suits between the person who claims such dues and cesses and the person by whom such dues or cesses are alleged to be payable. Therefore, a suit between parties, each of whom claims to be entitled to collect such dues, does not fall within the purview of the clause, when the persons from whom such dues are claimable are not parties thereto. Such a suit is cognizable by the Civil Courts.

A suit by the proprietors of a *patti* for a declaration that they are entitled to collect village dues and that certain other persons, who have settled in the *patti*, have no such right is not barred by the proviso to section 42 of the Specific Relief Act.

The fact that defendants have, by adverse possession, become owners of the sites occupied by them and by their *kamins* in the area of plaintiff's *patti*, does not lead to the inference that the defendants thereby became jointly entitled with plaintiffs to the dues and cesses leviable within that area. The presumption is that the right to collect these dues and cesses rested in the proprietary body of the *patti*.

Second appeal from the decree of the Officiating Divisional Judge, Gujranwala Division, dated the 25th February 1910.

Mr. *Fazal i-Hussain*, for the Appellants.

Mr. *Duni Chand*, for the Respondents.

JUDGMENT.—Plaintiffs who are the proprietors of *patti* Kamal, in *Mauza* Jamlera, sued for a declaratory decree to the effect that the *abadi* Bara Shahr belonged to them and that they alone were entitled to collect village dues, such as *dhart*, in the said area.

The persons impleaded as defendants were the proprietors of *patti* Lalu in the same village. Plaintiffs allege that sometime ago, the defendants lost their own *abadi* by river action, whereupon plaintiffs allowed them to settle with their *kamins* upon the aforesaid area known as Bara Shahr, but that plaintiffs continued to collect all village dues and cesses in this area until quite recently when defendants denied their right to do so. Hence the present suit.

Defendants met plaintiffs' claim with a flat denial and asserted that the aforesaid area was part and parcel of their own *patti* and that they had the exclusive right to collect the village dues and cesses.

The District Judge found that the area in question belonged originally to plaintiffs' *patti*, that defendants were allowed by plaintiffs to settle thereon, and that plaintiffs had, until just before suit, been realising the dues and cesses. He accordingly granted plaintiffs a declaratory decree to the effect that they were entitled to realise the proprietary dues such as *dhart*, etc., in the *abadi* known as Bara Shahr.

With this decree plaintiffs were perfectly content, but defendants appealed to the Divisional Judge and succeeded in getting the plaintiffs' suit dismissed.

The learned Divisional Judge agreed with the District Judge in finding that the *abadi* Bara Shahr was originally part of plaintiffs' lands in *patti* Kamal, but he held that plaintiffs' claim must fail on the following grounds, *viz.*, because

(*a*) the defendants had by adverse possession or otherwise, obtained at least a share in the ownership of this *abadi*;

(*b*) as plaintiffs were not in possession, they were bound, under section 42, proviso, of the Specific Relief Act, to sue for consequential relief and could not claim a mere declaration;

(*c*) the suit was one cognizable by a Revenue Court [section 77 (3) (*j*) of the Punjab Tenancy Act]; and

(*d*) the evidence as to *dhart* dues having been taken by plaintiffs was not sufficiently strong in view of the fact that Lalu, defendant, as

the *Lambardar* of the *abadi*, would have realised such dues.

He accordingly held that the *dhart* dues probably belonged to the plaintiffs and defendants jointly and that as a result the suit must be dismissed.

Plaintiffs have preferred a further appeal to this Court and after hearing Counsel for them and for defendants-respondents, we have no hesitation in agreeing with the conclusions of the Court of first instance.

It is, upon the findings of the Courts below, abundantly clear that this area formed part originally of plaintiffs' *patti* and the fact that at the recent settlement it has been recorded as *abadi-deh* proves nothing, and certainly does not show that the entries in the settlement records of 1858 and 1872 are incorrect. It seems to us clear that defendants were allowed by plaintiffs, as a matter of grace, to make use of this area for the purposes of an *abadi* when they lost their own *abadi* by submersion, and we are entirely unable to accept the Divisional Judge's finding that defendant's possession, which was unquestionably permissive in its inception, at some subsequent and unknown period, became adverse. But even if we assume that defendants by adverse possession became owners of the sites occupied by them and by their *kamins* in this area, we cannot on that account jump to the conclusion that they thereby became jointly entitled with plaintiffs to the dues and cesses leviable in that area. This was a claim which even defendants did not venture to prefer. They urged that they alone had the right to such dues, and this because the area belonged to their *patti* and not to *patti* Kamal. This allegation has been found, and quite rightly, to be false, and upon the finding that the area really belongs to *patti* Kamal, though the defendants may not be removeable from the sites occupied by them—a point upon which we give no opinion—the obvious inference is that plaintiffs alone have the right to collect all dues within the said area. Plaintiffs have never seriously denied the right of defendants to occupy the sites in this area which they already are in possession of, and it was for this reason that they did not press their claim for a declaration that they were the owners of these sites. Their real claim was for a declaration of their right to collect the dues and they appear to have dropped any claim to other relief at the very outset of the case The proviso to section 42 of the Specific Relief Act would certainly not debar them from asking for a declaration as to their right to these dues, and it is obvious that both the parties themselves and the District Judge understood that this was the only question involved in the case. We hold, therefore, that plaintiffs' suit for the declaratory decree was good so far as their claim to the right to collect the dues and cesses was concerned and that the mere fact that defendants had by adverse possession (if such had been proved) acquired proprietary right to the sites in the *abadi* occupied by them would not, as a necessary consequence, have given defendants all the rights possessed by the proprietary body of the *patti* in which that *abadi* is situate.

Defendants attempted to prove that they had been actually realising these dues in times past, but apart from the oral evidence which is, as the District Judge rightly says, worthless, it is clear from the documentary evidence that it was only in *Sambat* 1964 (*i.e.*, 1907) that they attempted to make any such realisations and in 1907 the dispute had already arisen between them and plaintiffs. On the other hand, the documentary evidence adduced by plaintiff proves that ever since *Sambat* 1950, these dues have without demur been realised by them alone. We cannot agree with the Divisional Judge that this important evidence is to be ignored, simply and solely because Lalu, one of the defendants, is a *Lambardar* who resides in *abadi* Bara Shahr and would, therefore, realise the dues for himself and his co-defendants. He may have done so in *Sambat* 1964 (1907) after the dispute arose, but the documentary evidence shows clearly enough that he did not realise these dues for his party prior to that year.

Finally, as to the suit being one cognizable by a Revenue Court, we need say no more than that we agree with Rivaz, J.'s opinion, as expressed in *Hayat Shah* v. *Jawaya* (1), that clause (*j*) of section 77 (3) of the Tenancy Act applies only to suits between

(1) 204 P. R. 1889.

the person who claims such dues and cesses and the person by whom such dues and cesses are alleged to be payable. A suit between parties, each of whom claims to be entitled to collect such dues, does not fall within the purview of that clause, when the persons from whom such dues are claimable are not parties thereto.

We hold, therefore, that the decree of the District Judge was correct and accepting this appeal, we set aside the decree of the Divisional Judge, and grant plaintiffs a declaratory decree in the terms set forth in the District Judge's decree. Defendants will pay costs throughout.

Appeal accepted.

LOWER BURMA CHIEF COURT.
SPECIAL SECOND CIVIL APPEAL No. 226 OF 1910.
March 21, 1912.
Present:—Mr. Justice Parlett.
O. A. R. ANNAMALAY CHETTY—APPELLANT
versus
NA U MA AND OTHERS—RESPONDENTS.

Hindu Law—Minor—Guardian—Mortgage of minor's property by guardian—Burden of proof—Necessity—Suit against guardian as well as minor—Guardian confessing judgment—Money-decree.

The burden of proving that a transaction made by a guardian on behalf of a Hindu minor was for a legal necessity and the benefit of the minor, lies on the alinee or creditor. A person lending money on the security of a minor's estate is bound to exercise due care and attention in seeing that there was a legal necessity of the loan and must satisfy himself about the existence of the necessity and that the guardian was acting for the benefit of the minor's estate.

Where a guardian is sued on the loan together with the minor and the guardian confesses judgment, a money-decree should be passed against the guardian.

Mr. *Lambert*, for the Appellant.

Mr. *Robertson*, for the Respondents.

JUDGMENT.—First respondent, as guardian of the property of 3rd and 4th respondents, mortgaged their house and site with the trees thereon to appellant for Rs. 550. Her husband, second respondent, signed the deed as a surety. Appellant sued for Rs. 297-2 0, principal and interest, due under the mortgage. First respondent confessed judgment and second respondent did not contest the case. Third and fourth respondents, by their grandfather and guardian *ad litem*, pleaded that first respondent had no power to mortgage the property and the money was not borrowed or spent for their benefit.

The Court of first instance found in favour of plaintiff and gave him a mortgage decree. On appeal by the 3rd and 4th respondents, the District Court reversed the decree and by implication dismissed the suit as against all the respondents. Plaintiff now appeals and makes all the original defendants-respondents. The grounds are: (1) That the District Court erred in placing the burden of proving the necessity for the loan on the plaintiff, whereas the necessity being alleged by the mortgagor and the mortgagee having used reasonable care to ascertain its existence, it should have been presumed under section 38 of the Transfer of Property Act; and (2) that necessity was proved by the evidence on the record.

The parties are Hindus and it is not disputed that the power to mortgage can only be exercised by the guardian in case of need, or manifestly for the minor's benefit (See Trevelyan on Minors, 3rd Edition pp. 181 and 182).

All transactions which guardians enter into on behalf of their wards must leave to the latter some demonstrable advantage or avert some obvious mischief in order to obtain recognition from the Court. They must show the strictest good faith, and must be based on actual necessity or advantage, and not on calculations of possible benefit. (*Ibid.* page 167). In *Hunoomanpersaud Panday* v. *Munraj Koonweree* (1), the Privy Council decided that a person lending money on the security of a minor's estate is bound to exercise due care and attention in seeing that there was a legal necessity for the loan, and must satisfy himself as well as he can, and as an honest man, with reference to the parties with whom he is dealing, that the manager is acting in the particular instance for the benefit of the estate, and that circumstances of necessity had occurred which under the Hindu Law would justify the sale of the property (*Ibid.*, page 186).

(1) 6 M. I. A. 393; 18 W. R. 118 note.

KATWARU CHAMAR *v.* RAM ADHIN UPADHIA.

It appears that besides the house and site in suit, the minors own some 12 acres of paddy land, and that about three months before the present mortgage, the 1st and 2nd respondents mortgaged that paddy land to appellant for Rs. 1,200 to buy cattle and supply the expenses of cultivation. They gave the present mortgage as they wanted to pay coolies and other expenses. Appellant states that the money borrowed was spent for the benefit of the minors; that the 1st and 2nd respondents worked the land themselves; that they bought cattle and implements and paid cutivating expenses from the amount borrowed. The mortgage deed recites that the money is required as expenses for cultivating land for the benefit of the minors. First respondent, who was examined as a witness for the plaintiff, did not remember this clause being read out before the deed was executed, and said that she only spent Rs. 100 towards cultivating the minors' 12 acres of land. Another witness speaks to seeing Rs. 100 out of the loan paid to coolies, but he does not know how many pieces of land the 1st and 2nd respondents work. Plaintiff, however, admitted that they worked some 200 acres besides the minors' land, and that he does not know what the expenses of working the minors' land only would be. It obviously could not be anything like the sum of Rs. 1,750 advanced.

It cannot be said that plaintiff used reasonable care to ascertain the existence of necessity for the loan of Rs. 550 or that such necessity could be deemed to exist: nor does the evidence on the record prove its existence.

The District Court was right in holding that it lay upon plaintiff to prove the necessity for the loan, and that he had failed to prove it, and in dismissing the suit as against 3rd and 4th respondents. On the admission of 1st respondent, however, plaintiff was clearly entitled to a money decree as against her and her husband 2nd respondent. I, therefore, modify the decree of the District Court and grant plaintiff appellant a decree for Rs. 297-2, with costs against 1st and 2nd respondents; and dismiss the suit with costs in all Courts against 3rd and 4th respondents. Two gold *mohurs* will be entered as Advocate's fees of 3rd and 4th respondents in this appeal.

Decree modified.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 646 OF 1912.

November 19, 1912.

Present:—Mr. Justice Rafique.

KATWARU CHAMAR AND OTHERS—PLAINTIFFS—APPELLANTS

versus

RAM ADHIN UPADHIA—DEFENDANT—RESPONDENT.

Immoveable property—Fruit trees—Growing timbe—Transfer of Property Act (IV of 1882), s. 3.

In the absence of any evidence to prove that the character of fruit trees is that of growing timber, such trees fall within the definition of immoveable property.

Second appeal from a decree of the District Judge of Jaunpur, modifying that of the City Munsif.

Mr. *S. M. Ahmad Kareem*, for the Appellants.

Mr. *Gokul Prasad*, for the Respondent.

JUDGMENT.—Katwaru Chamar, one of the defendants-appellants, executed a hypothecation bond in favour of Ram Adhin on 28th of June 1890, in lieu of Rs. 80. The property hypothecated in the bond was as follows:—1 *bigha*, 19 *biswas* of occupancy holding, (2) 4 mango trees, (3) 6 bamboo clumps, (4) 4 *mahua* trees, (5) 2 plum trees (6) 1 *kathal* tree, (7) 2 *nim* trees, (8) 4 *babul* trees, (9) a *pucca* well, and (10) a *kolhu*.

On the 5th of August 1910, Ram Adhin and his minor son, Ram Chand, instituted a suit in the Court of the Munsif of Jaunpur against Katwaru Chamar and his sons and grandsons for recovery of the mortgage money by sale of the hypothecated property. The claim was resisted on two grounds, namely, (1) that no consideration had passed on the bond in suit, and (2) that the claim was barred by limitation. The Munsif found that the bond in suit was for consideration, but he held that the claim was barred with regard to trees and the sugar-pressing machine. He, consequently, exempted from sale the trees and the machine. On appeal by Ram Adhin, the learned Judge modified the decree of the first Court by holding that the fruit trees

were liable to sale in execution of the decree of the plaintiffs-respondents inasmuch as they fell within the definition of immoveable property. Katwaru and his sons and grandsons have come up in second appeal to this Court. It is contended on their behalf that the fruit trees do not necessarily come under the definition of immoveable property, that the character of fruit trees depends upon local custom and that it was for the plaintiff-respondent to have shown that the fruit trees in suit were hypothecated to him as immoveable property and not as growing timber. In support of this contention, the case of *Krishnarao* v. *Babaji* (1), is relied upon. I do not agree with the learned Counsel that it was for the plaintiff-respondent to prove a local custom as to the character of the fruit trees. On the contrary, I think, it was for the defendants-appellants to set up and prove a local custom, if any, with regard to the fruit trees as supporting their plea of limitation. A fruit tree does not necessarily fall under the definition of growing timber as remarked in the case of *Krishnarao* v. *Babaji* (1). I agree with the finding of the lower Appellate Court that the fruit trees in suit fall within the definition of immoveable property. The appeal fails and is dismissed with costs.

Appeal dismissed.

(1) 24 B. 31.

LOWER BURMA CHIEF COURT.
CIVIL REVISION PETITION NO. 143 OF 1911.
December 18, 1911.
Present:—Mr. Justice Twomey.
V. C. DURAI RAJAH MUDALIAR—APPLICANT
versus
M. R. VADIVELU—RESPONDENT.

Prisons Act (IX of 1894), s. 33—Supply of clothing to prisoner by arresting judgment-creditor—Subsistence allowance—Civil prisoner released owing to mistake of Jail authorities can be re-arrested — Civil Procedure Code (Act V of 1908), ss. 57, 58 (2).

Where *A.* a civil prisoner, was released by the Jail authorities for non-supply of the clothing required to be supplied to him under section 33 of the Prisons Act, 1894, but where it was discovered that the requisition on the arresting creditor was despatched to a wrong address and did not reach him till four days after the petitioner's release,

Held, (1) that *A.* was released owing to a mistake of the Jail authorities and not owing to any default of the decree-holder under section 33, Prisons Act;

(2) that *A.* could be re-arrested but in calculating the period of imprisonment under the new warrant, the time of imprisonment under the former warrant should be deducted.

The cost of clothing, etc., payable under section 33, Prisons Act, is not "subsistence allowance" as contemplated in section 58 of the Civil Procedure Code which includes only the monthly allowance fixed by scale under section 57.

Mr. *Karaka*, for the Applicant.

JUDGMENT.—The petitioner was arrested in execution of the respondent's money-decree and was committed to prison for six months on 1st August 1911. He was released by the Jail authorities on 12th August, because the respondent had not paid the cost of clothing and bedding supplied to the petitioner in Jail. Subsequently, it was discovered that the written demand sent to the respondent under section 33, Prisons Act, 1894, had been despatched to a wrong address and did not reach the respondent till four days after the petitoner's release. The Small Cause Court, in these circumstances, has ordered the petitioner to be re-arrested at the instance of the respondent. The petitioner contends that the Court had no power to order re arrest.

The Judge of the lower Court has held that the cost of clothing, etc., payable under section 33, Prisons Act, is not "subsistence allowance" as contemplated in section 58 of the Code of Civil Procedure. I think this view is right. The subsistence allowance referred to in section 58 is the monthly allowance fixed by scale under section 57, and it includes nothing else. At the same time if there had really been a default of payment of the cost of clothing, etc., under section 33, Prisons Act, it could probably be urged with good reason that on the analogy of section 58 (2), Code of Civil Procedure, the judgment-debtor having been released owing to the decree-holder's default, there should be no liability to re-arrest. But in the present case, there has been no default. Section 33, Prisons Act, requires the decree-holder to pay the cost of clothing, etc., "within 48 hours after the receipt by him of a demand, in writing." As the respondent did not receive the demand, he could not comply with it. Thus the petitioner was released owing to a mistake of the Jail authorities and not

owing to any default of the decree-holder under section 33, Prisons Act. There is no authority for holding that a civil prisoner released in such circumstances cannot be re-arrested. It was pointed out in the Bombay case, *Shamji* v. *Pooniz* (1), that the only prohibition on a second arrest expressed in the Code was that in section 341, Code of 1882 [corresponding with section 58 (2) of the present Code] and this prohibition is limited to the cases there enumerated. The case of a debtor whom the Jail authorities have released by mistake is not governed by section 58 (2) at all.

I, therefore, think that the learned Judge's order is correct. But, as in the Bombay case, the new warrant should have a memorandum thereon that in calculating the six months after which the defendant must be released, the time (eleven days) he suffered imprisonment under the former warrant is to be taken into consideration

The application for revision is dismissed.

Application dismissed.

(1) 26 B. 652; 4 Bom. L. R. 483.

ALLAHABAD HIGH COURT.

EXECUTION SECOND CIVIL APPEAL NO. 53 OF 1912.

November 22, 1912.

Present:—Mr Justice Chamier.

SURANJAN SINGH AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

RAM BAHAL LAL AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 148—Extension of time fixed by decree—Pre-emption decree—Appeal.

Payment of money into Court within a fixed time in pursuance of a decree is not an act prescribed or allowed by the Civil Procedure Code within the meaning of section 148.

A Court has no power to extend the time fixed by a pre-emption decree for payment of price.

Hukam Chand v. *Hayat*, 121 P. W. R. 1912; 99 P. R. 1912; 15 Ind. Cas. 941 and *Narendra Bahadur Singh* v. *Ajudhia Prasad*, 13 O. C. 28; 5 Ind. Cas. 443, followed.

An order extending time fixed for payment of money by a decree is appealable.

Rahima v. *Nipal Singh*, 14 A. 520; A. W. N. (1892) 99, followed.

Second appeal from a decree of the District Judge of Azamgarh, reversing that of the First Additional Munsif.

Mr. *M. L. Agarwala*, for the Appellant.

Mr. *Surendra Nath Sen*, for the Respondents.

JUDGMENT.—These appeals arise out of cross suits for pre-emption. In each case, the plaintiffs were given a decree for pre-emption of half of the property and the decree went on to provide that if they did not pay the price within a month, their claim would stand dismissed and, in that event, the plaintiffs in the other case were allowed a further period of fifteen days within which to pay in the price, so that if either set of plaintiffs failed to pay in the price, the other set would be entitled to take the whole of the property on complying with the terms of the decrees. The decrees in both cases were made on June 17th, 1911, and the period of one month expired on July 17th—no money was paid into Court in either case by that date.

On July 19, Kirat Singh and others, the plaintiffs in one case, petitioned the Court to grant an extension of the time limited by the decree, and by an order of July 25th, time was extended to August 4th. Each set of plaintiffs paid into Court the price specified in their decree before August 4th. The purchaser objected but his objection was overruled. He, then, appealed to the District Judge in both cases and it was held that the first Court had no power to extend the time limited by the decrees. The plaintiffs have appealed to this Court contending that there was no right of appeal to the District Judge against the orders of the first Court and that if the appeals were in order, the District Judge should have upheld the orders of the first Court on the merits.

The purchaser has applied in each case for revision of the orders of the first Court in case it is held that those orders were not appealable.

The plaintiffs rely upon section 148 of the Code of Civil Procedure as authorising the Munsif to extend the time fixed in the decrees. In *Jug Ram* v. *Jew Ram* (1), Banerji and Tudball, JJ., expressed grave doubts whether this section applied to suits for pre-emption, and in *Hukam Chand* v.

(1) 6 A. L. J. R. 647; 3 Ind. Cas. 497.

MAUNG CHIT TON v. MAUNG AUNG GYAW.

Hayat (2), Reid, C. J., held that this section did not apply to periods fixed by a decree. To the same effect is the decision of Messrs. Evans and Piggott in *Narendra Bahadur* v. *Ajudhia Prasad* (3). I agree with the views expressed in these cases. It appears to me that the payment of money into Court within a fixed time in pursuance of a decree is not an act prescribed or allowed by the Code within the meaning of section 148. According to the decision in *Rahima* v *Nepal Rai* (4), which is binding upon me, I must hold that the orders of the Munsif were appealable. In my opinion, the District Judge was right in setting those orders aside. The two appeals to this Court are dismissed with costs.

Appeals dismissed.

(2) 121 P. W. R. 1912; 99 P. R. 1912; 15 Ind. Cas. 941.
(3) 13 O. C. 28; 5 Ind. Cas. 443.
(4) 14 A. 520; A. W. N. (1892) 99.

LOWER BURMA CHIEF COURT.

SPECIAL SECOND CIVIL APPEAL No. 92 OF 1911.

February 19, 1912.

Present:—Mr. Justice Twomey.

MAUNG CHIT TON—DEFENDANT—APPELLANT

versus

MAUNG AUNG GYAW—PLAINTIFF—RESPONDENT.

Burden of proof—Possession—Mortgagor and mortgagee.

The burden of proof as to the nature of the transaction by which the person in possession obtained that possession is on the person who is out of possession.

Maung Shwe Tha v. *Maung Thu Daw*, P. J. 461, approved.

This rule, however, is inapplicable when the original relation of the parties was that of mortgagor and mortgagee. It is then on the party who alleges that the said relation has ceased to prove it.

For the purpose of placing the burden of proof, it is immaterial whether possession was given under the original mortgage or not until the time of the subsequent transaction in dispute.

Maung Po Te v. *Maung Po Kyaw*, 1 L. B. R. 215; *Ma Dan Da* v. *Kyaw Zan*, 3 L B. R. 5, referred to.

Appeal against the judgment and decree of the District Court of Prome, reversing the decree of the Township Court of Paungde.

Mr. *Halkar*, for the Appellant.

JUDGMENT.—Both the lower Courts have found that the defendant-appellant failed to prove any agreement to sell the land. The District Court considered the matter carefully and there can be no doubt that the finding is correct. The oral evidence is very weak and there is no proof that the plaintiff-respondent consented to or knew of the entry of an outright sale in Pyatbaing.

It is argued that the burden of proof was wrongly placed on the defendant-appellant. The defendant-appellant is in possession of the land, and it was laid down in *Maung Shwe Tha* v. *Maung Thu Daw* (1), that the burden of proof as to the nature of the transaction by which the person in possession obtained that possession is on the person who is out of possession. This rule, however, is inapplicable when the original relation of the parties was that of mortgagor and mortgagee. Whether the transaction of 1905 was intended to be a mortgage or a sale, it is the defendant-appellant's case that the land had been mortgaged to him with possession two or three years before. In these circumstances, the burden of proving that the relation of mortgagor and mortgagee ceased in 1905 was clearly on the defendant, and for the purpose of placing the burden of proof, it is immaterial whether possession was given under the original mortgage or not until the time of the subsequent transaction in dispute [see *Maung Po Te* v. *Maung Po Kyaw* (2) and *Ma Dan Da* v. *Kyaw Zan* (3)].

The learned Counsel for appellant asks me to re-consider the question of the date of the Pyatbaing report. Even if the admission in the written statement in the earlier suit (No. 110 of 1911) be excluded from consideration, there remains the fact that the date on the Pyatbaing itself is 11th March 1905 and that the extract from Register I put in by the defendant-appellant is for the agricultural year 1905-06 which began on 1st July 1905. As the defendant-appellant relied on the Pyatbaing, it was for him to prove that the transaction mentioned therein took place before the Transfer of Property Act came into force. I think the date of the transaction must be taken to be not earlier than 1st January 1905, when the sections of the Transfer of Property Act relating to sales and mortgages came into force in rural areas.

(1) P. J. 461.
(2) 1 L. B. R. 215.
(3) 3 L. B. R. 5.

S. N. DAR, B. A., LL. B.
Vakil High Court,
SRINAGAR (Kashmir)

MITHAN LAL v. MIZAJI LAL.

The decree of the District Court is upheld with the modification that the plaintiff-respondent must pay to the defendant-appellant the amount of Rs. 140 which he admittedly owes to him.

The costs of this appeal will be borne by the appellant.

Decree modified.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 715 OF 1912.

November 22, 1912.

Present:—Mr. Justice Chamier.

MITHAN LAL—PLAINTIFF—APPELLANT

versus

MIZAJI LAL AND OTHERS—DEFENDANTS—RESPONDENTS.

Agra Tenancy Act (II of 1901), *s.* 164—*Practice—Burden of proof—Suit by co-sharer against* lambardar *for share of profits—North Western Provinces Rent Act (XII of* 1881*)*, *s.* 209.

In a suit by a co-sharer for his share of profits against the *lambardar* under section 164 of the Agra Tenancy Act, the burden of proof is, in the first instance, on the plaintiff, who is required to produce some general evidence of negligence on the part of the *lambardar*, such as evidence that a very large percentage of the rent has remained uncollected.

If this is proved, it is then for the *lambardar* to explain why so large a percentage has remained uncollected and, in the absence of a satisfactory explanation, the burden of proving the real profits of the property is shifted on to him.

Where it is proved that a very large percentage of the rent remained uncollected, and the *lambardar* admitted he had kept no accounts and had not had all the collections entered in the *patwari's siaha*, the burden of proof is shifted on to the *lambardar* to show why so large a sum remained uncollected.

The practice in this respect has been the same under the Agra Tenancy Act as it was under the old Rent Act. The meaning of section 164 of the former Act is practically the same as that of section 209 of the Rent Act.

Second appeal from a decree of the District Judge of Mainpuri, modifying that of the Assistant Collector, first class.

Messrs. *G. L. Agarwala* and *Gulzari Lal*, for the Appellant.

Mr. *Baldev Ram Dave*, for the Respondents.

JUDGMENT.—This is a suit by a co-sharer in a village against the *lambardar* for the profits of the plaintiff's share for *rabi*, 1315 *Fasli* and for the years 1316 and 1317 *Faslis*. The only question for decision is whether the lower Appellate Court was right in giving a decree to the plaintiffs for the profits calculated on the demand and not on the actual collections. The lower Appellate Court was of opinion that the plaintiffs had succeeded in showing that the *lambardar's* failure to collect a larger sum during the years in question was due to negligence. In second appeal, it is contended that, whatever may have been the law previously, according to the present law which is contained in section 164 of the Tenancy Act, the plaintiff must in a case of this kind prove precisely what sums have remained uncollected owing to the negligence of the *lambardar*, that is to say, he must in the case of each tenant show that the sum not collected from him remained uncollected owing to the negligence of the defendant. The language of the section, no doubt, differs to some extent from the language of section 209 of the old Rent Act (Act XII of 1881), which it has re-placed, but it appears to me that the meaning of the two sections is practically the same. The Tenancy Act has been in force for nearly eleven years and the learned Vakils for the defendant in the present case are unable to refer me to any case in which it has been held that the plaintiff, who claims more than his share according to the collections, must go into the account of each tenant and show what items have remained uncollected owing to the negligence of the *lambardar*. As far as I know, the practice has been the same under the Tenancy Act as it was under the old Rent Act of 1881. The burden of proof is placed in the first instance on the plaintiff who is required to produce some general evidence of negligence on the part of the *lambardar*, such as, evidence that a very large percentage of the rent has remained uncollected. The Court then calls upon the *lambardar* to explain why so large a percentage has remained uncollected, and, in the absence of a satisfactory explanation shifts the burden of proving the real profits of the property on to him. This is what has been done in the present case, but in addition to producing evidence that a very large percentage of the rent remained uncollected, the plaintiffs proved several other suspicious circumstances. They also obtained from the *lambardar* an admission that he had kept no accounts and that he had not had all the collections entered in the *patwari's siaha*.

In these circumstances, I must hold that the plaintiffs gave more than *primâ facie* proof of the negligence of the *lambardar*, and that the burden was rightly shifted on to the *lambardar* to explain why so large a sum remained uncollected. In my opinion, the Court was right in giving the plaintiffs profits calculated on the demand. But it omitted to allow the *lambardar* his *lambardari* dues on the plaintiff's share of the collections. The sum is Rs. 10-10-0. To this extent the appeal is allowed with proportionate costs throughout.

Appeal allowed in part.

LOWER BURMA CHIEF COURT.

CIVIL REVISION PETITION No 156 OF 1911.

February 16, 1912.

Present:—Mr. Justice Twomey.

M. N. P. L. FIRM—APPLICANT

versus

KIRWAN GYAN—RESPONDENT.

Negotiable Instruments Act (XXVI of 1881), s. 20—Blank promissory-note, suit on—Payee's name not filled in—Endorsement.

A payee can fill in a blank inchoate instrument and sue on it himself after filling it or endorse it to some one; but no decree can be passed on a blank instrument not containing the name of the *payee*; nor is such an instrument transferable by endorsement.

JUDGMENT.—It has been found by both the lower Courts that the two respondents, who owed money to one Subromanian Chetty, gave him the document, Exhibit A, which is a blank promissory-note form printed in English but has the following memorandum in Burmese below the printed matter:

"On the 12th *Lazan* of *Wagaung* 1270, Kirwan Gyan and his wife, Mi So Kirwe, of Apaukwa village, Thingaunt circle, borrow and take the sum of Rs. 325 (Rupees three hundred and twenty-five only) with interest at Rs. 2¼ per cent. per mensem."

A one-anna stamp is affixed to the form and across the stamp are the signatures of the respondents. This document was afterwards transferred by endorsement to the petitioners who sued the respondent upon it. The Township Court granted them a decree. But on appeal the District Court

held that as Subromanian is not named as payee in the document, his indorsement to the petitioners gave them no right of action against the respondent. It is contended that this decision is erroneous and that the lower Appellate Court disregarded the provisions of section 20, Negotiable Instruments Act, 1881.

Under that section, Subromanian, undoubtedly, had authority to fill in the blank promissory-note entering his own name as payee or entering as payee the name of the Firm M. P. L., to whom he transferred the document and if he had done so, the petitioners could have recovered from the respondents. But as Subromanian and the petitioners left the document blank and the petitioners sued upon it in its inchoate form, I do not see how they can succeed. It is not a promissory-note at all as it stands. It is a mere acknowledgment of indebtedness and was not transferable by indorsement. The radical defect in the petitioner's suit was brought to notice in the Township Court and it was then open to the petitioners to apply for permission to withdraw the suit under Order XXIII, rule 1 with liberty to bring a fresh suit after filling in the promissory-note.

They failed to adopt this course. In the exercise of the revisionary jurisdiction of this Court, I cannot now hold that to be done which the petitioners ought to have done.

The petition is dismissed with costs.

Petition dismissed.

ALLAHABAD HIGH COURT.

EXECUTION FIRST CIVIL APPEAL No. 263 OF 1912.

November 23, 1912.

Present:—Mr. Justice Griffin.

BANWARI LAL AND OTHERS—PLAINTIFFS—APPELLANTS

versus

Musammat RAMA AND OTHERS—DEFENDANTS—RESPONDENTS.

Mesne profits—Execution of decree for mesne profits—Interest.

In execution of a decree for mesne profits, the decree-holder is entitled to claim interest on mesne profits, as the definition of the term includes interest on such profits.

Execution first appeal from the decree of the Subordinate Judge of Mainpuri.

Mr. *Govind Prasad*, for the Appellants.

JUDGMENT.—This appeal arises out of an application for execution of a decree for mesne profits. The decree-holders claimed interest on mesne profits. The Court below held that the decree-holders were not entitled to interest inasmuch as the original decree was silent as to interest on mesne profits. In the plaint interest had been asked for on mesne profits. The learned Subordinate Judge was of opinion that as the decree was silent on the question of interest, the relief as to interest should be deemed to have been refused. The decree-holders appeal.

It appears from the definition of the term 'mesne profits' that it includes interest on such profits. The original decree must, therefore, have included interest on mesne profits and the decree-holders were entitled in execution of their decree to interest thereon. I allow the appeal, set aside the order of the Court below in so far as it dismisses the decree-holders' claim for interest on mesne profits and direct that the application be dealt with by that Court according to law. The respondents are not represented here. The appellants will get their costs in this appeal.

Appeal allowed.

LOWER BURMA CHIEF COURT.
CIVIL REVISION PETITION No. 48 OF 1911.
March 29, 1912.
Present:—Mr. Justice Parlett.
BALTHAZAR AND SONS—APPLICANTS
versus
THE BURMA ENGINEERING AND TRADING CO.—RESPONDENT.

*Receiver—Leave to sue—*Ex parte *decree without such leave—Application to set aside.*

A Receiver is an officer of the Court appointing him and can only be sued with the leave of that Court. Any party proceeding against him without leave is in contempt of Court. A decree obtained against a Receiver sued without permission must be set aside.

A. B. Miller v. *Ram Ranjan Chakravarti*, 10 C. 1014, followed.

The fact that a Receiver, against whom an *ex parte* decree without obtaining the leave of the Court to sue him was passed, previously applied to have the *ex parte* decree set aside and for permission to defend the suit, does not debar him from attacking the decree as passed without leave of Court.

Application to revise the judgment and decree of the Court of Small Causes, Rangoon, in Civil Regular No. 67 of 1911.

Mr. *Doctor*, for the Applicants.

Mr. *Higginbotham*, for the Respondents.

JUDGMENT.—The suit was brought against the Firm of Messrs. Balthazar and Sons as Receivers of the estate of Ashan Ally, deceased, and on 13th January 1911, an *ex parte* decree was passed against them. On 6th February, they filed an application, supported by affidavits, for the *ex parte* decree to be set aside, and permission given them to defend the suit. Notice was issued to the plaintiff, but on the day fixed, 17th March 1911, the defendants did not appear and their application was dismissed. On the 5th April, defendants filed this application to set aside the decree on the ground that the leave of the Court was not obtained to sue the Receiver.

On the plaintiff's side, it is allowed that leave should have been obtained and was not, but it is urged that by asking to be allowed to defend the suit, defendants have submitted themselves to the jurisdiction of the Small Cause Court, and have waived their rights, and that the decree should only be set aside if it is one which should never, on the pleadings, have been passed against the Receiver.

It has been stated before me, and not contradicted, that the defendant firm consists of more than one partner, only one of whom was Receiver of the estate in question. If this be so, plaintiff was clearly not entitled to a decree against the firm.

I hold that there is no question of the Receiver submitting himself to the jurisdiction of any Court. He is an officer of the Court appointing him and can only be sued with the leave of that Court, any party proceeding against him without leave is in contempt of Court. Decree obtained against a Receiver sued without permission must be set aside [*A. B. Miller* v. *Ram Ranjan Chakravarti* (1)]. It has been urged that by not proceeding with their applications to

(1) 10 C. 1014.

set aside the *ex parte* decree and to defend the suit, and by filing this application, the defendants have taken up a position of obstruction.

In my opinion, however, if they are able to show, as in this case, that the decree is one which should be set aside, they are entitled to do so, notwithstanding that they have previously applied to be allowed to defend the suit. I consider that the decree must be set aside, and the suit dismissed with costs, and I order accordingly. Respondents will pay costs of this application, Advocates' fees two gold *mohurs*.

Decree set aside.

CALCUTTA HIGH COURT.
CIVIL RULE No. 3143 OF 1911.
July 4, 1911.
Present:—Mr. Justice Coxe and Mr. Justice Teunon.
DIGAMBAR NANDA—PLAINTIFF—PETITIONER
versus
THE SECRETARY OF STATE FOR INDIA—DEFENDANT—OPPOSITE PARTY.

Record of Rights—Suit for declaration that plaintiff not tenure-holder but raiyat—*Party—Court adding persons recorded as* raiyats, *as defendants—Plaintiff not prejudiced—Persons recorded as* raiyats, *whether necessary parties.*

The plaintiff sued for a declaration that he was not a tenure-holder as he had been described in the Record of Rights, but a *raiyat*. The Munsif, during the hearing of the case, thought it desirable, in the interest of justice and to prevent a multiplicity of suits, to add *suo motu*, as defendants the persons who had been recorded in the Record of Rights as *raiyats* of the land under the plaintiff as tenure-holder. The plaintiff's case was that those persons were mere tenants-at-will:

Held, (1) that as by the law the status of the tenants under the plaintiff was made to depend on his status, they were as vitally interested in the Record of Rights, as he himself and were proper parties to the suit;

Mahomed Badsha v. *Nicol, Fleming & Co.*, 4 C. 355; 2 C. L. R. 330, distinguished.

(2) that the order did not prejudice the plaintiff in any way and that, therefore, it should not be set aside.

Rule against the order of the Munsif of Contai, dated May 20th, 1911.

Babu *Nil Madhab Bose*, for the Petitioner.

Babu *Ram Charan Mitra*, Senior Government Pleader, for the Opposite Party.

JUDGMENT.—The plaintiff in this suit has sought, among other reliefs, for a declaration that he is not a tenure-holder, as he had been described in the Record of Rights but a *raiyat*.

The Munsif, during the hearing of the case, thought it desirable in the interests of justice and to prevent, a multiplicity of suits, to add, as defendants, the persons who had been recorded in the Record of Rights as *raiyats* of the land under the plaintiff as tenure-holder.

The plaintiff's case is that these persons are mere tenants-at-will, paying rent in kind.

The plaintiff has obtained from this Court a Rule on the opposite party to show cause why this order should not be set aside. The order was passed on the 5th May 1911, apparently *suo motu* by the Munsif, although the case had been fixed for the 20th May 1911.

This, no doubt, was an irregularity, but as the matter has now been fully argued, we do not think that the plaintiff has been prejudiced in any way.

The only question that remained is whether these tenants under the plaintiff are proper parties to the present suit.

We feel ourselves entirely unable, in revision, to set aside the order of the Munsif in this respect.

The plaintiff's cause of action is the publication of this Record of Rights. His complaint is that he has been recorded as a tenure-holder, instead of *raiyat*.

By the law the status of the tenants under him is made to depend on his status. So that these tenants are as vitally interested in the Record of Rights as he is himself if indeed they are not more so. If this suit succeeds and the plaintiff obtains a declaration that he is a *raiyat* that declaration may work very grave injury to these tenants under him.

The special provisions of the law which cause the position of these tenants to depend on the position of the plaintiff makes the case entirely distinguishable from the case cited, namely, that of *Mahomed Badsha* v. *Nicol, Fleming & Co.* (1), which was a commercial case.

(1) 4 C. 355; 2 C. L. R. 330.

MANDAYA v. MA E.

We think that under the circumstances of the case it is most desirable, as the Munsif says, in the interest of justice and to prevent a multiplicity of suits, that these tenants, who are so vitally interested in the result of the suits, should be allowed to take part in it. The Rule will accordingly be discharged with costs. We assess the hearing fee at two gold *mohurs*.

Rule discharged.

LOWER BURMA CHIEF COURT.
SECOND CIVIL APPEAL No. 183 OF 1910.
February 26, 1912.
Present:—Mr. Justice Twomey.
MANDAYA—APPELLANT
versus
MA E AND OTHERS—RESPONDENTS.

Benami *sale—Suit for possession—Fraud against creditors.*

A. sued to recover possession from *B.* of certain property under a deed of sale which was found to have been executed in favour of *A.* by *B.* "*benami*" and with a view to defraud the creditors of the vendors:

Held, that *A.* was not entitled to recover possession and that it did not matter whether the object of the fraudulent transfer was actually effected or not.

Obiter dictum.—The fraudulent grantor or giver loses his right to claim the aid of law in recovering his property only if the contemplated fraud has been carried out.

T. P. Petherperumal Chetty v. *R. Muniandy Servai*, 35 C. 551 (P. C.); 12 C. W. N. 562; 7 C. L. J. 528; 5 A. L. J. 290; 14 Bur. L. R. 108; 10 Bom. L. R. 590; 18 M. L. J. 277; 4 M. L. T. 12; 4 L. B. R. 266; 35 I. A. 98, referred to.

JUDGMENT.—The appellant, Mandaya, sued for possession of certain land and cattle sold to him for Rs. 1,000 by the defendants-respondents some two years before the suit was filed. The property was never made over to the appellant. Both the lower Courts have found that there was no consideration for the conveyance which was a mere *benami* transaction designed to defeat the claims of creditors of the vendors (defendants-respondents). This finding of facts is final and cannot be questioned in second appeal. The only point for consideration is whether in the above circumstances, the plaintiff-appellant, Mandaya, is entitled to obtain possession of the property from the real owners, the defendants-respondents, who executed the *benami* conveyance in his favour.

It is urged that the lower Courts erred in allowing the respondents to succeed by pleading their own fraud. But it is clear that this argument cannot prevail. In the Privy Council case, *T. P Petherperumal Chetty* v. *R. Muniandy Servai* (1), the plaintiff who had executed a *benami* deed of sale of land to defeat the claims of a mortgagee was allowed to recover the land from the *benamidar* because the contemplated fraud on the mortgagee had failed. The plaintiff was a party to the contemplated fraud but was not put out of Court on that account. The Rule was laid down that the fraudulent grantor or giver loses the right to claim the aid of the law in recovering his property only if the contemplated fraud has been carried out.

In the present case, it is not the vendors who come into Court asking for relief. It is the purchaser who sought to obtain possession of the property in pursuance of the fraudulent transfer. It matters not in this case whether the object of the fraudulent transfer was actually effected or not. The question whether the defendants-respondents' creditors were really defeated by the *benami* transfer would arise only if the vendors were seeking the aid of the Court to avoid the transfer, either by recovering the property from the *benami* purchaser or by having the conveyance formally annulled. In that case, the Court would refuse its aid or not according as it found that the fraudulent purpose contemplated by the parties had been really achieved or not. If that purpose had been achieved, the Court would refuse to aid either party.

But here the Court was asked to take the property from the rightful owner and hand it over to the *benamidar*. Even if creditors have been defeated by the fraudulent transfer, the Court cannot treat that as a reason for carrying out another fraud on the defendants-respondents by depriving them of their property.

In the Privy Council case referred to above, the Court, in avoiding the fraudulent transfer, was merely restoring the *status quo ante*. In the present case, the Court finding the property in the hands of the rightful owner, leaves it there, refusing to

(1) 35 C. 551 (P.C.); 12 C. W. N. 562; 7 C L. J. 528; 5 A. L. J. 290; 14 Bur. L. R. 108; 10 Bom. L. R. 590; 18 M. L. J. 277; 4 M. L. T. 12; 4 L. B. R. 266; 35 I. A. 98.

give effect to a document which was never meant to be carried out.

On these grounds, I dismiss the appeal with costs.

Appeal dismissed.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEALS NOS. 4169 AND 4170 OF 1910 WITH CIVIL RULES NOS. 5419 AND 5420 OF 1910.

April 25, 1911.

Present:—Mr. Justice Holmwood and Mr. Justice Chatterjee.

PAJIRUDDIN AND OTHERS—PLAINTIFFS—APPELLANTS AND PETITIONERS

versus

THE SECRETARY OF STATE FOR INDIA—DEFENDANT—RESPONDENT AND OPPOSITE PARTY.

Court fee—Declaratory decree—Consequential relief—Suit for declaration that plaintiff is occupancy raiyat *and for settling fair rent*—Ad valorem *court-fee—Party—Status of plaintiff—Persons recorded as* raiyats, *whether necessary parties—Bengal Tenancy Act (VIII o 1885), s.* 104-H.

A suit under section 104H of the Bengal Tenancy Act, for a declaration that the plaintiff is an occupancy *raiyat* and not a tenure-holder as he has been entered in the Record of Rights, and for settling a fair and equitable rent for his holding, is not a suit for a mere declaratory decree, but one for a consequential relief, and, therefore, *ad valorem* Court-fee should be paid upon such a plaint.

Any declaration, which is made as regards the status of the plaintiff, must be made in the presence of those who are now recorded as *raiyats* under him.

Appeals from the decisions of the District Judge of Midnapur, dated December 6th, 1910, reversing those of the Sub-Judge of Midnapore, dated March 23rd, 1910.

Babus *Mohendra Nath Roy* and *Bidhu Bhushan Gangooly*, for the Appellants and Petitioners.

Babu *Ram Charan Mitra*, Senior Government Pleader, for the Respondent and Opposite Party.

JUDGMENT.—This is an appeal from the decision of the District Judge of Midnapur reversing that of the Officiating Subordinate Judge and directing that three weeks' time be given to the plaintiffs to file the deficit *ad valorem* Court fees to be assessed on the valuations stated in the plaints. There was a further order that, if this was done, the suits will be remanded for further determination after the subordinate tenants have been added as defendants and costs will abide the result.

We have heard the learned Vakils on either side and have carefully considered the matter, and we are of opinion that the order of the learned Judge on both points must be upheld. As a matter of fact, the plaintiffs have paid in the deficit Court-fees.

A certain difficulty arises on the wording of section 104-H, for although sub-clause (3) of that section expressly sets out the suits which may be instituted under that section from (*a*) to (*g*) and no others, and these causes of action are all of them purely declaratory, yet we find in the sub-clause (4) that if the Court proceeds to make any declaration, it shall in some cases give one kind of consequential relief and in other cases give others, and that is quite contrary to the law which is laid down in Schedule II, Article 17, of the Court Fees Act. There it is clearly set out that the plaint or memorandum of appeal can only be stamped as declaratory suit with a fee of Rs 10 when the relief is to obtain a declaratory decree where no consequential relief is prayed. It does not seem to us that it was necessary for the appellant to add to prayer (*kha*) in the plaint, but as it is a consequential relief, it seems to us that it must be paid for *ad valorem*. In the Case No. 1469, no difficulty arises, inasmuch as there is a further prayer for a relief which is wholly uncontemplated by section 104 (H) and that is that one tenure should be split up into two separate *jotes*.

As regards the necessity of joining the present tenants, whom the learned Judge rather loosely refers to as under-tenants, it appears to us clear that any declaration which is made as regards the status of the appellants must be made in the presence of the present tenants. As long as the appellants remain, as they are now declared by the Record of Rights to be, tenure-holders, the tenants may have rights of occupancy, and to declare that the tenure-holders have occupancy rights would be to take away that status from the present tenants who would in

that case become under-tenants. This again is a matter which seems to render the case more complicated than an ordinary simple declaratory suit under section 104-H in respect of an individual tenant.

We, therefore, dismiss the appeal, and direct that the case be remanded for fresh determination after the present tenants have been added as defendants and that the costs as ordered by the lower Court abide the result.

We assess the hearing fee at three gold *mohurs* in each case in this Court.

This judgment governs Second Appeal No. 4170 of 1910.

The Rules are discharged without costs.

Appeals dismissed: Rules discharged.

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 871 OF 1910.

October 4, 1911.

Present:—Mr. Justice Spencer.

T. V. VEERA RAGHAVAN PATTAR—3RD COUNTER-PETITIONER

versus

VATASSERI PARA MANNADISSIER AND OTHERS—PETITIONERS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 73, O. XXI, r. 89—Sale in execution—Application for setting aside sale—Deposit of amount specified in sale proclamation—Amounts due to decree-holders applying for rateable distribution.

Where an application is made to set aside a sale under rule 89, Order XXI, it is necessary to deposit, under clause (*b*) of the rule, besides 5 per cent. of the purchase-money, only the amount specified in the proclamation of sale as due to the decree-holder in execution of whose decree the sale has been held, and not the amounts due by the judgment-debtor to all other decree-holders who have applied under section 73 for rateable distribution.

Petition, under section 115 of Act V of 1908, praying the High Court to revise the order of the District Judge of South Malabar in Civil Miscellaneous Appeal No. 1 of 1910, presented against that of the District Munsif of Palghat, in M. P. No. 1882 of 1909, Original Suit No. 312 of 1899.

Mr. *T. K. Govinda Aiyar*, for the Petitioner.

Mr. *P. S. Sivaswami Aiyar*, Advocate-General, and Mr. *K. P. Govinda Menon*, for the Respondents.

JUDGMENT.—A sale of immoveable property having been held in execution of a decree and other decree-holders having come in under section 73, Civil Procedure Code for a rateable distribution of the assets, a prior mortgagee applied, under Order XXI, rule 89 to have the sale set aside on his depositing 5 per cent. of the purchase-money and the amount specified in the proclamation of sale as that for the recovery of which the sale was ordered. The District Munsif dismissed the application holding that the latter amount included "the amounts of all the decree-holders' claimable rateable share," an expression from which it is not clear whether he meant the whole of their decrees or only so much as they would have got on a rateable distribution taking place. On appeal, the District Judge reversed the Munsif's order and set aside the sale. It is now contended that the District Judge's order was wrong, as the deposit should have included the amounts of the decrees of the decree-holders applying for rateable distribution. I am unable to accede to this contention. It is true that it has been held that a judgment creditor, who has applied to participate in the assets of a sale conducted on the attachment of another judgment-creditor, although he may not have made any attachment of the property, is entitled to have the sale proceeded with to satisfy his decree after the decree of the attaching creditor has been satisfied [*Mohunt Megh Lall Pooree* v. *Shib Pershad Madi* (1)] and the sale may, therefore, be said to be for the benefit of decree-holders who have applied for execution other than the attaching creditor, but this is far from imposing on the judgment-debtor or person otherwise interested an obligation not authorised by any section of the Code. In *Lakshmi* v. *Kuttunni* (2), on a consideration of the wording of sections 2 and 295 of the Code of 1882, this Court held that 'decree-holders' in section 311 included other decree-holders applying for rateable distribution so far as applications to set aside sales on the 'ground of irregularities' were concerned. The principle, that a sale in execution of a decree enures for the benefit of other decree-holders who have applied for execution besides that decree-holder at whose instance the

(1) 7 C. 34.
(2) 10 M. 57.

property is sold is recognised in *Kashi Nath Roy Chowdhry* v. *Surbanand Shaha* (3) and in *Bykant Nath Shaha* v. *Rajendro Narain Rai* (4). It has to be noticed, however, that all these rulings were antecedent to the insertion in the Code of section 310-A under Act V of 1894, and they afford no clue to the interpretation of the word 'decree-holder' in that section. Coming now to rule 89, Order XXI of Act V of 1908, which governs the present case, the language is clear enough. The person who applies to set aside a sale under this section besides depositing 5 per cent. of the purchase-money "for payment to the purchaser must deposit for payment to the decree-holder the amount specified in the proclamation of sale as that for the recovery of which the sale was ordered." It would be doing violence to the English language to construe the words "the amount specified in the proclamation of sale" as meaning and including the amounts due by the judgment-debtor to all other decree-holders who have applied under section 73 for execution of their decrees. Again, when the succeeding rule dealing with the setting aside of sales for fraud or irregularity contains expressly the words "the decree-holder or any person entitled to share in a rateable distribution of assets," there is no reason why the words "or any person entitled to share in a rateable distribution of assets" should be read in after the word 'decree-holder' in rule 89 where they do not exist. On a consideration of the language of rule 89 of Order XXI of the present Code, I am clearly of opinion that the appellant's contention is untenable, and it will not help him that rule 92 provides for previous notice being given to all persons likely to be affected by such an order and seems to contemplate that a Court is not bound in its discretion in every case to allow applications under rule 89 or that the wording of the new section 73 is a little different from that of the old section 295.

Under the old Civil Procedure Code, the decisions in *Pita* v. *Chuni Lal* (5) and *Roshan Lal* v. *Ram Lall Mullick* (6), which follow an earlier decision in *Hari Sundari Dasya* v. *Shashi Bala Dasya* (7), are distinctly

(3) 12 C. 317 at p. 321.
(4) 12 C. 333.
(5) 31 B. 207; 9 Bom. L. R. 15.
(6) 30 C. 262.
(7) 1 C. W. N. 195.

against him. This petition is dismissed with costs.

Petition dismissed.

CALCUTTA HIGH COURT.

MISCELLANEOUS CIVIL APPEALS NOS. 253 AND 267 OF 191 .

September 5, 1912.

Present:—Sir Ashutosh Mookerjee, KT., Judge, and Mr. Justice Holmwood.

JOGENDRA NATH SINGH AND OTHERS —PLAINTIFFS—APPELLANTS

versus

SECRETARY OF STATE FOR INDIA IN COUNCIL AND OTHERS— DEFENDANTS—RESPONDENTS.

Bengal Tenancy Act (VIII of 1885), s. 104-H—Scope of section—Relief to be granted—By whom to be instituted—Who should be made defendant—Necessary and proper party, distinction between—Person indirectly or remotely interested, whether necessary party—Secretary of State and under-tenants, whether necessary parties.

The only relief which the plaintiff in a suit under section 104-H can claim, is the alteration of an entry of the rent settled or the insertion of an entry as to the amount of rent to be settled. No doubt, the Court, with a view to determine the question, whether the entry of the rent as settled is erroneous or whether there ought to be an entry of settled rent, must incidentally examine the ground assigned by the plaintiff as set out in the six clauses of sub-section 3. But the Court cannot be called upon, in a suit under section 104-H, to make an express declaration upon any of the six matters mentioned in that sub-section.

The plaintiffs are not competent to seek in a suit under section 104-H a declaration that part of the lands is *nij jote* or that certain specific tenants have not acquired rights of occupancy therein.

A suit under section 104-H may be instituted either by the landlord or by the tenant, according as the one or the other considers himself aggrieved by the entry in the Record of Rights.

The suit should have as defendant only the person benefited by the rent-entry or by the omission to make a rent-entry, as the case may be. The Secretary of State for India is the proper party to be made defendant. The under-tenants are not necessary parties in the determination of the one question directly in issue, namely, whether the rent-entry showing the amount of rent payable by the plaintiffs to the Secretary of State, is or is not correct. The under-tenants are not necessary parties for as far as the entry relates to their status as under-tenants, it cannot be altered as the result of this suit.

There is a well founded distinction between necessary parties and proper parties to a suit. Two

conditions must be satisfied in order that a party may be considered a necessary party defendant, namely, *first*, there must be a right to some relief against him in respect of the matter involved in the suit; and *secondly*, his presence is necessary in order to enable the Court effectually and completely to adjudicate upon and settle all questions involved in the suit.

Durga Charan Sarkar v. *Jatindra Mohan Tagore*, 27 C. 493 at p. 497, relied upon.

In each case, it must be determined whether a particular person is or is not a necessary party, that is, necessary for the determination of the question raised by the plaintiff and for the grant of the relief he claims. But it may be laid down as a general rule that a person who is only indirectly or remotely interested, is not a necessary party.

Pajiruddin v. *Secretary of State*, 17 Ind. Cas. 919; 16 C. L. J. 383 and *Digambar Nanda* v. *Secretary of State*, 17 Ind. Cas. 917; 16 C. L. J. 381, distinguished and explained.

Appeals from the order of the District Judge of Midnapur, dated March 12th, 1912, reversing that of the Sub-Judge of Midnapur, dated May 20th, 1911, and remanding the case to the first Court.

Dr. *Rash Behary Ghosh* and Babu *Jyotish Chandra Hazra*, for the Appellants.

Babu *Ram Charan Mitter*, Senior Government Pleader, for the Secretary of State, Respondent.

Babu *Khirode Narayan Bhunia*, for *pro forma* Defendants, Respondents.

JUDGMENT.

MOOKERJEE, J.—This appeal is directed against an order of remand in a suit under section 104-H of the Bengal Tenancy Act. The plaintiffs instituted the suit on the ground mentioned in sub-section 3, clause (*e*) of that section, namely, that as tenants they belong to a class different from that to which they are shown in the Record of Rights as belonging. The substantial relief which they claimed, in fact it is the only relief which they can claim under sub-section 1 of section 104-H, is, that the amount of the rent settled at the present settlement is excessive and illegal and that fair and equitable amount of rent be settled. On behalf of the Secretary of State for India in Council, objection was taken to the frame of the suit on the ground that the under-tenants subordinate to the plaintiffs had not been joined as defendants. This objection was overruled by the primary Court; the suit was tried on the merits and decreed in favour of the plaintiffs; the decree declared that the status of the plaintiffs was that of *ryots* with rights of occupancy and not that of intermediate tenure-holders. The Secretary of State appealed against this decision, and contended that the under-tenants should have been joined as defendants, because their status is dependent upon the status of the plaintiffs. The District Judge has given effect to this contention, upon the authority of the cases of *Pajiruddin* v. *Secretary of State* (1) and *Digambar Nanda* v. *Secretary of State* (2) The District Judge has, in this view, set aside the decree of the Court of first instance and remanded the case in order that the under-tenants might be added as defendants and the suit re-tried in their presence. This appeal by the plaintiffs is directed against the order of remand, and has been supported on the ground that in a suit under section 104-H of the Bengal Tenancy Act, the under-tenants of the plaintiffs are not necessary parties.

Before the substantial question of law raised in the appeal is examined, it is necessary to point out that the plaint has not been framed properly for the purposes of a suit under section 104-H of the Bengal Tenancy Act. Sub-section 1 of that section provides that any person aggrieved by an entry of a rent settled in a Settlement Rent Roll, prepared under sections 104-A to 104-F and incorporated in a Record of Rights finally published under section 103-A or by omission to settle a rent for entry in such Settlement Rent Roll, may institute a suit in the Civil Court. The sub-section specifies the Court where the suit may be instituted, namely, it is the Court which has jurisdiction to entertain a suit for the possession of the land to which the entry relates or in respect of which the omission was made. Sub-section 2 limits the time within which the suit may be instituted. Sub-section 3 specifies the grounds on which the suit may be instituted, and it is stated explicitly that on no ground other than those specified in the sub-section can the suit be maintained. It is plain, therefore, that the only relief which the plaintiff in a suit under section 104-H can claim is the alteration of an entry of the rent settled or the insertion of an entry as to the amount

(1) 16 C. L. J. 383; 17 Ind. Cas. 919.
(2) 16 C. L. J. 381; 17 Ind. Cas. 917.

of rent to be settled. When we examine the plaint in this case, in view of this exposition of the scope of section 104-H, we find that the first two prayers are entirely out of place. The first prayer is to the effect that the plaintiffs may be declared occupancy *ryots* and that the entry in the Record of Rights to the effect that they are tenure-holders may be declared erroneous. The second prayer is to the effect that the names of two of the defendants who are recorded as occupancy *ryots* in the Record of Rights may be expunged therefrom and the lands in their occupation may be recorded in the *khatian* as the *nij jote* of the plaintiffs. The third prayer is to the effect that the amount of the rent settled at the present settlement is excessive and illegal and that a fair and equitable amount of rent may be settled. The fourth prayer relates to costs, while the fifth embodies the usual general prayer for such relief as the plaintiffs might be entitled to claim in accordance with law and equity. It is plain that the first two prayers are entirely foreign to a suit properly framed under section 104-H of the Bengal Tenancy Act. No doubt, the Court, with a view to determine the question, whether the entry of the rent as settled is erroneous or whether there ought to be an entry of settled rent, must incidentally examine the ground assigned by the plaintiffs as set out in the six clauses of sub-section 3. But the Court cannot be called upon, in a suit under section 104-H, to make an express declaration upon any of the six matters mentioned in that sub section. The second prayer is, if possible, still more foreign to the scope of the suit. The plaintiffs are not competent to seek in a suit under section 104H a declaration that part of the lands is *nij jote* or that certain specific tenants have not acquired rights of occupancy therein. It is a matter for surprise that these patent defects in the plaint were not noticed in either of the Courts below, and, as a matter of fact, here also they were not discovered till the plaint had been examined by ourselves. If objection had been taken by the defence at the earliest stage, as it might and ought to have been taken, and if, notwithstanding the exception, the plaintiffs had persisted and proceeded to trial with the plaint as framed, they would not have been entitled to any consideration at the hands of the Court. Here, however, the defect was discovered by us, and as soon as attention was drawn to it, the learned Vakil for the appellants asked for permission to amend the plaint. Under the exceptional circumstances of this case, I think this application may be granted, specially as the learned Government Pleader did not seriously oppose the application. The first two prayers in the plaint will, consequently, be expunged, and the names of all the defendants other than the Secretary of State will also be removed from the record. The plaint, as thus amended, is a proper plaint in a suit under section 104-H of the Bengal Tenancy Act. The question arises, whether in a suit framed strictly in accordance with section 104-H, the under-tenants are necessary parties.

It is worthy of note that section 104H of the Bengal Tenancy Act does not state expressly against whom the suit under sub-section (1) may be instituted. The reason for this omission is obvious. The suit may be instituted not merely by a tenant but also by a landlord. This is clear from an examination of the six grounds mentioned in sub section 3. Ground (*a*), namely, that the land is not liable to the payment of rent, can be taken only by the tenant. Ground (*b*), namely, that the land though entered as rent-free is liable to the payment of rent, can be taken only by the landlord. Ground (*c*), namely, that the relation of landlord and tenant does not exist, can be taken either by the landlord or by the tenant. Ground (*d*), namely, that the land has been wrongly recorded as part of or omitted from a particular estate or tenancy, may be taken by either party. Ground (*e*), namely, that the tenant belongs to a class different from that in which he has been placed in the Record of Rights, may be urged either by the landlord or by the tenant. Ground (*f*) which relates to the date from which the rent settled is to take effect, may be taken either by the landlord or by the tenant It is manifest, therefore, that a suit under section 104-H may be instituted either by the landlord or by the tenant, according as the one or the other considers himself aggrieved by the entry in the Record of Rights. Against whom, then,

should the suit be instituted? Clearly, against the person in whose favour the entry of rent settled has been made or who has been benefited by the omission to settle a rent for entry in the record. Tested in the light of this principle, a suit under section 104-H should have as defendant only the person benefited by the rent-entry or by the omission to make a rent-entry, as the case may be. In the present case, therefore, the Secretary of Sate for India is the proper party to be made defendant. The under-tenants are not necessary parties in the determination of the one question directly in issue, namely, whether the rent-entry showing the amount of rent payable by the plaintiffs to the Secretary of State, is or is not correct. In the Court below, it appears to have been argued, however, that the under-tenants are necessary parties, because they are interested in the question which incidentally arises as to the status of the plaintiffs. The obvious answer is that they cannot be affected or prejudiced in any manner by the result of this suit, to which they are not parties; the entry in the Record of Rights, in so far as it relates to their status as under-tenants, cannot be altered as the result of this suit. There is a well-founded distinction between necessary parties and proper parties to a suit. The Code of Civil Procedure, 1908, does not contain any express provision as to who should be considered necessary parties, but it is clear from an examination of the rules in Order I of the Code that two conditions must be satisfied in order that a party may be considered a necessary party defendant, namely, *first*, there must be a right to some relief against him in respect of the matter involved in the suit, and, *secondly*, his presence is necessary in order to enable the Court, effectually and completely, to adjudicate upon and settle all the questions involved in the suit. *Durga Charan Sarkar* v. *Jatindra Mohan Tagore* (3). As pointed out, however, by Story in his classical treatise on Equity Pleadings, section 76 (*e*), it is impossible to formulate precise rules of universal application to the joinder of parties, and the only principle which can be safely adopted is that all persons materially interested in the suit or in the subject of the suit or in the object of the suit should be made parties. To the same effect is the exposition by Calvert in his Treatise on Parties to Suits in Equity, Second Edition, 1847, pages 1-11, where statements are quoted from the judgments of Lord Hardwicke, Lord Thurlow, Lord Eldon and Sir William Grant, and it is pointed out that the rule is expressed in vague language by very logical reasoners. The rule is formulated in the same terms in Daniell on Chancery Practice, Vol. I, page 263, where it is pointed out that all persons materially interested in the subject should generally be made parties to the suit, either as plaintiffs or defendants (See also Daniell, Vol. I, pages 170, 171, 200, and Story on Equity Pleadings, sections 76, 94, 120, 138). In each case, it must be determined whether a particular person is or is not a necessary party, *i. e.*, necessary for the determination of the question raised by the plaintiff and for the grant of the relief he claims. It may be laid down, however, as a general rule that a person who is only indirectly or remotely interested, is not a necessary party. In illustration of this principle, reference may be made to the cases of *Moser* v. *Marsden* (4) and *McCheane* v. *Gyles* (5), and in England it has been ruled that an order for the addition of a defendant would be made only where, before the Judicature Act, a plea in abatement would have succeeded. *Wilson* v. *Balcarres Brook Steamship Co* (6), *Robinson* v. *Geisel* (7). That there may be room for divergence of judicial opinion on the subject is well illustrated by the judgment of Sir Barnes Peacock in *Joy Gobind Dass* v. *Gouree Porshad Shah* (8) and of Mr. Justice Markby in *Kaliprasad Singh* v. *Jainarayan Roy* (9). It is worthy of note that rule 9 of Order I of the Code of Civil Procedure now provides that no suit shall be defeated by reason of the non-joinder of parties, and the Court may in every suit deal with the matter in contro-

(3) 27 C. 493 at p. 497.

(4) (1892) 1 Ch. 487; 61 L. J. Ch. 319; 66 L. T. 570; 40 W. R. 520.

(5) (1902) 1 Ch. 911; 71 L. J. Ch. 446; 50 W. R. 387; 86 L. T. 217.

(6) (1893) 1 Q. B. 422; 62 L. J. Q. B. 245; 4 R. 286; 68 L. T. 312; 41 W. R. 486; 7 Asp. M. C. 321.

(7) (1894) 2 Q. B. 685; 64 L. J. Q. B. 52; 9 R. 555; 71 L. T. 70; 42 W. R. 609.

(8) 7 W. R. 201.

(9) 11 W. R. 361; 3 B. L. R. A. C 24.

versy so far as regards the rights and interests of the parties actually before it, a rule well recognised and frequently applied in England. *In re Brown* (10). A good illustration is furnished by the decision of their Lordships of the Judicial Committee in *Durga Prasad Singh* v. *Brajanath Bose* (11). In that case, a suit was brought by a *zemindar* to establish his right to minerals under-lying a *mouza* in his *zemindary* held by a Digwar on Digwari tenure. The Digwar was appointed by and was in possession under the authority of Government. It was contended that the Secretary of State was a necessary party to the suit. In answer, it was argued that the Secretary of State was not a necessary party, and that on the authority of the cases of *Kashi* v. *Sadashiv* (12), *Van Geldar* v. *Sowerby Bridge Flour Society* (13), *Fergusson* v. *The Government* (14), and *Mutty Lall* v. *Deshkar Roy* (15), the Court might try the matters in controversy as between the parties to the suit. The Subordinate Judge held that the Secretary of State was not necessary party; upon appeal, the High Court held, *Brojanath Bose* v. *Durga Prosad Singh* (16), that the Secretary of State was a necessary party, because the Government had asserted a right to the lands and might be affected, indirectly, at any rate, by the result of the litigation. The Judicial Committee reversed the decision of the High Court. Lord Macnaghten observed that the Secretary of State was not a necessary or even a proper party to the suit, and that the rights of the Government, whatever they were, would not be prejudiced or affected by the result of a suit to which it was not a party. The case before us is reasonably free from difficulty. The plaint as now amended is a plaint appropriate to a suit under section 104-H of the Bengal Tenancy Act. The only question directly and substantially in issue in the suit so framed, is, whether the entry of the rent settled as payable by the plaintiffs is too high; that rent is payable only to the Secretary of State. Consequently, the under-tenants are not necessary parties to the suit. The view I take is not in conflict with that adopted in the cases of *Pajiruddin* v. *Secretary of State* (1) and *Digambar Nanda* v. *Secretary of State* (2). In both those cases, the plaints were not in strict conformity with the requirements of section 104-H of the Bengal Tenancy Act, and declarations were sought which could not have been granted in a suit properly framed under that section. It may finally be added that if the contention of the respondent were to prevail, in suits for enhancement of rent under section 7 or section 30 of the Bengal Tenancy Act, the under-tenants might have to be joined as defendants. Let us take two concrete illustrations. Suppose a suit is brought by *A.* for enhancement of the rent of his tenant, *B.*, on the allegation that *B.* is tenure-holder. *B.* contends that he is an occupancy *raiyat* and his rent is not liable to be enhanced under section 7 of the Bengal Tenancy Act. The Court is necessarily called upon to determine the status of *B.* On what principle can it be suggested that the under-tenants of *B.* should be joined as defendants, though their status necessarily depends upon the status of *B.*? They are not interested in the question of the amount of rent payable by *B.* to *A.* and their status cannot be affected by a decision in the suit to which they are not parties. Suppose, again, that *A* sues *B* for an enhancement of rent on the allegation that *B.* is an occupancy *ryot.* *B.* pleads that he is a tenure-holder and not liable to have his rent enhanced under section 30; it would certainly be a novel proposition to hold that all the sub-tenants of *B.* should be made parties to the suit, because the question of the status of *B.* is in controversy, and their status is dependent upon the status of *B.* On the whole, therefore, I am of opinion that in the present suit the under-tenants are not necessary parties.

The result is that this appeal must be allowed, the order of the District Judge set aside and the case remitted to him in order that the appeal may be heard on the merits. The plaint will be amended by the removal of the names of all the defendants other than the Secretary of State, and the first two

(10) (1861) 29 Beav. 401; 7 Jur., (N. S.) 650; 9 W. R. 430; 131 R. R. 641.

(11) 39 I. A. 133; 15 C. L. J. 461; 15 Ind. Cas. 219; 16 C. W. N. 482; (1912) 1 M. W. N. 425; 11 M. L. T. 337; 9 A. L. J. 462; 14 Bom. L. R. 445; 23 M. L. J. 26; 39 C. 696.

(12) 21 B. 229.

(13) (1890) 44 Ch. D. 374; 59 L. J. Ch. 583; 63 L. T. 132; 38 W. R. 625.

(14) 8 W. R. 232.

(15) 9 W. R. 1.

(16) 34 C. 753 at p. 772; 5 C. L. J. 583.

prayers will be expunged. The appellants must, however, pay the respondents the costs of this appeal. The hearing fee is assessed at three gold *mohurs*, to be divided equally between the Secretary of State and the other defendants who are now discharged from the suit.

It is conceded that this judgment will govern the other appeal which will, therefore, be allowed on the same terms, and a similar order will be drawn up therein.

HOLMWOOD, J.—I am in entire agreement with my learned brother as to the order which should be passed in this appeal, but as I was a party to the judgment in *Pajiruddin* v. *Secretary of State* (1), I think it right to add that those cases can be readily distinguished partly on the grounds already referred to in the judgment of my learned brother and also on the further ground that no amendment of the plaint was suggested and the parties desired and intended to have the status of the tenants determined. No doubt, it would have been competent to us to hold that the suit thereby ceased to be one under section 104 H, but this was unnecessary as no change in jurisdiction was involved in trying the suit as a regular suit on the issues raised by the parties and the necessary payment of *ad valorem* fees had already been made. The true rule, however, seems to be that such issues cannot be raised in a suit under section 104H so as to affect the rights of absent and unnecessary parties.

The later decision, *Digambar Nanda* v. *Secretary of State* (2), by Coxe and Teunon, JJ., seems merely to have held that the under-tenants were desirable parties if they wanted to come in and not that the suit was bad in their absence.

I take it that the clear exposition of the law now given by my learned brother will remove any difficulty which might have arisen in the application of these two rulings.

I concur in the order passed in this appeal as to the remand after amendment of the plaint and as to costs.

Appeals allowed; Cases remanded.

LOWER BURMA CHIEF COURT.

MISCELLANEOUS CIVIL APPEAL No. 145 OF 1911.

May 23, 1912.

Present:—Sir Charles Fox, Kt., Chief Judge, and Mr Justice Hartnoll.

MA MYA—APPELLANT

versus

FELIX SLYM—RESPONDENT.

Guardians and Wards Act (VIII of 1890)—Illegitimate children, custody of—Law applicable to them.

In dealing with the custody of illegitimate children, the Courts in England are governed by equitable rules and exercise equitable jurisdiction. One of those rules is that the desire of the mother of an illegitimate child as to its custody is primarily to be considered.

Barnardo v. *McHugh*, (1891) L. R. App. Cas. 388; 61 L. J. Q. B. 721; 65 L. T. 423; 40 W. R. 97; 55 J. P. 628, referred to.

This equitable rule should be adopted in the case of parties in this country whose personal law is obscure.

An illegitimate child is regarded as no body's child, and neither the father nor the mother has any absolute right to the custody of their illegitimate child.

Mr. *May Oung*, for the Appellant.

Mr. *Chari*, for the Respondent.

JUDGMENT.

FOX, C. J.—The District Judge overlooked or did not appreciate the fact that the children are not legitimate. It is unnecessary to decide whether the girl is a European British Subject and the boy is not such under the definition in the Guardians and Wards Act, on account of the girl being a Christian and the boy being of no religion. Under English Law, an illegitimate child is regarded as nobody's child, and neither the father nor the mother has any absolute right to the custody of their illegitimate child—See Trevelyan on Minors, page 77.

In dealing with the custody of illegitimate children, the Courts in England are governed by equitable rules and exercise equitable jurisdiction. One of those rules is that the desire of the mother of an illegitimate child as to its custody is primarily to be considered —See *Barnardo* v. *McHugh* (1).

This equitable rule should, I think, be adopted in the case of parties in this country whose personal law is obscure.

There is nothing against the present character of the mother, whereas the father is stated to be again living in adultery.

(1) (1891) L. R. A. C. 338; 61 L. J. Q. B. 721; 65 L. T. 423; 40 W. R. 97; 55 J. P. 628.

DALIP NARAYAN SINGH *v.* CHAIT NARAIN SINGH.

The suggestion that the mother is not quite *compos mentis* appears to have little foundation. I would allow the appeal, reverse the order of the District Court and dismiss the father's petition to be apppointed guardian of the children with costs to be paid by him.

I would also order that he pays the respondent's costs of this appeal—three gold *mohurs* allowed as Advocate's fee.

HARTNOLL, J.—I concur.

Appeal allowed.

CALCUTTA HIGH COURT.

REGULAR CIVIL APPEALS NOS. 320 AND 321 OF 1910.

September 3, 1912.

Present:—Sir Ashutosh Mookerjee, KT., Judge, and Mr. Justice Beachcroft.

DALIP NARAYAN SINGH AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

CHAIT NARAYAN SINGH AND OTHERS—DEFENDANTS—RESPONDETS.

Res judicata, *constructive—Mortgage—Priority—Transfer of Property Act (IV of 1882), ss. 79, 80—Puisne mortgagee, whether personally responsible for re-payment of mortgage-debt.*

On the 28th September 1900, the mortgagors took a lease from the mortgagees of a certain property and on the same date executed a security bond, for the due payment of rent. The two documents were registered on the 11th October 1900. The lessees made default in payment of rent. The landlords, consequently, sued for rent and enforcement of the security given by the lessees. In this suit, several persons were joined as defendants including one *H.*, a mortgagee under a bond dated 12th October 1900, on the allegation that they had acquired an interest in the propertiesgiven by the lessees by way of security. A decree was made in favour of the landlords on the 13th March 1907, which declared the priority of the landlord's mortgage over that of *H.* On 20th April 1908, a mortgage bond was executed in favour of the morgagees in lieu of the decree debt and other debts. In a suit to enforce this mortgage:

Held, that the security bond of the 28th September 1900, was not entitled to priority over the mortgage of the 12th October 1900, except to the extent that the matter was *res judicata* by virtue of the decree of the 13th March 1907, in respect of the sum then in controversy, for the Court would not extend the doctrine of constructive *res judicata* beyond the subject matter of the particular litigation.

Surjiram Marwari v. *Barhamdeo Prasad*, 1 C. L. J. 337, relied upon.

A mortgagee, making a further advance, shall not in respect of that advance acquire any priority as against an intermediate mortgagee; but this general rule is subject to the exception that the intermediate mortgage is postponed in respect of advances subsequently made on the security of that mortgage, provided it expresses the maximum to be secured thereby and that maximum is not exceeded.

A puisne mortgagee, as holder of a fragment of the equity of redemption, cannot be held personally responsible for the re-payment of the mortgage-debt which is primarily payable by the mortgagors.

Appeals from the decrees of the Sub-Judge of Monghyr, dated May 13th 1910.

Babus *Dwarka Nath Chakravarti* and *Rshetra Mohun Sen*, for the Appellants.

Babus *Joges Chandra Roy* and *Ganes Dutt Singh*, for the Respondents.

JUDGMENT.—These appeals are directed against two decrees in cross suits for the enforcement of mortgage securities. On the 20th April 1908, four persons, who may be briefly described as the mortgagors, executed a mortgage security in favour of Dalip Narayan Singh and Balmiki Prasad for a sum of Rs. 15,539. The consideration for the mortgage comprised judgment-debts due from the mortgagors to the mortgagees, and also arrears of rent due in respect of leases granted by the mortgagees to the mortgagors. The mortgagees have joined as defendants not merely the mortgagors, but also junior incumbrancers. One of the defendant is Harak Narayan Singh, who claims under a mortgage-bond executed in his favour by the mortgagors on the 12th October 1900. *Prima facie*, he is a prior incumbrancer, and, consequently, not a proper party to the mortgage suit, but the plaintiffs have joined him as a defendant as they claim priority against him. The suit was commenced on the 11th October 1909, and Harak Narayan died shortly afterwards, whereupon his infant sons were brought on the record. On the 11th April 1910, they filed their written statement wherein they repudiated the claim to priority set up by the plaintiffs. Meanwhile, on the 15th November 1909, they had instituted a suit to enforce their security of the 12th October 1900, and joined therein as defendants the mortgagees of the 20th April 1908, as puisne incumbrancers. The latter filed their written statement on the 19th April 1910, and claimed priority on the basis of three securities of the 14th June 1900, 28th September 1900 and 27th April 1903, which they contended had not only been not superseded but actually kept alive by the mortgage of the 20th April 1908. The substantial question in controversy in the two cross suits, consequently, was,

whether the mortgage of the 20th April 1903, is entitled to priority over the mortgage of the 12th October 1900, and if so to what extent. The Subordinate Judge has negatived the claim for priority and has not only given mortgage decrees to the two sets of mortgagees, but, has, in the suit by the mortgagees of the 12th October 1900, given them a personal decree against the mortgagees of the 20th April 1908. These mortgagees have now appealed to this Court, and on their behalf the decrees of the Subordinate Judge have been assailed on two grounds, namely, *first* that the security of the 20th April 1903, is entitled to precedence over the security of the 12th October 1900, and, *secondly*, that a puisne mortgagee, as holder of a fragment of the equity of redemption, cannot be held personally responsible for the re-payment of the mortgage-debt which is primarily payable by the mortgagors.

To test the soundness of the first contention, reference must briefly be made to some of the earlier transactions between the parties. On the 28th Septembr 1900, the mortgagors tooka lease from the mortgagees of a half share of a property Balibigha, for a term of nine years, on an annual rental of of Rs. 1,500. On the same date, the mortgagors executed a security bond to secure the due performance by them of their engagement to pay rent. These two documents were presented for registration on that very date and were actually registered on the 11th October 1900. The lessees made default in payment of rent. The consequence was that the landlords sued to recover arrears of rent, and joined as defendants several persons, among them Harak Narayan Singh, the mortgagee under the bond of the 12th October 1900, on the allegation that they had acquired an interest in the properties given by the lessees by way of security. The suit as framed was not merely a suit for rent but also a suit for enforcement of the security given by the lessees. A decree was made in favour of the landlords on the 13th March 1907. The decree declared the prior title of two of the defendants, but not of Harak Narayan Singh. On the 24th May 1907, the landlords obtained another decree for rent. Under these two decrees, the lessees became liable for a considerable sum to their landlords. On the 27th April 1903, the mortgagees had granted another lease of a property Mahespara to the mortgagors for a period of nine years at an annual rent of Rs. 1,654. On the same date, the lessees executed a security bond to the lessors for the due payment of the rent. On the 20th April 1903, it was found that a considerable sum of money was due to the lessors under the two decrees already mentioned and further arrears which had accrued due. The lessees accordingly executed the mortgage-bond in suit for a sum of Rs 15,539; the mortgage lien created under the securities of the 28th September 1900 and 27th April 1903, were kept alive in express terms. The mortgagees of the 20th April 1908, now contend that they are entitled to fall back upon the security of the 28th September 1900, to the extent of their debt secured thereby. They further contend that this question is *res judicata* by virtue of the decision in the rent suit given on the 13th March 1907, at any rate, to the extent of the amount covered by that decree. The two questions, therefore, which require examination are, *first*, what is the true effect of the decree of the 13th March 1907, and, *secondly*, is the security bond of the 28th September 1900, entitled to priority over the mortgage of the 12th October 1900.

With respect to the first of these questions, it is plain that the decision of the 13th March 1907, operates as *res judicata*. The then plaintiffs claimed priority in respect of their security of the 28th September 1900 as against Harak Narayan Singh, the mortgagee of the 12th October 1900 From the judgment in that suit, it is not clear whether Harak Narayan Singh claimed priority in respect of his mortgage, but it is immaterial whether he did so or not. If he did resist the claim and was unsuccessful, he is bound by the decision; if he did not resist the claim, inspite of the opportunity afforded to him, he is equally bound by the decision. In support of this view, reference may be made to the cases of *Surjiram Marwari* v. *Barhamdeo Persad* (1), *Srigopal* v. *Pirthy Singh* (2) and *Muhammad Ibrahim* v.

(1) 1 C. L. J. 337.

(2) 29 I. A. 118 (P.C.); 24 A. 429; 4 Bom. L. R. 827; 6 C. W. N. 889.

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Ambika (3), which reverses upon this point the decision in *Bainath Singh* v. *Mahomed Ibrahim Hossein* (4). As, however, the general question of the priority of the security bond of the 28th September 1900, over the mortgage of the 12th October 1900, was not directly put in issue, the effect of that decision will be deemed conclusive only in respect of the sum then in controversy, for the Court will not extend the doctrine of what has been called constructive *res judicata* beyond the subject-matter of the particular litigation: *Surjiram Marwari* v. *Barhamdeo Prasad* (1). The learned Vakil for the respondents, the mortgagees of the 12th October 1900, contended that as a decree had been obtained on the security bond, the security had merged in the decree and could no longer be set up against a puisne incumbrancer. This contention is manifestly fallacious, and is opposed to the decision in *Bibijan Bibi* v. *Sri Sachi Bewah* (5) and *Surjiram Marwari* v. *Barhamdeo Prasad* (6). We hold, therefore, that in respect of the sum covered by the decree of the 13th March 1907, the mortgagees of the 20th April 1908, are entitled to priority over the mortgagees of the 12th October 1900, to the extent defined by that decree. We add this important qualification, because the decree directed the realisation of the decretal amount by the sale of the lease-hold interest in the first instance, and by the sale of the security properties only in the event of a deficit. Consequently, the market-value of the lease-hold interest on the 13th March 1907, must be determined by the Court below and deducted from the decretal amount. The balance alone will be deemed charged upon the security properties. That balance, again, has to be distributed proportionately upon the two properties covered by the security; when this has been done, the mortgagees of 1908 will be entitled to claim priority against the mortgagees of 1900 in respect of the sum so determined.

With respect to the second question raised, whether apart from the question of *res judicata*, the security bond of the 28th September 1900, is entitled to priority over the mortgage of the 12th October 1900, the answer must depend upon the true construction of sections 79 and 80 of the Transfer of Property Act. At the date of the execution of the mortgage bond of the 12th October 1900, no instalment of the rent had fallen due. Whatever debt, therefore, became ultimately secured under the bond of the 28th September 1900, accrued due after the 12th October 1900. Now, section 80 of the Transfer of Property Act provides that, except in the case provided for by section 79, no mortgagee making a subsequent advance to the mortgagor, whether with or without notice of an intermediate mortgage, shall thereby acquire any priority in respect of his security for such subsequent advance. Section 79 provides that if a mortgage, made to secure future advances, the performance of an engagement or the balance of a running account, expresses the maximum to be secured thereby, a subsequent mortgage of the same property shall, if made with notice of the prior mortgage, be postponed to the prior mortgage in respect of all advances or debits not exceeding the maximum, though made or allowed with notice of the subsequent mortgage. These provisions deliberately depart from the rule laid down by the House of Lords in *Hopkinson* v. *Rolt* (7) and *Bradford Banking Co.* v. *Briggs* (8), and repeatedly accepted as good law in Ireland and America; *In re Macnamara's Estate* (9), *In re Keogh's Estate* (10), *Shirras* v. *Caige* (11). Assistance, therefore, cannot be derived from an examination of the English authorities on the subject; and the answer to the question raised must depend upon the construction of sections 79 and 80 of the Transfer of the Property Act. The general rule laid down is that a mortgagee, making a further advance, shall not in respect of that advance acquire any priority as against an intermediate mortgagee; but this is subject to the exception that the intermediate mortgagee who has notice of the prior mortgage is postponed

(3) 15 C.L.J 411; 39 I.A. 68; 39 C. 527; 14 Ind. Cas. 496; 11 M. L. T. 265; (1912) 1 M. W. N. 367; 9 A. L. J. 332; 14 Bom. L. R. 280; 16 C. W. N. 505; 22 M. L. J. 468.

(4) 2 C. L. J. 574.

(5) 31 C. 863; 8 C. W. N. 684 (F. B.).

(6) 2 C. L. J. 202 at p. 214.

(7) (1861) 9 H. L. C. 514; 74 L. J. Ch. 468; 7 Jur. (N.S.) 1209; 5 L.T. (N.S.) 90; 9 W.R. 900; 131 R.R. 313.

(8) (1886) 12 A. C. 29; 56 L. J. Ch. 364; 56 L. T. 62; 35 W. R. 521.

(9) (1883) 13 L. R. Ir. 158.

(10) (1895) 1 I. R. 201. (11) (1812) 7 Cranch 74.

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in respect of advances subsequently made on the security of that mortgage, provided it expresses the maximum to be secured thereby and that maximum is not exceeded. Let us test the security bond of the 28th September 1900, from these points of view. The first question is, does it express the maximum amount secured thereby, and the second question is, whether the mortgagee of the 12th October 1900, had notice of the prior security. With regard to the first question, it cannot be disputed that the security bond does not explicitly express the maximum amount secured, though from the recitals the amount may be calculated; but further consideration of the first question is needless, because, upon the second question, it is clear that the puisne incumbrancer had no notice of the earlier security. The security bond was presented for registration on the 28th September 1900, apparently immediately before the *Durga Puja* Holidays, and was not registered till the 11th October, after the office had re-opened. The mortgage bond of the 12th October 1900, was presented for registration and registered on that very date. Even if, therefore, the view taken in the cases of *Lakshmandas* v. *Dasrat*(12), *Dina* v. *Nathu* (13), *Janki Prasad* v. *Kishen Dat*(14), and *Nand Kishore* v. *Anwar Husain* (15), which is contrary to the view taken in *Inderdawan Pershad* v. *Gobind Lal Chowdhry* (16), *Magniram* v. *Mehdi Husain* (17), *Ram Narain Sahoo* v. *Bandi Pershad* (18), *Preonath Chattopadhya* v. *Ashutosh Ghose*(19), namely, that registration is equivalent to notice, were adopted, it could not be said that the subsequent mortgagee had notice of the prior mortgage; before the puisne incumbrancer negotiated for the advance of his money, he could not have discovered by the most diligent search in the registration office, the fact of the prior mortgage. There is also no reliable evidence to show that the puisne incumbrancer had actual knowledge of the prior mortgage. Under these circumstances, we must hold that the security bond of the 28th September 1900, is not entitled to priority over the mortgage of the 12th October 1900, except to the extent that the matter is *res judicata* by virtue of the decree of the 13th March 1907 as already explained. The first contention of the appellants must, consequently, be allowed in part.

To test the soundness of the second contention, namely, that in the suit by the mortgagee of the 12th October 1900, no personal decree can be made against the mortgagees of the 28th September 1900, we have only to remember that the personal covenant was by the mortgagors alone and does not bind other holders of the equity of redemption. *Jumna Das* v. *Ram Outer Pandey* (20). The second contention of the appellants must, therefore, prevail.

The result is that these appeals must be allowed, the decrees made by the Subordinate Judge discharged, and the cases remanded to him in order that accounts may be taken on the principle explained in this judgment, and after determination of such other questions as may be incidental thereto. The materials on the record are not sufficient to enable this Court to make the final decree between the parties. There will be no order for costs in these appeals, as the appellants have been only partially successful in their contention.

Appeals allowed: Cases remanded.

(12) 6 B. 168.
(13) 26 B. 538; 4 Bom. L. R. 253.
(14) 16 A. 478; A. W. N. (1894) 151.
(15) 30 A. 82; A. W. N. (1908) 13; 5 A. L. J. 91; 3 M. L. T. 195.
(16) 23 C. 790.
(17) 31 C. 95; 8 C. W. N. 20.
(18) 31 C. 737.
(19) 27 C. 358; 4 C. W. N. 490.

(20) 15 C. L. J. 68; 39 I. A. 7; 34 A. 63; 13 Ind. Cas. 304; 16 C. W. N. 97; 11 M. L. T. 6; 9 A. L. J. 37; (1912) 1 M. W. N. 32; 14 Bom. L. R. 1; 21 M. L. J. 1158.

LOWER BURMA CHIEF COURT.

CIVIL REVISION PETITION No 74 OF 1907.

November 11, 1907.

Present:—Sir Charles Fox, KT., Chief Judge.

DAR BUX—DEFENDANT—APPELLANT

versus

DAR MEAH—PLAINTIFF—RESPONDENT.

Oaths Act (X *of* 1873), *s.* 10—*Oath taken in absence of other party.*

The defendant offered to be bound by the oath of plaintiff taken in the mosque on the Koran: the parties went to the mosque but defendant refused to hand over the Koran to plaintiff. Next day plaintiff went to the mosque with a Court peon in the absence of the defendant and took the oath as agreed. The suit was decreed.

Held, setting aside the decree, that there was nothing to show what the plaintiff had said after taking the oath and, consequently, there was no basis for the decree.

If the oath is taken out of Court, a commission should issue under section 10 of the Oaths Act to administer it and to take the evidence of the person sworn.

Revision of the judgment and decree of the Court of Small Causes, Rangoon, in Civil Regular No. 2520 of 1907.

JUDGMENT.—The defendant offered to be bound by the oath of the plaintiff on the Koran and taken in the mosque that the plaintiff had deposited with him the amounts he claimed.

The parties proceeded to the mosque where the plaintiff asked the defendant to hand him the Koran, the defendant refused to do this. On the following day, the plaintiff went with a Court peon to the mosque and in the absence of the defendant made oath on the Koran.

There is nothing to show what he said after taking the oath and, consequently, there was no basis for a decree.

If the oath is taken out of Court, a commission should issue under section 10 of the Oaths Act to administer it and to take the evidence of the person sworn.

The decree is set aside and the case must be re-heard.

Decree set aside.

CALCUTTA HIGH COURT.
REGULAR CIVIL APPEAL No. 349 OF 1910.
September 3, 1912.
Present:—Sir Ashutosh Mookerjee, Kt., Judge, and Mr. Justice Beachcroft.

DALIP NARAYAN SINGH AND ANOTHER—PLAINTIFFS—APPELLANTS
versus
CHAIT NARAYAN SINGH AND OTHERS—DEFENDANTS—RESPONDENTS.

Mortgage—Priority—Transfer of Property Act (IV of 1882), ss. 79, 80—Notice of prior mortgage—Maximum amount—Release of property of one of mortgagors, effect of.

Under section 79 of the Transfer of Property Act, two elements have to be considered; *first*, whether the subsequent mortgagee took with notice of the prior mortgage, and, *secondly*, whether the prior mortgage expresses the maximum secured thereby.

A deed stated that a lease had been granted and that the lessees had hypothecated their properties for the payment of the annual rent and interest on defaulted instalments:

Held, that the deed expressed the maximum to be secured thereby within the meaning of section 79 of the Transfer of Property Act, and would be enforceable against a subsequent mortgagee, if the latter took with notice.

A mortgagee cannot release the properties of one of the mortgagors to the detriment of the others.

Mir Eusuff Ali v. *Panchanan Chatterjee*, 6 Ind. Cas. 842; 11 C. L. J. 639; 15 C. W. N. 800; *Imam Ali* v. *Baij Nath*, 10 C. W. N. 551; 3 C. L. J. 576; 33 C. 613; *Ramranjan* v. *Indra Narayan*, 10 C. W. N. 862 and *Hakim Lal* v. *Ram Lal*, 6 C. L. J. 46, relied upon.

If the mortgagee relinquishes a valuable property for an inadequate consideration, he cannot be permitted to throw the burden of the balance of the debt upon the remaining properties.

Venkata Chella v. *Srinivasa*, 28 M. 555; 15 M. L. J. 442, relied upon

Appeal from the decree of the Subordinate Judge of Monghyr, dated the 13th May 1910.

Babus *Dwarka Nath Chakrabarti*, *Harendra Narayan Mitra* and *Kshetra Mohan Sen*, for the Appellants.

Babus *Joges Chandra Roy* and *Gones Dutt Singh*, for the Respondents.

JUDGMENT.—This is an appeal by the plaintiffs in a suit to enforce a mortgage security executed in their favour on the 20th April 1908. On the 14th June 1900, the mortgagors took a lease from the mortgagees of a number of villages for a term of nine years upon an annual rental of Rs. 12,125. On the same date, the lessees executed a security bond in favour of the lessors by which two properties were hypothecated to secure the due performance of the engagement for payment of rent. On the 12th October 1900, the mortgagors executed a mortgage in favour of Harak Narayan Singh. On the 20th April 1908, they executed in favour of their lessors the mortgage-bond now in suit. The consideration for the mortgage was the arrears of rent due under the lease; and the rights of the lessors under the security bond of the 14th June, 1900, were expressly kept alive. In the present litigation, the plaintiffs claim priority over the mortgage of Harak Narayan Singh. The representatives of Harak Narayan, now dead, resist the claim, and also urge that the plaintiffs have prejudiced their position, because they released the properties of Nandlal Singh covered by the security bond, when they took the mortgage they now seek to enforce. The questions in controversy between the parties at this stage are, *first*, are the

plaintiffs entitled to priority over the mortgage of Harak Narayan, dated the 12th October 1900, and, *secondly*, how far have the plaintiffs prejudiced their position by the release in favour of Nandlal Singh?

In so far as the first question is concerned, it is clear from the terms of the lease of the 14th June 1900, that no rent had accrued due thereunder on the 12th October 1900. Consequently, whatever rent is now sought by the plaintiffs to be charged upon the security properties, it is clear, accrued due subsequently to the mortgage of Harak Narayan Singh. The rights of the parties must, consequently, be determined with reference to the terms of sections 79 and 80 of the Transfer of Property Act as explained in the case of *Dalip Narayan* v. *Chait Narayan* (1). Under section 79, two elements have to be considered, *first*, whether the subsequent mortgagee took with notice of the prior mortgage, and, *secondly*, whether the prior mortgage expresses the maximum secured thereby. With reference to the first of these elements, we observe that the security bond of the 14th June 1900, was presented for registration on the next day and was registered on the 16th June 1900. The subsequent mortgage of Harak Narayan was executed and registered on the 12th October 1900. *Prima facie*, therefore, if Harak Narayan had made an inquiry in the registration office, as an intending creditor with ordinary prudence would do, he would have discovered that part of the property proposed to be mortgaged to him had already been hypothecated by the security bond of the 14th June 1900. Whether he made any inquiry or not, does not appear from the papers on the record. We are, consequently, not in a position to say whether he took with notice of the prior mortgage, and the matter must be investigated. With reference to the second element mentioned in section 79, we are of opinion that the prior mortgage did express the maximum to be secured thereby, on the principle that that is certain which can be made certain. The deed states that a lease had been granted for a term of nine years upon an annual rental of Rs. 12,125 and that the proprietors lessors wanted reliable security for the payment of the annual rent; it then recites that the lessees hypothecated their properties for the payment of the annual rent and interest on defaulted instalments. Even if we assume for a moment that the amount of interest was not sufficiently specified, there can be no question that the aggregate rent payable under the lease could be determined by a simple arithmetical calculation. To take a view most favourable to the subsequent incumbrancer, the hypothecated properties could be held liable at any time for four years' rent, for the recovery whereof a suit could be brought by the landlord within the period of limitation prescribed by the Bengal Tenancy Act. We hold, therefore, that the prior mortgage expressed the maximum to be secured thereby within the meaning of section 79 of the Transfer of Property Act and would be enforceable against a subsequent mortgagee, if the latter took with notice. This question of notice must be investigated on evidence to be adduced, and the Court must determine whether the subsequent mortgagee had notice, actual or constructive, of the prior mortgage. The first contention of the appellants must, therefore, prevail in part.

In so far as the second question is concerned, it is clear that the plaintiffs have prejudiced their position in so far as they have released the properties of Nandlal Singh by the mortgage instrument of the 20th April 1905. It is well settled that in circumstances like these, the mortgagee cannot release the properties of one of the mortgagors to the detriment of the others: *Mir Eusuff Ali Hai* v. *Panchanan Chatterjee* (2), *Imam Ali* v. *Baij Nath* (3), *Ramranjan* v. *Indra Narayan* (4) and *Hakim Lal* v. *Ram Lal* (5). The plaintiffs, therefore, must apportion what was chargeable upon all the properties covered by the security of the 14th June 1900 and proceed against the properties over which they have not relinquished their lien, only to the extent of the sum fairly chargeable thereon; in other words, as pointed out in *Venkata Chella* v. *Srinivasa* (6), if they have relinquished a valuable property for an inadequate consideration, they cannot be permitted to throw the burden of the balance of the debt upon the remaining

(1) 16 C. L. J. 395; 17 Ind. Cas. 927.

(2) 15 C. W. N. 800; 11 C. L. J. 639; 6 Ind. Cas. 842.

(3) 10 C. W. N. 551; 3 C. L. J. 576; 33 C. 613.

(4) 10 C. W. N. 862.

(5) 6 C. L. J. 46.

(6) 28 M. 555; 15 M. L. J. 442.

properties. The materials on the record are not sufficient for the determination of this question, which must, consequently, be determined by the Court below on evidence to be adduced by the parties. The second question which is raised by the respondents, must, therefore, be partially answered in their favour.

The result is that this appeal is allowed, the decree of the Subordinate Judge set aside, and the case remanded to him in order that the mortgage accounts may be taken and the rights of the parties adjusted after determination of the questions mentioned as also other questions incidental thereto. There will be no order for costs in this appeal, as both the parties have successfully assailed the decree of the Court below.

The documents which have been filed in this Court will be made part of the record and sent down to the Court below.

Appeal allowed: Case sent back.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1581 OF 1911.

November 13, 1912.

Present:—Mr. Justice Sundara Aiyar and Mr. Justice Sadasiva Aiyar.

RANDIPURAZIL KUNHISOW KARNAVAN AND MANAGER OF HIS TARWAD—PLAINTIFF—APPELLANT

versus

ALUKANDIYIL PARKUM MULLOLI CHATHU—DEFENDANT—RESPONDENT.

Landlord and tenant—Lease—Assignee from lessee—Liability for rent—Apportionment of rent—Privity of estate—Transfer of Property Act (IV of 1882), ss. 36, 108.

As an assignee from the lessee becomes the lessee from the date of assignment, he must be held liable only for the rent accruing *after* the assignment.

Privity of estate being the ground of assignee's liability, the liability should not be made heavier than the extent of that privity would justify.

An assignee of a lease can claim as against the lessor an apportionment of the rent, accruing after the date of his assignment, according to the period before and after his assignment, as the rent is deemed accruing from day to day as between him and the lessor.

Second appeal from the decree of the District Court of North Malabar, in Appeal Suit No. 510 of 1910, preferred against that of the District Munsif of Kuthuparamba, in Original Suit No. 474 of 1910.

Mr. *C. V. Anantakrishna Aiyar*, for the Appellant.

Mr. *K. Govinda Marar*, for the Respondent.

JUDGMENT.—This is a suit for rent for three years 1033 to 1035, Malayalam year. Defendants Nos. 1 to 3 are sought to be made liable directly under the *mimpu* or rental instrument, the 1st defendant and the manager of the family of defendants Nos. 2 and 3 being the executants of the Marupat. The 4th defendant purchased the rights of defendants Nos. 1 to 3 in the land on the 4th January 1909 during the currency of the year 1034 and assigned his rights to defendants Nos. 6 and 7 on the 29th April 1909, about 3½ months after his purchase. The plaintiff's case is that the 4th defendant is also liable for the rent of the Malayalam year 1084 and that defendants Nos. 6 and 7 are liable for the rents of the years 1034 and 1035. The District Munsif passed a decree against the 4th defendant for the rent of the year 1084. He appealed to the District Court on the ground that he was liable only for the rent accruing from the date of his purchase up to the date of his assignment to defendants Nos. 6 and 7 *i.e.*, from the 4th January to 28th April 1909. The District Judge upheld his contention.

The plaintiff has preferred this second appeal and his contention is that the 4th defendant is liable for the whole of the rent for the year 1084 inasmuch as the rent for that year became payable after his purchase. Exhibit A, the rental instrument, did not fix any specific date for the payment of the annual rent. A rent of Rs. 60 per annum was fixed to be paid from the 25th *Meenam* 1069. It is argued that this must be construed to mean that the rent should be paid on the 25th *Meenam* each year. In the plaint, the allegation is that the annual rent was payable in monthly instalments. We cannot say, on the construction of Exhibit A, that the 25th of *Meenam* can be regarded as the date fixed for the payment of rent every year. The Malayalam year 1034 expired only after the 4th defendant's assignment of his rights under the lease. If the rent is regarded as payable at the end of each Malayalam year, the plaintiff can have no

ground for holding the 4th defendant liable for the whole rent of 1084. If the tenancy be regarded as running from the 25th *Meenam* of each year to the 24th *Meenam* of the succeeding year, then the rent due for 1084 fell due during the period that the 4th defendant held the lease-hold interest by virtue of his purchase. Assuming that the whole rent for the year was intended to be payable on the 24th or 25th *Meenam*, can it be held that the 4th defendant is bound to pay the whole of the rent for 1084? Section 108 of the Transfer of Property Act lays down that "a lessee may transfer his interest in the lease-hold property" but that he "shall not, by reason only of such transfer, cease to be subject to any of the liabilities attaching to the lease." It does not enact any rule regarding the liability of the assignee but as the assignee becomes the lessee from the date of the assignment, according to the section, he must be held liable for the rent accruing after the assignment. The appellant's argument is that a covenant to pay rent being one running with the land, the assignee is bound to discharge all obligations under the covenant which mature after the assignment. It is, no doubt, the rule that an assignee is liable for all breaches of express covenant running with the land accruing after the date of assignment. There is a privity of estate between the lessor and the assignee and the latter is bound to perform the covenant of the lease after the assignment. If a covenant to keep the premises in repair or to do an act on a day which falls after the assignment is broken subsequently, the assignee is, undoubtedly, liable. That a covenant to pay rent is one running with the land appears to be the established rule in England. See Woodfall's Landlord and Tenant, page 189. The assignee is liable for rent even though he may not have taken possession. See page 296 of the same book. For, possession is not the ground of his liability, but the privity of estate which is created by the assignment itself. 24 American Cyclopædia of Law and Procedure, page 1180. But the question for our decision is whether the liability on the covenant can be apportioned or not. According to section 36 of the Transfer of Property Act, all rents are, upon the transfer of the lease, to be deemed, as between the transferor and transferee, to accrue due from day to day to be apportionable accordingly but to be payable on the days appointed for the payment therefor. See *Lakshmi Naranappa* v. *Meloth Raman Nair* (1). No rule of apportionment has been laid down in the Act, with regard to liability for rent, as between the lessor and the transferee from a lessee. It is settled law that the privity of estate between the lessor and the lessee's assignee is terminated by the assignment to a third person by the assignee, and the latter would not be responsible to the lessor for rent after he has assigneed his rights under the assignment to himself. The question whether the assignee of a lease can claim as against the lessor an apportionment of the rent accruing after the date of his assignment does not appear to have been definitely decided either in this country or in England in cases arising between the lessor and the assignee. But on principle there seems to be no reason why he should not be entitled to do so, and why the rent should not be deemed accruing due from day to day as between him and the lessor. The liability of the assignor of a lease continues notwithstanding the assignment and the lessor cannot be damnified in any manner by the apportionment of liability on the personal covenant for rent so as to make the assignee liable only for the rent accruing after the assignment. Privity of estate being the ground of assignee's liability, there is no reason why it should be made heavier than the extent of that privity would justify. If the lease contains any provision entitling the lessor to any right in case of a breach of the covenant to pay rent on a day subsequent to the assignment, he should, no doubt, be entitled to exercise that right as against the assignee. But it does not follow from this that he should be liable to have a decree passed against him personally for the payment of more than the rent accruing after the assignment in his favour. If the assignment be of a portion only of the premises included in a lease, it is settled law that the assignee is not liable for more than the proportionate rent due on what is com-

(1) 2 M. 540.

prised in his assignment. Why should not the same principle apply where diminished liability is claimed not on the ground that the whole of the premises has not been assigned, but on the ground that the assignment has been in operation only during a portion of the period for which rent is claimed? In Halsbury's Laws of England, Vol. 18, page 483, it is stated that "An apportionment can be made, not only as between the persons entitled to the rent, but also as against a tenant whose liability for rent ceases, or changes its character, between two rent days; and after the day when the entire portion of rent has, or would have, fallen due, the proportionate part is recoverable against the tenant as rent due under the lease. Consequently, a lessee who surrenders his lease between two rent days is liable for rent up to the surrender, and a lessee on whom a lessor lawfully re-enters is liable for rent up to the re-entry." In *Swansea Bank* v. *Thomas* (2), a liquidator, in whom the residue of a term under a lease became vested, assigned over during a current quarter. In an action brought after the expiration of the quarter against the transferee by the lessor to recover a proportionate part of the quarter's rent up to the time of the assignment over by him, it was held that the lessor was entitled to apportionment. In England, the law of apportionment has long been regulated by Statutes and the case was decided on the construction of 33 and 34, Vict. Chapter 35, which provided that "all rents, annuities, dividends and other periodical payments in the nature of income, whether reserved or made payable under an instrument in writing or otherwise, shall, like interest on money lent, be considered as accruing from day to day and shall be apportionable in respect of time accordingly." According to the Common Law of England, rent neither accrued due nor was payable except on the day on which it was reserved although interest on money lent accrued due *de die in diem* although it might be payable on certain specified days. In India, there is no reason for not applying to rent the principle adopted in England in the case of interest. There are other cases in England which follow the rule laid down in *Swansea Bank* v. *Thomas* (2). See *In re Johnson, Ex parte Blackett* (3) and *In re Wilson, Ex parte Hastings* (4); *In re South Kensington Co-operative Stores* (5), *In re Howell, Ex parte Mandleberg and Company* (6). If the lessor can claim apportionment as against the lessee assigning his right, there is no reason why the assignee should not have the right to make a similar claim against the lessor. Reason and equity seem to us to require that he should have such right. In *Glass* v. *Paterson* (7), it was held that an assignee was only liable for the apportioned rent from the date of assignment. In America, a different view appears to have been taken. McAdam in his work on "Landlord and Tenant," Volume I, page 801, says: "When a covenant to pay rent becomes broken after an acceptance of an assignment and during actual possession, the assignee is liable for the whole rent then becoming due." It is not clear how the question of actual possession is material, seeing that privity of estate and not possession is the ground of the assignee's liability. The Irish decision in *Glass* v. *Patterson* (7) seems to be more in accordance with the *ratio* of the English cases referred to above and with principle and justice.

We must, therefore, hold that the plaintiff's claim against the 4th defendant for the whole rent of the year 1084 should not be sustained and this second appeal must be dismissed with costs.

Appeal dismissed.

(2) (1879) 4 Ex. D. 94; 48 L. J. Ex. 344; 40 L. T. 558; 27 W. R. 491.

(3) (1894) 70 L. T. 381; 10 R. 138; 1 Manson 54.

(4) (1893) 62 L. J. Q. B. 628 at p. 632; 5 R. 455; 10 Morrell 219.

(5) (1881) 17 Ch. D. 161; 50 L. J. Ch. 446; 44 L. T. 471; 29 W. R. 662.

(6) (1895) 1 Q. B. 844, 64 L. J. Q. B. 454; 15 R. 372; 72 L. T. 472; 43 W. R. 447; 2 Manson 192.

(7) (1902) 2 Ir. R. 660.

GOKHAI PADHAN *v.* GONES LAL PANDIT.

CALCUTTA HIGH COURT.
MISCELLANEOUS CIVIL APPEAL NO. 407 OF 1911.
August 28, 1912.

Present:—Sir Ashutosh Mookerjee, KT., Judge, and Mr. Justice Beachcroft.

GOKHAI PADHAN AND OTHERS—JUDGMENT-DEBTORS—APPELLANTS

versus

GONES LAL PANDIT—DECREE-HOLDER—RESPONDENT.

Decree—Execution—Alteration of decree—Acting upon altered decree for number of years, effect of—Mortgage decree providing for interest up to date of grace but silent as to subsequent interest—Petition by judgment-debtors for time agreeing to pay subsequent interest and praying for sanction—Grant of time by Court—Whether order sanctioned agreement or not—Civil Procedure Code (Act XIV of 1882), s. 257A—Judicial orders, construction of—Presumption of judicial acts having been regularly performed—Inconsistent positions—Parties not to be allowed to assume—Practice.

A decree must ordinarily be executed as originally made and the parties cannot be permitted to make a substantial alteration therein.

Bhoopendro Nath v. *Kalee Prosunno*, 24 W. R. 205, and *Heera Lall* v. *Dhunput Singh*, 24 W. R. 282, relied upon.

But where the parties have acted upon the decree as altered for a number of years and treated it as valid, the judgment-debtors who have been substantially benefited thereby, cannot be permitted to take exception to its validity.

A mortgage decree made in 1903 directed that interest should run on the principal amount at the bond rate up to six months. No provision was made in the decree for interest from the expiry of the period of grace to the date of realisation. The decree was made absolute and the decree-holder applied for sale of the mortgaged properties. The judgment-debtors presented a petition to the Court asking for time to enable them to satisfy the decree and agreeing to pay interest up to the date of realisation of the whole amount. The decree-holder gave his consent to the petition which prayed for the Court's order of sanction to the agreement. The Court granted time and the sale was postponed. Subsequently in several applications for execution, the claim for interest up to realisation was made, and the judgment-debtors raised no objection to the claim, and obtained adjournment upon part payments and expressly agreed to pay the balance of the entire decretal amounts etc., on the adjourned dates:

Held, that the agreement contained in the petition of the judgment-debtors was sanctioned by the Court under section 257A of the Civil Procedure Code of 1882, because the Court deemed the consideration reasonable under the circumstances of the case, and that the agreement was valid.

A judicial order must be reasonably construed. Although there is no presumption of law that a particular act required to be performed has been done, yet judicial acts must be presumed to have been regularly performed.

Narendra Lal v. *Joyi Hari*, 32 C. 1107; 2 C. L. J. 107; *Saroda Prosaud* v. *Lutchmeepat*, 10 B. L. R. 214 at p. 230; (P. C.); 17 W. R. 289; 14 M. I. A. 529; *Bourne* v. *Gatliff*, 11 Cl. & F. 45 at p. 80; 8 Scott (N. R.) 604; 7 Man. & G. 850; 44 R. R. 723 and *Banwari Das* v. *Muhammad Mashiat*, 9 A. 690 at p. 702; A. W. N. (1887) 254, relied upon.

Parties litigant are not allowed to assume inconsistent positions in Court to the detriment of their opponents: where they have elected to adopt a certain course of action, they will be confined to the course they have deliberately adopted.

Appeal from the order of the Subordinate Judge of Cuttack, dated the 15th July 1911.

Dr. *Rash Behary Ghose* and *Babu Monmohon Dutt*, for the Appellants.

Mr. *B. Chakrabarti* and *Babu Biraj Mohon Majumdar*, for the Respondent.

JUDGMENT.—This is an appeal on behalf of the judgment debtors against an order for execution of a mortgage decree. The predecessor-in-interest of the respondent obtained an *ex parte* mortgage decree against the appellants on the 19th September 1903. The decree was drawn up in the following terms: "The suit be decreed *ex parte* with costs, and interest do run on the principal amount at the bond rate up to six months. If the decretal amount be not paid within six months, then the mortgaged properties be sold in auction." The decree was made under section 88 of the Transfer of Property Act, but for some unexplained reason, possibly through oversight, no provision was made in the decree for interest on the decretal amount from the expiry of the period of grace to the date of realisation. The decree was made absolute on the 17th July 1905, and shortly afterwards, the decree-holder applied for sale of the mortgaged properties. The sale proclamation was duly published, and the sale was fixed for the 15th November 1905. On that date, the sale was not held and was postponed. Three days later, the judgment-debtors, with the assent of the decree-holder, presented a petition to the Court. The true effect of the order made by the Court upon this petition is now in controversy between the parties The material portion of the petition was in these terms: "In the bond sued upon by the plaintiff decree-holder, it is stipulated that interest will run at the rate of one per cent. up to the date of the realisation of the whole amount, but in the decree passed in this suit, such interest is ordered to run till six months from the date of the decree, there

S. N. DAR, LL.B. Vakil High Court, SRINAGAR (KASHMIR)

being no provision for any interest to run up to the date of the payment of the whole amount. We, therefore, saw and approached the plaintiff decree-holder to-day, and having promised to pay interest at the rate of one per cent. up to the date of realisation of the whole amount, as provided in his bond, and having paid him rupees two hundred in cash in part-payment of his decretal money, we asked him for two months' time, that is, up to the 14th January 1906. The plaintiff decree-holder has thereupon agreed to grant two months' time in accordance with the above conditions. We will pay the plaintiff decree-holder the decretal money with interest at one per cent. per mensem from the date of the decree up to the date of realisation, and we pray for the Court's order of sanction in that respect If we pay anything by instalments, we will make such payments with interest at the aforesaid rate of one per cent. per mensem. We shall not be able to make any objection with regard to the payment of interest. If we fail to pay, within the aforesaid period, the whole amount due to the plaintiff decree-holder on his decree with interest at the aforesaid rate of one per cent. per mensem, the properties under auction sale will be sold in auction on the 15th January 1906, without service of sale proclamation. We file this petition with the consent of the plaintiff, and pray that Your Honour, in consideration of the above, will be pleased to order that interest will run at the aforesaid rate of one cent. per mensem from the date of decree to the date of realisation of the whole of the decretal amount due to the plaintiff decree-holder." At the foot of this petition, the Pleader for the decree-holder stated that he consented to the adjournment mentioned. The Subordinate Judge thereupon recorded an order in the ordersheet to the following effect: "To-day the judgment-debtors, having paid rupees two hundred to the decree-holder, file a petition, consented to by the decree-holder, asking for two months' time to pay off the balance, etc., Ordered, that time be granted, and that in accordance with the terms of the petition for time, the execution sale of the properties put up for sale be postponed till the 14th January next, and if the judgment-debtors fail to pay off the balance within the time granted, the aforesaid properties be sold in auction at 12 noon of the 15th January aforesaid, without service of fresh sale proclamation. Rupees two hundred be credited towards the amount due in this case." On the date fixed, the money was not paid in full, and on the 20th January following, the application for execution was dismissed on part satisfaction, the sale having been adjourned to the 15th February 1906. The next application for execution was filed on the 13th February 1906, and in this application the decree-holder claimed interest in terms of the agreement embodied in the petition of the 18th November 1905. The judgment-debtors raised no objection to the claim, and made part-payments from time to time. The next application for execution, presented on the 9th July 1906, contained a similar claim for interest; no exception was taken by the judgment-debtors who made part payments from time to time under petitions which unquestionably affirmed the agreement of the 18th November 1905. This application for execution was dismissed on the 21st January 1907, only to be followed promptly by another on the 13th February 1907. To this application, which repeated the claim for interest, the officers of the Court took objection, which was, however, ultimately disallowed. The judgment-debors, when they appeared, did not take exception to the claim for interest but repeatedly made part-payments and obtained adjournments. The application was dismissed on the 16th July 1907, and was followed by another on the 13th August 1907, in which there was a similar claim for interest, and a similar omission on the part of the judgment-debtors to take exception to the claim. The same state of things happened with three successive applications for execution, filed on the 9th March 1908, 14th November 1908, 11th September 1909. In each of these applications, the decree-holder claimed interest in accordance with the agreement of the 18th November 1905; the judgment-debtors did not dispute the claim, but repeatedly obtained adjournments on part-payments, and agreed to pay the balance of decretal amount on the adjourned date. To summarise the position, after the 18th November 1905, the decree-holder has in seven successive applications for execution claimed interest on the basis of the agreement embodied in the petition of that date; the judgment-debtors, with knowledge of the claim, have never disputed it, and have, on

58 successive occasions, obtained adjournments upon part-payments and expressly agreed to pay the balance of the entire decretal amount etc., on the adjourned dates Under these circumstances, the decree-holder might well have imagined that his dues would be realised without difficulty; but the unexpected did happen when on the 24th September 1910, he again applied for execution of his decree. The judgment-debtors took exception to the claim on the ground that they had agreed to pay interest at 12 per cent. per annum by the petition of the 18th November 1905, through fear, as the decree-holder would not otherwise consent to an adjournment of the sale, and that the agreement was void, as the requisite sanction had not been accorded by the Court. The Subordinate Judge has overruled this objection, and has held that the decree-holder was entitled to the interest claimed. On the present appeal by the judgment-debtors, two grounds have been urged, *first*, that the agreement of the 18th November 1905, was void, as it was not sanctioned by the Court under section 257A of the Civil Procedure Code of 1882, and, *secondly*, that even if such sanction had been granted, it would have been inoperative, because the agreement was not for the satisfaction of a "judgment-debt" within the meaning of that section. These positions have been controverted by the respondent as unsound in law, and, it has further been urged on his behalf that the judgment-debtors cannot be allowed to take up, to the detriment of the decree-holder, a position wholly inconsistent with that deliberately taken up by them on the 18th November 1905 and persistently maintained for more than five years.

In support of the first ground, reference has been made to section 257A of the Code of 1882, which provides that an agreement to give time to a judgment-debtor, or for satisfaction of a judgment-debt, is valid, only if made with the sanction of the Court. This has not been disputed by the respondent, who maintains that the requisite sanction was granted. In our opinion, the construction placed by the respondent upon the order of the Subordinate Judge on the petition of the 18th November 1905, is obviously reasonable and should be accepted. The judgment-debtors asked for time to enable them to satisfy the decree; the decree-holder agreed to give time for a consideration, namely, the payment of interest upon his money which he would, otherwise, be able to realise forthwith by sale of the mortgaged properties. The judgment-debtors explicitly prayed for sanction of the Court. The Court thereupon granted time, and, in accordance with the terms of the petition, postponed the sale. This order has been sought to be interpreted by the judgment-debtors as one for grant of time alone; it has been seriously suggested that the Court gave time in terms of the petition, but did not sanction the agreement for payment of interest. We are entirely unable to accept this view of the matter. Judicial orders must be reasonably construed. No doubt, as indicated in *Narendra Lal* v. *Jogi Hari* (1), there is no presumption of law that a particular act required to be performed has been done; but, as repeatedly laid down in cases of the highest authority, *Saroda Prosaud* v. *Lutchmeeput* (2) and *Bourne* v. *Gatliff* (3), judicial acts must be presumed to have been regularly performed: *Banwari Das* v *Muhammad Mashiat* (4). In the case before us, the Court received the petition and made an order thereon; it is suggested that the Court did not consider the contents of the petition and merely granted the prayer for adjournment in accordance therewith, without adverting to the question whether the consideration for the agreement to give time was or was not reasonable. The assumption we are asked to make is, in our opinion, unwarrantable; it is not sought to be established as well founded by evidence of what took place in Court on that date. On the other hand, the circumstances point to a contrary conclusion. The parties admittedly understood that the sanction had been granted and have uniformly acted on that theory for a series of years. The reason why the Court did not explicitly record its opinion that the consideration for the agreement was reasonable, is not far to seek. The consideration was so manifestly appropriate that there could be no room for controversy as to the propriety of the agreement. As was stated in the

(1) 32 C. 1107; 2 C. L. J. 107.
(2) 10 B. L. R. 214 at p. 230 (P. C.); 17 W. R. 289; 14 M. I. A. 529.
(3) (1844) 11 Cl. & F. 45 at p. 80; 8 Scott (N. R.) 604; 7 M. & G. 850; 44 R. R. 723.
(4) 9 A. 690 at p. 702; A. W. N. (1887) 254.

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petition by the judgment-debtors, the loan carried simple interest at 12 per cent. per annum, which was to run up to the date of the actual realisation. The mortgage decree had, evidently by an oversight, omitted to provide for payment of interest after the expiry of the period of grace. The result was that it was to the interest of the decree-holder to realise his dues forthwith; the longer his money was withheld by the judgment-debtors, the greater the loss to him; under these circumstances, any creditor of ordinary prudence would have resolutely refused to entertain any suggestion for delay. The judgment-debtors, therefore, consented that interest should run on the decretal amount at the rate mentioned in the bond, which was by no means a high rate. They deliberately adopted this course, because they were anxious, wisely or unwisely, for time and opportunity to pay off the dues of the mortgagee and ultimately to save their property. The agreement, indeed, was so palpably just and reasonable that there would be no occasion for protracted discussion in Court or a lengthy statement of the reasons which induced the Judge to accord his sanction thereto. We feel no doubt whatever that the agreement was sanctioned by the Court under section 257A, because the Court deemed the consideration reasonable under all the circumstances of the case. The first ground, therefore, fails.

In support of the second ground, it has been argued that the sum due on a mortgage decree for sale, is not a 'judgment-debt' within the meaning of section 257A of the Code of 1882, and reliance has been placed upon the cases of *Kedar Nath* v. *Kali Churn* (5), *Kartick Nath* v. *Juggernath* (6), *In re Lloyd, Llyod* v. *Lloyd* (7) and *Heath* v. *Pugh* (8), affirmed on appeal, *Pugh* v. *Heath* (9). It has been suggested, in substance, that the expression 'judgment-debt' is used in its technical sense familiar to English lawyers and does not consequently include a decree for sale on a mortgage. It is not necessary for our present purpose to decide the question raised, though it may be observed incidentally that a similar question arose upon the construction of section 230 of the Code of 1882, and the Legislature has reproduced that section, in section 48 of the Code of 1908, so as to include within its scope decrees for money as also mortgage decrees. The answer to the contention of the appellants is that if it was not competent to the Court to sanction the agreement, no question arises as to whether such sanction was or was not in fact accorded. The position then is that the parties engrafted on the decree a condition, and the validity of such condition has been asserted on the one hand and conceded on the other in successive execution proceedings. Under these circumstances, the case is completely covered by the decision of Sir Richard Couch in *Dinonath Sen* v. *Guruchurn Pal* (10). No doubt, as pointed out in *Ram Runjun* v. *Jowhurujumah* (11), a decree must ordinarily be executed as originally made and the parties cannot be permitted to make a substantial alteration therein: *Bhoopendro Nath* v. *Kalee Prosunno* (12) and *Heera Lall* v. *Dhunput Singh* (13). But where, as here, the parties have acted upon the decree as altered for a number of years and treated it as valid, the judgment-debtors, who have been substantially benefited thereby, cannot be permitted to take exception to its validity. The second ground, consequently, fails.

We are further clearly of opinion that the judgment-debtors cannot be permitted at this distance of time to repudiate their agreement. It is not necessary, for our present purpose, to consider whether the doctrine recognised by the Judicial Committee in the case of *Mungul Pershad Dichit* v. *Grija Kant* (14), and applied in the cases of *Sheik Budan* v. *Ramchandra* (15), *Narayana* v. *Gopala Krishna* (16), *Ramasamy Naik* v. *Ramaswami Chetti* (17), *Mon Mohan* v. *Dwarka Nath* (18), *Khoshal Chandra* v. *Uziladdi* (19) and

(5) 25 C. 703; 2 C. W. N. 353.
(6) 27 C. 285.
(7) (1903) 1 Ch. 385 at p. 398; 72 L. J. Ch. 78; 87 L. T. 541; 51 W. R. 177; 19 T. L. R. 101.
(8) (1881) 6 Q. B. D 345; 50 L. J. Q. B. 573.
(9) (1882) 7 Ap. Cas. 235; 51 L. J. Q. B. 367; 46 L. T. 321; 30 W. R. 553.
(10) 14 B. L. R. 287; 21 W. R. 310.
(11) 23 W. R. 129.
(12) 24 W. R. 205.
(13) 24 W. R. 282.
(14) 8 C. 51; 11 C. L. R. 13; 8 I. A. 123.
(15) 11 B. 537.
(16) 28 M. 355; 15 M. L. J. 247.
(17) 30 M. 255 at p. 263; 2 M. L. T. 167; 17 M. L. J. 201.
(18) 12 C. L. J. 312; 7 Ind. Cas. 55.
(19) 14 C. W. N. 114; 3 Ind. Cas. 47.

Sreepati Charan v. *Shamaldhone*(20), is of any assistance to the respondent. But we are plainly of opinion that he can rely upon the elementary doctrine that parties litigant are not allowed to assume inconsistent positions in Court to the detriment of their opponents; where they have elected to adopt a certain course of action, they will be confined to the course they have deliberately adopted (Bigelow on Estoppel, 5th Edition, pages 673 and 717). In the case before us, the decree-holder, upon faith of the agreement of the judgment-debtors to give interest, has allowed the latter the use of his money; but for this agreement, he would have realised his money and invested it in other securities. To allow the judgment-debtors now to resile from the position they have taken up, would be to assist them in the perpetration of a fraud of the gravest character upon the decree-holder. If the contention of the judgment-debtors were to prevail, the sums already paid would have to be credited against the sum determined as due on the 19th September 1903, and practically nothing would be now due to the decree-holder; in other words, the judgment-debtors would be allowed the use of the money of the decree-holder for all these years without any consideration: the proposition has only to be stated to be repudiated as wholly unjust and inequitable.

The result is that the order of the Subordinate Judge is confirmed and this appeal dismissed with costs. In view of the amount in controversy, the nature of the objection raised, and the fact that the hearing of the appeal has extended over three days, we assess the hearing fee at sixty gold *mohurs*.

Appeal dismissed.

(20) 15 C. L. J. 123; 15 C. W. N. 661; 8 Ind. Cas. 22.

MADRAS HIGH COURT.

CIVIL APPEAL No. 41 OF 1909.

October 16, 1912.

Present:—Mr. Justice Sankaran Nair and Mr. Justice Napier.

Sri Datla VENKATA SURYANARAYANA JAGAPATI RAJU BAHADUR GARU AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

Sri Rajah INUGANTI VENKATARAJA GOPALA SURYA RAO BAHADUR GARU AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act XIV of 1882), *s.* 295—*Rateable distribution—"Money decree"—Mortgage decree expressly exempting from personal liability—Collusion—Corrupt bargain—Right of decree-holder to prove.*

A mortgage-decree for sale of the mortgaged property, expressly exempting the defendant from personal liability, is not a money decree within the meaning of section 295 of the Civil Procedure Code, 1882.

Vaidhinadasamy Ayyar v. *Somasundaram Pillai*, 28 M. 473; 15 M. L. J. 126 (F. B.); *Kommachi Kather* v. *Pakker*, 20 M. 107; 7 M.L.J. 66; *Abdulla Sahib* v. *Doctor Oosman Sahib*, 28 M. 224 and *Krishnan* v. *Venkatapathi Chetti*, 29 M. 318, distinguished.

A decree-holder is entitled to prove that a decree, obtained by another decree-holder claiming rateable distribution, against the judgment-debtor was obtained in collusion with the latter or as a result of a corrupt bargain between the parties. The Court will not allow rateable distribution if it is satisfied of the collusion or the corrupt bargain.

Appeal from the decree of the Subordinate Judge of Godaveri, in O. S. No. 63 of 1907.

Mr. *S. Srinivasa Aiyangar*, for the Appellants.

Mr. *P. Narayana Murthi*, for the Respondents.

JUDGMENT.—The question in appeal is whether the respondents (defendants Nos. 2 to 8) decree-holders in Original Suit No. 69 of 1902 are entitled to rateable distribution along with the plaintiffs who obtained a decree against the same judgment-debtor, the 1st defendant in Original Suits Nos. 57 and 58 of 1904. The plaintiffs, after having obtained the decree, sold the properties of the 1st defendant in execution thereof on the 3rd August 1906. One-fourth of the sale-proceeds was then paid into Court and the balance was deposited in Court on the 17th August 1906. The defendants Nos. 2 to 8 obtained their decree on the 9th March 1903 against the 1st defendant who was the 2nd defendant in that suit and also some other

parties. Whether it is a money decree or not so far as the 1st defendant is concerned, is one of the questions in dispute. On the 13th August 1906, they made an application under section 90 of the Transfer of Property Act for a personal decree and on the 17th of the same month they obtained a decree by consent, which, undoubtedly, is a personal decree against the 1st defendant. On the same date, they made an application (Exhibit C) for rateable distribution. It will be observed that this was the same date on which the balance of the sale-proceeds was paid into Court by the purchaser of the properties in execution of the plaintiff's decree in Original Suits Nos. 57 and 58 of 1904. The plaintiffs dispute the right of the respondents to claim rateable distribution. The Subordinate Judge held that under the decree in Order Suit No. 69 of 1902, dated the 9th March 1903, the respondents were not entitled to any rateable distribution as it was not a money decree; but he was of opinion that the decree which was passed on the 17th August 1906 was not collusive and, therefore, illegal as contended for by the appellants and that the respondents were, therefore, entitled to rateable distribution under that decree. With reference to another argument that was advanced on behalf of the appellants that, as the purchase-money was realised on the 17th August and the respondents obtained their consent decree only on the same day, it cannot be said that they had made an application "before the realization of the sale-proceeds" which is necessary to entitle them to rateable distribution under section 295 of the Civil Procedure Code, the Subordinate Judge held that, as a matter of fact, the decree was passed and the application was made before the realization and that, therefore, the respondents were not disentitled to rateable distribution on that ground. In appeal, the same contentions have been mainly pressed upon us on behalf of the appellants.

It was contended before us that the decree passed on the 9th March 1903 in Original Suit No. 69 was not a personal decree. That suit was brought by the respondents Nos. 2 to 8 against the 1st defendant, Surya Rao, who was the 2nd defendant in that suit, and also against one Venkatrama Rayanim Garu, the 1st defendant therein, and his minor sons who were defendants Nos. 3 and 4 in that suit, on a mortgage bond executed by the 1st defendant therein and the father of Surya Rao the present 1st defendant. The plaintiffs prayed for a decree directing the defendants Nos. 1 to 4 to pay the amount due to them into Court, and in default, for the sale of the mortgaged property subject to the claims of certain prior mortgagees; for payment by the 1st defendant therein of the balance due after such sale and for the recovery of such balance by the sale of the other family properties of defendants Nos. 1, 3 and 4 and the family properties of the 2nd defendant, Surya Rao, the present 1st defendant (See Exhibit II). The decree directed the 1st defendant therein to pay to the plaintiffs the amount claimed above Rs. 90,000 with interest thereon within a certain date Then after the usual directions for the sale of the property in default of payment etc., there followed this important direction "that the defendants Nos. 2 to 4 be exempted from personal liability to the decree and that their shares in the mortgage property be answerable." (See Exhibit A). The question that was argued at great length in this case was whether this was a personal decree or not; and both sides relied upon the Full Bench case in *Vaidhinadisamy Aiyar* v. *Somasundaram Pillai* (1). In that case, it was held that "every decree by virtue of which money is payable is to that extent a decree for money." The decree in the case before the Full Bench contained an order for the sale of the mortgaged property and also an order for the recovery personally from the judgment-debtor what might remain undischarged after the sale of the mortgaged property. There were similiar directions in the other cases decided by this Court referred therein, *viz.*, *Kommachi Kather* v. *Pakker* (2) and *Abdulla Sahib* v. *Doctor Osman Sahib* (3). This is the usual form of decree passed in mortgage suits in this Presidency and as all these decrees contain a direction for the payment of the money, though the mortgaged properties are first to be sold and it is only for the undis-

(1) 28 M. 473 at p. 447; 15 M. L. J. 126 (F. B.)
(2) 20 M. 107; 7 M. L. J. 66.
(3) 28 M. 224.

charged balance that the judgment-debtor is to be personally liable, such decrees are decrees for money according to this Full Bench decision. In a later case, however, *Krishnan* v. *Venkatapathi Chetti* (4), there was only a decree for the recovery of the money by the sale of the mortgaged property. There was no order for payment of money nor was there any order that the balance may be recovered personally or from the other properties of the debtor; and yet it was held on the strength of the Full Bench decision that it was a money decree. It may be reasonably doubted whether the Full Bench decision goes the length.

The decree in the case of *Krishnan* v. *Venkatapathi Chetti* (4) may be a decree for money according to the Full Bench decision to the extent it may be discharged by the sale-proceeds of the property sold. As for the balance that might be due, if there is no decree at all directing the defendant to pay the money, there can scarcely be said to be a money decree. However, in the decree in Original Suit No. 69 passed on the 6th March 1903, there is no direction that the 2nd defendant, Surya Row, should pay any money at all. On the other hand, his share in the mortgaged property is alone declared to be answerable. This might make it a personal decree according to the decision of *Krishnan* v. *Venkatapathi Chetti* (4) to the extent of the sale-proceeds that may be realized by the mortgaged property, but in this case it is admitted by the respondents in their petition (D) for a decree under section 90, Transfer of Property Act, that the mortgaged property is worthless, that it is encumbered to much more than its market-value and that when they attempted to get the property sold in Court auction there was no bid at all. Mr. Srinivasa Aiyangar also relies upon the provision in the decree that the 2nd defendant is exempted from personal liability to show that it cannot be construed as a personal decree. The contention appears to be right. There can scarcely be said to be a money decree in the face of such a provision. We confirm the finding of the Subordinate Judge on this point.

The next question is whether the defendants-respondents Nos. 2 to 8 are not entitled to rateable distribution under the decree as modified on the 17th August 1906. Various objections are taken to this decree. It is, however, necessary to consider only one of them. As already pointed out, the decree originally passed on the 9th March exempted the defendants Nos 2 to 4 from any personal liability. This amounts to a decision that they were not liable. Their properties, therefore, could not have been attached and sold in execution of that decree. The matter is *res judicata*. See *Abbakke* v. *Krishnayya* (5).

The respondents, however, made an application on the 13th August 1906 for a decree to be passed under section 90 of the Transfer of Property Act. They further alleged that sums due to certain prior mortgages amounted to seven *lakhs* of rupees which was more than the value of the mortgaged property and prayed for a decree directing the decree amount to be recovered from the 1st defendant personally and from the family properties of defendants Nos. 2 to 4. On this application, the following decree was passed by consent:—"This Court doth order and decree that the plaintiffs do recover from the 1st defendant personally and from the family of defendants Nos. 1 and 2 Rs. 85,709-12-6 etc." It appears that the respondent's application for a decree under section 90 presented on the 13th August was first posted to the 22nd August for hearing (See Exhibit E) and that petitions were presented by both parties on the 17th consenting to a decree being passed as prayed for (See Exhibits E and F). It is admitted by the defendant, one of the decree-holders in Original Suit No. 69, as plaintiff's first witness, that an agreement was entered into between himself and Surya Rao, the judgment-debtor in that suit, that he should consent to such a decree being passed against him and if the decree-holder were on account of such decrees awarded any amount for his share in the rateable distribution of assets, he should divide it with the judgment-debtor; the decree-holder was to take two-thirds, and Surya Rao, one-third and it was on this understanding that the judgment-debtor agreed to the decree being "converted" into a money decree (See the deposition of the

(4) 29 M. 318.

(5) 32 M. 534; 5 M. L. T. 246; 4 Ind. Cas. 1120.

2nd defendant). There was, therefore, undoubtedly a corrupt bargain between the parties. The judgment-debtor consents to a decree being passed against him for a consideration to be received by him consisting of a share of the money which the decree-holder would in that event receive out of the sale-proceeds to the detriment of the present plaintiffs. If the judgment-debtor had not consented to that, the decree-holder, the 2nd defendant, would not have realized anything and the plaintiffs (appellants) would have realized the entire sale proceeds. Thus according to the terms of the decree which was passed on the 9th March, the plaintiffs therein were not afterwards entitled to get a decree for money against the judgment-debtor in that suit; the decree for money subsequently passed was, no doubt, one obtained in collusion; the plaintiffs (appellants) were clearly entitled to prove that it was so obtained as they are prejudiced thereby.

We hold, accordingly, that the respondents were not entitled to claim any rateable distribution under this decree and they are directed to pay to the plaintiffs the amount received by them Rs. 7,984-14-9 with future interest at 6 per cent.

The appellants are entitled to their costs throughout.

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL No. 175 OF 1911.

October 1, 1912.

Present:—Sir Basil Scott, KT, Chief Justice, and Sir N. G. Chandavarkar, KT, Judge.

VINAYAK BALKRISHNA KULKARNI —APPELLANT

versus

SITARAM JANARDAN PANDIT—RESPONDENT.

Landlord and tenant--Adverse possession—Non-payment of rent--Khoti Settlement Act (Bom. I of 1889),ss. 33 (*c*), 40 (*a*)*—*Rules under section* 40 (*a*), *rr.* 1-8† —Khot—*Occupancy tenant—Rent—Crop-share —Gross annual produce how determined—Appraisement —Admission of defendant—Rule* 8, intra vires.

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*The sections run as follows:—

33. The rent payable to the *khot* by privileged occupants shall be as follows, namely:

(*c*) by any occupancy-tenant: In each case according to the terms of the entry in the survey-record made in respect thereof, and for the time being applicable thereto, under the following rules:

Rule 1. Every such entry shall show whether any rent is payable and, if so, whether it is payable as

(*a*) an amount fixed: that is to say, a certain amount, irrespective of the crop, payable in money or kind, or both; or

(*b*) a crop-share: that is to say, a fixed proportion of the gross annual produce of the land, and of the produce of fruit-trees (if any).

40. The Governor in Council may, by notification in the *Bombay Government Gazette*, from time to time frame and from time to time vary or rescind, rules not inconsistent with the provisions of this Act—

(*a*) for the inspection and appraisement of crops when the rent payable to a *khot* consists of a share of the produce of privileged occupants' land;

†The rules run as follows:

I. Whenever the rent payable to the *khot* consists of a share of the produce of the tenant's land, the amount of produce claimable by the *khot* shall be ascertained by an estimate of the probable yield of the crop of each field to be made by the *khot* on an inspection of the crop a reasonable time before the same is ready for reaping in the presence of the tenant, or a member of his family appointed by him in writing for that purpose, or his legally appointed agent, and of two respectable witnesses, one of whom is able to read and write, provided that unless the tenant otherwise desires, the *khot* shall inspect and appraise the crops specified below on or before the dates entered below:

III. If notwithstanding that the days fixed for the inspection and appraisement have been notified as aforesaid, the tenant, or a member of his family appointed by him in writing for that purpose, or his legally appointed agent, is not present in his field, on the days so fixed the *khot* shall nevertheless proceed to inspect and appraise such tenant's crops and shall inform such tenant in writing of the appraisement so made within 24 hours of the same by sending him a copy of the entries relating to his fields by the *khot* in the *abhavani patrak* mentioned in the rule immediately following.

VIII. If the *khot* fails to keep an *abhavani patrak* or to inspect or appraise the crop at the time and in the manner laid down in Rule I or to make an entry or to cause the same to be made therein in the manner hereinbefore provided, or to give information to the tenant in the manner provided in Rule III, he shall be entitled to recover from the tenant such rent only as may be due according to the yield of the crop admitted by the tenant.

VINAYAK BALKRISHNA *v.* SITARAM.

Mere non-payment of rent by a tenant does not make him owner of the land by adverse possession, unless the tenant does some act which is inconsistent with the owner's title and thereby turns his possession, as tenant into possession adverse to that of the owner.

Rule 8 of the rules framed under section 40 (*a*) of the Khoti Settlement Act is *intra vires*.

The only rent, which the occupancy-tenant under a *khot* can be liable to pay, is the rent as prescribed by section 33 (*c*), that is, a crop-share by way of a fixed proportion of the gross annual produce of the land and of the produce of the fruit trees, if any.

The crop may be appraised according to the provisions of the rules framed under section 40 (*a*).

If the provisions of the rules are not observed, then the appraisement admitted by the tenant himself is to be taken as determining the gross annual produce.

Apart from the provisions of the rules and the admission of the tenant, it is not open to the Court to estimate the amount of rent on an equitable basis from other materials.

Second appeal from the decision of the Assistant Judge of Ratnagiri, in Appeal No. 105 of 1910, varying the decree passed by the first class Subordinate Judge at Ratnagiri, in Civil Suit No. 181 of 1908.

The following interlocutory order was first passed by Scott, C. J and Heaton J.

ORDER.—It has been suggested in this case on behalf of the appellant, who is an occupancy-tenant of a *khoti* land, that he has set up a title by adverse possession and is not liable on that account to pay any rent to the *khot*, but we think that the Subordinate Judge took the right view of the position when he said: "Mere non-payment of rent by a tenant does not make him owner of the land by adverse possession, unless the tenant does some act which is inconsistent with the owner's title and thereby turns his possession as tenant into possession adverse to that of the owner. Such an act, if done for more than twelve years before suit, only can confer a title on the tenant adverse to that of the owner. There is no such contention, nor any such evidence in the case before me."

The only other question which remains is as to the amount of rent which is payable by the defendant to the plaintiff.

The rules under the Khoti Settlement Act provide for the manner in which Abhavni-patraks shall be made up recording the appraisement of the crop between the *khot* and his tenant.

The learned Judge of the lower Appellate Court states that the plaintiff put in Abhavnis to show the estimate of the crop for the years in suit; but, he does not think that those documents are reliable, and he, therefore, forms an estimate of the crop without reference to the provisions of the rules. This the appellant contends, is unwarranted and he insists that if the Abhavni-record is not reliable, the tenant can only be made liable for rent upon the basis of a crop valuation admitted by him under rule 8 of the Khoti Settlement Rules.

In the present case, we have no evidence of any crop-valuation admitted by the tenant, and even if we had such crop-valuation, there is the further difficulty that the plaintiff contends that the rule which provides that in certain cases the rent shall be assessed upon the crop valuation admitted by the tenant only, is *ultra vires*.

We, therefore, frame the following issues for determination by the lower Court:—

(1) Have the Abhavni-patraks been prepared in accordance with the provisions of the rules under the Khoti Settlement Act?

(2) If they have not been so prepared, or, if any other of the conditions mentioned in rule 8 arise, has any yield of crop been admitted by the tenant, and if so, what rent is due according to such admission?

(3) If there is evidence of any such admission, is the rule 8 *ultra vires* or within the powers of Government under section 40 of the Khoti Settlement Act?

Further evidence may be taken as to the admissions, if any, of the tenants, but not as to the manner of appraisement and preparation of the Abhavni-patraks.

Findings to be returned in three months.

The findings returned on those issues were in the negative on the first two issues. No finding was recorded on the third issue, as the second was found in the negative.

Mr. *D. A. Khare*, for the Appellant.

Mr. *N. V. Gokhale*, for the Respondent.

JUDGMENT.—The only question in this appeal, now that the issues on remand have been decided, is whether the *khot* can recover from the occupancy-tenant on the basis of a judicial estimate of the amount of rent payable. This depends upon whether the Court is precluded from arriving at what it considers the reasonable amount of rent

by the provisions of rule 8 of the Rules framed under section 40 (*a*) of the Khoti Settlement Act.

Now the only rent which, according to Statute, the occupancy-tenant can be liable to pay, is the rent as prescribed by section 33 (*c*), which for the purpose of this suit may be taken to be a crop-share, that is to say, a fixed proportion of the gross annual produce of the land and of the produce of fruit-trees, if any. How then is the gross annual produce of the land to be ascertained? That is provided for by section 40, which says that "the Governor in Council, may by notification...from time to time, frame... rules not inconsistent with the...Act...for the inspection and appraisement of crops when the rent payable to a *khot* consists of a share of the produce of a privileged occupant's land."

Now rule 8 of the Rules under section 40 (*a*) of the Khoti Settlement Act, referring to the provisions of previous Rules says, that "If the *khot* fails to keep an Abhavni-patrak or to inspect or appraise the crop in the manner laid down in rule 1 or to make an entry or to cause the same to be made therein in the manner herein before provided, or to give information to the tenant in the manner provided in rule 3, he shall be entitled to recover from the tenant such rent only as may be due according to the yield of the crop admitted by the tenant," that is to say, the rule provides for the two methods of appraisement of the crop:—The crop may be appraised according to the provisions of the rules. But if the provisions of the rules for appraisement are not observed, then there is one other appraisement which the *khot* can have regard to for the purpose of determining the gross annual produce and that is the appraisement made by the tenant himself. In that view of the case, it appears to us that the rule is *intra vires* and that the gross annual produce has not been settled according to either mode prescribed by rule 8. The lower Court was wrong in trying to settle the question upon other materials.

We, therefore, reverse the decree and dismiss the suit with costs throughout.

Decree reversed.

MADRAS HIGH COURT.

REGULAR CIVIL APPEAL No. 5 OF 1912.

November 1, 1912.

Present:—Sir Ralph Benson, Kt., Judge, and Mr. Justice Sundara Aiyar.

NARAYANA RAO AND OTHERS—APPELLANTS

versus

THE PRESIDENT OF THE CORPORATION OF MADRAS—RESPONDENT.

Madras City Municipal Act (III of 1904), s. 172, meaning of—"Shall ordinarily be resident in"—Direction not imperative.

Section 172 of the Madras City Municipal Act does not require that one of the Commissioners, hearing an application for revision of assessment, should *always* be one who is resident in or representative of the division in which the applicant resides or carries on business or in which the property assessed is situate. The meaning of the section is that *ordinarily* one of the Commissioners hearing the application should be resident in or representative of the division.

Cases stated under section 176 of the Madras City Municipal Act III of 1904, by the Chief Presidency Magistrate and the fourth Presidency Magistrate in House Tax Appeals in Civil Cases Nos. 4053, 4054, 4570 to 4573, 5441 and 5442 of 1912.

Mr *P. Doraisami Aiyangar*, for the Respondent.

JUDGMENT.—Although the language of section 172 of Act III 1904 is not altogether free from ambiguity, we are of opinion that the section does not require that one of the Commissioners hearing an application for revision of assessment should always be one who is resident in or representative of the division in which the applicant resides or carries on business or in which the property assessed is situated. The meaning of the section, we think, is that ordinarily one of the Commissioners hearing the application should be resident in or representative of the division. The language of the corresponding section in the Acts of 1857, 1878, 1884, and 1892 shows that this was the intention of the Statute. No change was intended to be introduced by the change of language in the Act of 1904.

BAI FATMA *v.* ALI MAHOMED.

BOMBAY HIGH COURT.
SECOND CIVIL APPEAL No. 164 OF 1912.
October 1, 1912.
Present:—Mr. Justice Batchelor and Mr. Justice Rao.
BAI FATMA—APPELLANT
versus
ALI MAHOMED AIYAB—RESPONDENT.

Contract Act (IX of 1872), s. 23—Void contract—Public policy—Husband and wife—Agreement for future separation—Muhammadan parties—English Law.

The rule of English Law that an agreement which provides for, and, therefore, encourages future separation between the spouses, is void as being against public policy, applies to Muhammadans. The fact that Muhammadan Law allows polygamy does not make the rule inapplicable. It is as much the policy of the Muhammadan Law as of the English Law, that people who are married should live together and not apart.

Consequently, an agreement made between a Muhammadan husband and his wife, providing for a certain maintenance to be given to the wife in the event of a future separation between them, is void as being opposed to public policy under section 23 of the Contract Act.

Second appeal from the decision of the District Judge of Ahmedabad, in Appeal No. 194 of 1911, confirming that passed by the Additional Joint Subordinate Judge at Ahmedabad, in Civil Suit No. 878 of 1910.

Mr. *L. A. Shah*, for the Appellant.
Mr. *T. R. Desai*, for the Respondent.

JUDGMENT.

BATCHELOR, J.—We have before us in this appeal an agreement made between a Muhammadan husband and his wife, providing for a certain maintenance to be given to the wife in the event of a future separation between them. There can be no doubt that that is the effect of the agreement, and that it contemplates not a present but a prospective separation. In fact, the separation did not take place until the lapse of some weeks after the execution of the agreement.

The question is whether that agreement is good in law or is void as being opposed to public policy under section 23 of the Contract Act. This question, arising also between Muhammadans, was considered by me in *Meherally* v. *Sakerkhanoobai* (1), where, to the best of my ability, I have explained the reasons which led me to hold that such an agreement, which would admittedly be bad in English Law, is bad also as between Muhammadan spouses. My learned brother informs me that he is in agreement with the decision in *Meherally's* case (1) and it is unnecessary, therefore, to repeat the reasons which were there adduced.

Upon further consideration, I remain of the same opinion, and I think it necessary to notice only the one additional argument which Mr. Shah brought forward in support of the wife's case. That argument is that the rule as to the public policy which obtains in England in regard to such agreements cannot properly be applied to similar agreements executed among people to whom polygamy is by their law allowed. It appears to me, however, that on analysis this argument cannot be sustained. The utmost extent to which, I think, it goes is that whereas as a result of a separation between English spouses, there are two people married yet living separate, among Muhammadans, owing to the husband's power of marrying another wife, you would have in similar circumstances only one of the spouses, namely the wife, married yet living separate. It appears to me that this reduction in the extent of the evil which the rule of law aims at suppressing ought not to affect the general result. It is, as I understand it, as much the policy of the Muhammadan Law as of the English Law, that people who are married should live together and not apart and if that is so, it seems to me that there should be no difficulty in applying to Muhammadans the English rule that any agreement such as this, which provides for, and, therefore, encourages, future separation between the spouses, must be pronounced void as being against public policy.

For these reasons, I think that the appeal fails and must be dismissed with costs.

RAO, J.—I agree.

Appeal dismissed.

(1) 7 Bom. L. R. 602.

RAMAKRISHNA MALLAY v. BABURAYA.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1425 OF 1912.
November 13, 1912.

Present:—Sir Arnold White, Kt., Chief Justice, and Mr. Justice Sankaran Nair.

RAMAKRISHNA MALLAY—PLAINTIFF—APPELLANT

versus

BABURAYA *alias* VENKATESHA HEGADE AND OTHERS—DEFENDANTS—RESPONDENTS.

Landlord and tenant—Lease prior to 1882—Forfeiture for non-payment of rent—Relief against forfeiture—Landlord's act—Lease not providing for period of grace—Loss of improvements—Equitable relief—Plea of payment not proved.

In the case of a lease made prior to the coming into operation of the Transfer of Property Act, an act on the part of the landlord, showing that he elects to take advantage of the forfeiture, is not a condition precedent to his right to sue for ejectment.

The question whether a tenant is entitled to relief against forfeiture for non-payment of rent must depend on the facts of the particular case.

Where no period of grace for payment of arrears of rent is provided and the lessee has agreed to deliver back the property, without demanding the value of his improvements, the lessee is entitled to relief against forfeiture for non-payment of rent.

The fact that the tenant sets up a plea of payment which he fails to prove, does not necessarily disentitle him to equitable relief.

Second appeal from the decree of the Temporary Subordinate Judge of South Canara, in Appeal Suit No. 376 of 1908, presented against that of the District Munsif of Karkal, in Original Suit No. 141 of 1908.

The case first came on before their Lordships, the Chief Justice, and Mr. Justice Ayling on the 11th April 1911, who made the following

ORDER.—We agree with the Courts below that on the true construction of the lease (Exhibit A), the sub-lease by the first defendant's father did not work a forfeiture. The lower Appellate Court in holding that, assuming there was a forfeiture by reason of non payment of rent, it could not be enforced as the plaintiff had not done any act to show he intended to avail himself of the forfeiture, would seem to have followed the decision of this Court in *Venkataramana Bhatta* v. *Gundu Raya* (1). In that case, however, it was not brought to the notice of the Court that the lease in question was prior to the coming into operation of the Transfer of Property Act. The lease, in the present case, was made in 1871 before the Transfer of Property Act came into operation and this being so, according to the decision in *Padmanabaya* v. *Ranga* (2), an act on the part of the landlord showing that he elects to take advantage of the forfeiture is not a condition precedent to his right to sue in ejectment. There is no finding by the lower Appellate Court as to whether, on the construction of the lease, non-payment of rent operated as a forfeiture. We accordingly send back the case to the lower Appellate Court for a finding on this question and also, if the Court holds there has been a forfeiture by reason of the non-payment of rent, for a finding as to the terms, if any, on which the defendant is entitled to be relieved against the forfeiture. The findings should be submitted within one month after the re-opening of the Sub-Court, and seven days will be allowed for filing objections.

In compliance with the order contained in the above judgment, the Subordinate Judge of South Canara submitted the following

FINDING.—The two issues on which this Court has been directed to submit its findings are (1) Whether on the construction of the lease, non-payment of rent operated as a forfeiture? (2) If there has been a forfeiture by reason of the non-payment of rent, whether the defendant is entitled to be relieved against it on any and what terms? The stipulation in question in the suit lease A is to this effect:—"I have no cause whatever either..... or to keep the rent in arrears. In case any small portion of the aforesaid rent is kept in arrears or in case.....I shall deliver back the said land etc., and all to you without demanding from you the value of the improvements made by me." As observed in *Subbaraya Kamti* v. *Krishna Kamti* (3), from the circumstance that the stipulation in question is that, if any portion of the rent should fall into arrears, the property should be surrendered with all right to improvements, *i. e.*, without claiming the value of improvements, it might be reasonably inferred that such provision was made in order that it might operate as a fear in the mind of the lessee that the rent should be

(1) 31 M. 403; 4 M. L. T. 221.

(2) 34 M. 161; (1910) 1 M. W. N. 462; 20 M. L. J. 930; 6 Ind. Cas. 447; 8 M. L. T. 110.

(3) 6 M. 159.

regularly paid and the parties did not seriously intend that it should be acted upon. In a word, this stipulation was inserted *in terrorem* [see also *Kottal Uppi* v. *Edavalath Thatham Nambudri* (4)].

2. Further, there is this important fact that the lease does not provide for any period of grace in respect of the payment of arrears of rent. It has been settled beyond any doubt or controversy that, when such is the case, the forfeiture arising from non-payment of rent will be one that can be relieved against; vide *Mahalakshmi Amma* v. *Lakshmi* (5), *Narayana Naicka* v. *Vasudeva Bhatta* (6), *Narayana Kamti* v. *Handu Shetty* (7) and *Adiraya Shetty* v. *Billa Tyampu* (8). Having regard to the intention of the parties, which can be gathered and reasonably inferred from the insertion of such stipulation as the one in question, and also to the circumstance that the lease provides for no period of grace, I should hold that the forfeiture under consideration is one that can be relieved against The defendants are entitled to have such equitable relief granted to them.

3. Before the defendants can claim such equity, they must be prepared to do equity. It will be incumbent upon them to pay up the arrears of rent due by them. The 2nd defendant pleaded discharge. The 2nd issue in the case was "whether the payments of rent and *thirva* pleaded are true." There was no evidence to prove that issue and it was found in the negative. The rent claimed by the plaintiff is due to him The defendants not only failed to tender it in Court but also set up a false plea of discharge. The plaintiff will be entitled to get the arrears of rent due to him and that with interest. Having regard to the fact that there was no tender on the part of the defendant even after the suit was brought—but he, on the other hand, falsely pleaded payment, it will not be unreasonable or inequitable to allow plaintiff interest at the rate of 12 per cent. per annum. Plaintiff will also be entitled to get his full costs of the suit, including the costs on the claim for recovery of possession of the suit property, vide *Subbaraya Kamti* v. *Krishna Kamti* (3).

4. For paying up the plaintiff the arrears of rent claimed by him with interest thereon at 12 per cent. per annum from the date on which the rent fell due up to the date of payment and also full costs, some reasonable time will have to be allowed to the defendants. Under the circumstances, I am of opinion that it will be sufficient if three weeks' time from the date of disposal of this second appeal in the High Court is allowed to them. There will be no loss or inconvenience to the plaintiff as he gets interest at the aforesaid rate up to the date of payment. If the defendants, with a view to avoid the burden of paying interest, wish to pay up the amount earlier, they will be at liberty to pay it to the plaintiff through Court.

5. For the reasons set forth above, I find on these two issues that if the defendant should pay up what is mentioned *supra* within the time specified therein, they would be entitled to have the forfeiture in question relieved against.

The case came on before the Bench constituted as above.

Mr. *B. Narasimha Row* for Mr. *K. Ramanath Shenai*, for the Appellant.

Messrs. *K. P. Madhava Row* and *K. P. Lakshmana Row*, for the Respondents.

JUDGMENT.—The question whether a tenant is entitled to relief against forfeiture for non-payment of rent must depend on the facts of the particular case. Here we think, on the authority of the decision in *Subbaraya Kamti* v. *Krishna Kamti* (3), following *Kottal Uppi* v. *Edavalath Thathan Nambudiri* (4), the tenant is entitled to relief. The cases relied on by the plaintiff (the landlord) are distinguishable. In *Narayana Kamti* v. *Handu Shetty* (7), a long period was allowed, some eight months, after default, before the forfeiture was to take effect and, apparently, there was no stipulation that the tenant should, on default, lose the value of his improvements. In *Mahalakshmi Amma* v. *Lakshmi* (5), a period of grace was also allowed. There was, no doubt, a stipulation in that case that the tenant, on default, should lose the value of his improvements but the effect of this stipulation is not discussed in the judgment.

We do not think the fact that the tenant

(4) 6 M. H. C. R. 258.

(5) 21 M. L. J. 960; (1911) 2 M. W. N. 335; 12 Ind. Cas. 456.

(6) 28 M. 389; 15 M. L. J. 208.

(7) 15 M. L. J. 210.

(8) 20 M. L. J. 944; 8 M. L. T. 108. (1910) 1 M. W. N. 419; 6 Ind. Cas. 438.

sets up a plea of payment which he fails to prove, necessarily, in itself, disentitles him to equitable relief.

We accept the finding and modify the decree of the lower Appellate Court in accordance with the finding. The plaintiff is entitled to his costs throughout.

In default of payment of rent and interest within the time allowed, the plaintiff may recover possession.

Decree modified.

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL No. 148 OF 1912.

October 1, 1912.

Present:—Mr. Justice Batchelor and Mr. Justice Rao.

HIRA—APPELLANT

versus

HANSJI PEMA—RESPONDENT.

Hindu Law—Marriage—Unapproved form—Asura *marriage*—Brahma *marriage*—Kolis—*Marriage of divorced woman without receipt of pecuniary benefit.*

Among *Kolis*, re-marriage of a divorced woman is valid and is not regarded with any social censure or disapproval.

The marriage of a divorced *Koli* woman cannot be regarded as marriage in an unapproved form when the father by whom the woman is given away receives no pecuniary benefit from the marriage.

The distinctive mark of the *asura* form of marriage is the payment of money for the bride, and the absence of such payment of a bride-price is a distinctive mark of the approved form.

Second appeal from the decision of the Joint first class Subordinate Judge at Surat, in Appeal No. 87 of 1911, reversing that passed by the second class Subordinate Judge at Surat, in Civil Suit No. 174 of 1909.

Mr. *R. R. Desai*, for the Appellant.

Mr. *L. A. Shah*, for the Respondent.

JUDGMENT.—The appellant before us was the original plaintiff who sued for a declaration of her right as the heir of her step-sister Ratan. The parties are *Kolis* by caste. Ratan was the daughter of one Hiria by Hiria's wife, Ramli. The plaintiff is the daughter of Hiria by another wife. It appears that Ratan had been three times married before suit, and had been divorced from her former husbands. The second defendant was her fourth husband to whom she was married in 1907. Shortly after that, Hiria died and about a week later Ramli died. Their property went in part to Ratan and in part to the present plaintiff. On the 23rd October 1908, Bai Raten died. The first defendant took possession of her property claiming as heir and also under a Will. The second defendant also claimed as heir and under another Will.

In the trial Court, the decision went in favour of the plaintiff, who was held to be the preferential heir to Ratan's *stridhan* property, the Court holding that Ratan's marriage with the second defendant was in the *asura*, that is, an unapproved form. It followed that the preferential heir was the step-sister and not the husband or the cousin.

The husband alone appealed to the District Court, and there he has succeeded, because in the District Court's opinion, his marriage with Ratan was not in the *asura* form and was not in any unapproved form.

The only question involved in the appeal is whether in the circumstances of the case, the marriage of the second defendant with Ratan is to be considered as a marriage in an approved or in an unapproved form. The parties, as we have said, are *Kolis*. Now it seems to us that we start with this proposition that so far as regards the present case at least, there are admittedly but two valid forms of marriage now subsisting, whereof the one is the *brahma* or the approved, and the other is the *asura* or the unapproved form. It is admitted by Mr. Desai that nothing can be urged against the validity of the second defendant's marriage with Ratan. That being so, it appears to us to follow that if the marriage is to be held to be unapproved, it can only be so held if it is regarded as a marriage in the *asura* form. On the evidence, however, we are satisfied that it cannot be so regarded.

The essence of the *asura* form, as we understand it, is that a bride-price should be paid to the father or other relative who gives away the bride in consideration for the marriage. That is disapproved because it runs counter to the text of Manu where it is said: "Let no father, who knows the law, receive a gratuity, however small, for giving his daughter in marriage since the man who, through avarice, takes a gratuity

HIRA v. HANSJI PEMA.

for that purpose is a seller of his offspring." The meaning of this text has been further expounded by Sir Narayan Chandavarkar in *Chunilal* v. *Surajram* (1), where the learned Judge says: "What distinguishes the one form from the other is that, in a *brahma* marriage it is a gift of the girl pure and simple; in the *asura*, it is the sale of the bride for pecuniary consideration." Further authority it is not necessary for us to invoke, but reference may be made to the decision of the Madras High Court in *S. Authikasavulu Chetty* v. *S. Ramanujam Chetty* (2), where the learned Chief Justice and Mr. Justice Sankaran Nair took the same view upon this topic. It is there said that the distinctive mark of the *asura* form is the payment of money for the bride, and the absence of such payment of a bride-price is a distinctive mark of the approved form.

If then that is the meaning of the *asura* form of marriage, it is plain upon the findings which have been recorded, that the re-marriage of the second defendant with Ratan is outside this form, for the learned Judge of the lower Appellate Court finds that the father by whom the bride was given away received no pecuniary benefit from the marriage. In these circumstances and upon this finding of fact, we are of opinion, that the re-marriage falls outside that definition of the *asura* form which is to be collected from the judgment of Sir Narayan Chandavarkar and the other authorities referred to.

But then it was said by Mr. Desai that even although he might not be successful in bringing this re-marriage within the strict definition of the *asura* form, yet it ought to be held to be unapproved in a general way, because the sense and spirit of the Hindu Law regarded such a re-marriage of a female with disapproval. The first answer to this argument seems to us to be supplied by the admission that, so far at least as this case is concerned, the *asura* form is the only surviving unapproved form of a valid marriage; and, that being so, if the re-marriage is not in the *asura* form, it is not unapproved. Moreover, the learned Pleader was fain to admit that he was unable to call our attention to any express text quotable as authority for his proposition that the re-marriage should be considered vaguely or generally unapproved. He urged, however, that the nuptial texts were in terms restricted to the marriage of a *kanya* or virgin, and that, therefore, the marriage of this woman Ratan was outside those texts. That, no doubt, is so, but it does not appear to us to follow that because such a marriage falls outside the particular texts dealing with the particular subject of the marriage of a *kanya*, therefore, the marriage must be held, whatever may be the facts of the case, to have been performed in an unapproved form It is, we think, important to observe that the division between the approved and the unapproved forms of marriage contains in it nothing that is technical or fanciful or arbitrary. It is a division which is based on the reason and justice of the thing; and the forms that incurred the ritual disapproval were disapproved for valid reasons, which rightly fixed a stigma upon such imperfect unions. If that is so, then it is our duty to-day to see whether any such stigma should now be placed upon such a marriage as the one now before us, regard being had to the ordinary presumption in favour of the approved form in the case of a valid marriage celebrated with due ceremonies. As we have said, there is no direct authority for the appellant's contention; nor is there any text which formally decides that such a marriage must be held to be in the unapproved form. Admittedly, re-marriage between parties of the *Koli* caste is valid, and there is nothing before us to suggest that the people of that caste regard it with any social censure or disapproval. This seems to us to be a capital consideration when we are administering a system of jurisprudence where established custom plays such an important part as it does in Hindu Law.

Mr. Desai's argument, as we understand it, practically amounts to an invitation to us to-day to add one more instance of the unapproved form to the categories which already exist. In the absence of any authority for so doing, we cannot accede to this argument, but must pronounce that the marriage, of the validity of which there is no dispute, which is shown not to fall within

(1) 33 B. 433 at p. 438; 11 Bom. L. R. 708; 3 Ind. Cas. 765.

(2) 32 M. 512; 6 M. L. T. 183; 3 Ind. Cas. 541.

the definition of *asura*, and which was celebrated with all the forms and rites peculiar to the *brahma* type, was celebrated in an approved form.

We must, therefore, confirm the decree of the Court below and dismiss this appeal with costs.

Appeal dismissed: Decree confirmed.

LOWER BURMA CHIEF COURT.
CIVIL REVISION PETITION No. 69 OF 1911.
June 14. 1912.
Present:—Mr. Justice Parlett.
A. S. P. L. S. SOMASUNDARAM CHETTY AND ANOTHER—PLAINTIFFS—PETITIONER
versus
P. L. V. R. M. LAKSHMAN CHETTY—RESPONDENT.

Negotiable Instruments Act (XXVI of 1881), ss. 35, 37, 38—Endorser, liability of.

An endorser is liable to every subsequent holder in case of dishonour by the drawer, provided he has received due notice of his dishonour, unless (*a*) there is a contract to the contrary or (*b*) he expressly excludes or limits his liability in the indorsement itself.

He is liable as a surety for the maker, but he is also, in the absence of a contract to the contrary, liable as principal to his endorsee. A holder having duly presented the instrument and given notice of dishonour is not bound to sue the drawer before he sues his immediate indorser; he has a right at once to sue the indorser without impleading the drawer in the same suit.

Gopal Das v. Seetaram, 3 Agra 268, relied upon.

JUDGMENT.—The firm of A. S. P. L. S. sued the makers of a promissory note together with their indorser, the respondent. The note was in favour of the P. L. V. R. M. firm and was indorsed by their agent-respondent and delivered to plaintiff. The indorsement is in full and runs:—"Principal and interest due on this should be paid to A. S. P. L. S. Kadirasen Chetty, signed P. L. V R. M. Lakshman and P. L. V. R. M.'s attorney, Vyravan Pillay."

Plaintiff made demand from the maker of the note, who failed to pay, and then applied to the respondent, who asked him to make further demands and said if they were unsuccessful, he would pay: the further demands were unsuccessful.

Respondent pleaded that the note was indorsed and handed to plaintiff in full satisfaction of a debt and that he was not liable to pay it. Under the circumstances, this was no defence. The Township Court, however, framed an issue as to whether respondent promised to pay if the makers of the note failed to do so, laid the burden on plaintiff, and holding that he has failed to prove the agreement, dismissed the suit as against respondent. This was confirmed on appeal. Plaintiff has now applied for revision. Sections 35, 37 and 38 of the Negotiable Instruments Act are quite plain as to the liabilities of indorsers. The indorser is liable to every subsequent holder in case of dishonour by the drawer, provided he has received due notice of his dishonour, unless (*a*) there is a contract to the contrary or (*b*) he expressly excludes or limits his liability in the indorsement itself.

He is liable as a surety for the maker, but he is, also, in the absence of a contract to the contrary, liable as principal to his indorsee. He is liable in default of payment by the drawer to be sued immediately by the holder. This liability is not affected by the fact that the holder does not implead the drawer in the same suit, for "a holder having duly presented the instrument and given notice of dishonour, is not bound to sue the drawers before he sues his immediate indorser; he has a right at once to sue the indorser." *Gopal Dass* v. *Seetaram* (1).

In the present case, there was failure to pay on the part of the drawers and notice of dishonour to the indorser. He can only escape liability if his indorsement excludes or limits it, which is not the case; or if he can prove that there was a contract excluding or limiting it either under section 35 or section 38 and this he made no attempt to do. He was, therefore, liable by law and plaintiff was entitled to a decree against him. The decree will be amended accordingly with costs against the respondent in all Courts, Advocate's fees in this Court, two gold *mohurs*.

Decree amended.

(1) 3 Agra 268.

SPECIAL OFFICER, SALSETTE BUILDING SITES *v.* DOSABHAI.

BOMBAY HIGH COURT.

CIVIL APPLICATION No 442 OF 1912.

October 4, 1912.

Present:—Mr. Justice Batchelor and Mr. Justice Heaton.

THE SPECIAL OFFICER, SALSETTE BUILDING SITES—APPLICANT

versus

DOSABHAI BEZONJI MOTIVALA, —OPPONENT.

Privy Council Appeal—High Court's decision in Land Acquisition case—Letters Patent (Bombay), cl. 39—Final judgment or order—Land Acquisition Act (I of 1894), s. 54.

No appeal lies to the Privy Council from a decision of the High Court under section 54 of the Land Acquisition Act, although the value of the property involved in the case exceeds Rs. 10,000 and a substantial point of law is involved in the judgment.

The Land Acquisition Act is a special statute enacted to deal with a certain special class of cases and the orders made thereunder are outside the ordinary course of the Civil Court's jurisdiction.

Since the Act itself gives no right of appeal to the Privy Council, no such right exists.

An award made in a land acquisition case by the High Court is not a decree within the ordinary jurisdiction to which the Civil Procedure Code refers. Nor is it a final judgment or order within the meaning of section 39 of the Letters Patent.

Mr. *Jardine*, Acting Advocate-General, with him Mr. *R. W. Lesai*, for the Applicant.

Mr. *Weldon*, with him Messrs *Smetham & Co.*, for the Opponent.

JUDGMENT.

BATCHELOR, J.—This is an application for leave to appeal to the Privy Council in the matter of an award made by this Court on appeal from the Court of the District Judge. The proceedings were taken under the Land Acquisition Act (I of 1894), and the question raised was as to the value of certain land acquired under that Statute by the Government. It is admitted that the value of the property involved in this application exceeds Rs. 10,000, and it is also admitted that a substantial point of law is involved in this Court's judgment with reference to the position occupied by the Special Collector under the Land Acquisition Act. The difficulty, however, in the way of the applicant is furnished by the judgment of their Lordships of the Privy Council in the *Rangoon Botatoung Company Limited* v. *The Collector, Rangoon* (1). *Prima facie*, as the learned Advocate-General admitted, this decision seems to bar the applicant's right to appeal to the Privy Council. It was sought, however, to escape from the effect of the decision by the argument that in that case the Privy Council were dealing with the Chief Court of Lower Burma, a Court which is constituted under an Act of the Indian Legislature and not under the Letters Patent, whereas, the argument runs, this Court is constituted under the Letters Patent, and although the applicant may have no right of appeal under the Civil Procedure Code, he should be considered to have that right under clause 39 of the Letters Patent. It appears that in the argument before the Privy Council in the *Rangoon Company's* case (1), there was no reference to this clause of the Letters Patent; and indeed any such reference would have been irrelevant.

The question we have to decide is, whether the existence of this clause gives the applicant a right of appeal, which otherwise he would not have. The words of the clause upon which reliance is placed are these:—"And we do further ordain that any person or persons may appeal to Us, Our heirs and successors, in Our or their Privy Council, in any matter not being of criminal jurisdiction, from any final judgment, decree, or order of the said High Court." It is urged that this Court's award, in the appeal from the District Judge, is, if not a decree or order, at least a final judgment within the meaning of the clause. It appears to me, however, that this view cannot be held consistently with the judgment of the Privy Council.

As I read that judgment, it proceeds upon the footing that the Land Acquisition Act is a special Statute enacted to deal with a certain special class of cases, that orders made thereunder are outside the ordinary course of the Civil Court's jurisdiction, and that, since the Act itself gives no right of appeal to the Privy Council, no such right exists. The High Court is referred to by their Lordships as the ultimate umpire in a series of arbitration proceedings; and the judgment, after referring to section 54 of the Land Acquisition Act, as authorizing an appeal to the High Court but not beyond it, goes on:—"Their Lordships cannot accept the argument or suggestion that when once the claimant is admitted to the High Court

(1) 14 Bom. L. R. 833; 16 C. W. N. 961; 12 M. L. T. 195; (1912) M. W. N. 781; 16 C. L. J. 245; 22 M. L. J. 276; 10 A. L. J. 271; 5 Bur. L. T. 205, 207; 16 Ind. Cas. 188.

he has all the rights of an ordinary suitor, including the right to carry an award made in an arbitration as to the value of land taken for public purposes up to this Board as if it were a decree of the High Court made in the course of its ordinary jurisdiction." This passage shows that it is a mistake to suppose that the award made in such a case by the High Court is a decree within the ordinary jurisdiction to which the Civil Procedure Code refers; and it seems to me it would be equally erroneous to regard such an award as a final judgment or order within the meaning of clause 39 of the Letters Patent. I am of opinion that it follows from the judgment of the Privy Council that such an award as this is as much outside the purview of clause 39 of the Letters Patent, as it is outside the provisions of the Civil Procedure Code. For the Letters Patent, like the Code, make provision for appeals from such judgments, decrees and orders as are passed by this Court in the exercise of its usual civil jurisdiction; and they cannot, I think, be invoked to sustain an appeal from a determination which must be regarded as a mere award by a final arbitrator under a Special Act, which does not confer any such right of appeal. In any event, and putting the matter on its lowest footing, I think that after the judgment by the Privy Council in the Rangoon case, the only safe position for us now is to refrain from presuming to grant the certificate applied for, and to leave it to their Lordships of the Privy Council to admit the appeal, if it is to be admitted, upon the somewhat fine distinction which the learned Advocate-General has contended for. So far as we are concerned, I think we ought to say that clause 39 of the Letters Patent does not avail to take the case out of the general rule laid down by the Judicial Committee.

On these grounds, I am of opinion that the rule should be discharged with costs.

At the Advocate-General's suggestion, we note that he applied for leave to put in an affidavit in reply to an affidavit recently filed by the respondent.

HEATON, J.—I am of the same opinion.

Rule discharged.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 644 OF 1911.

November 25, 1912.

Present:—Sir Ralph Benson, Kt., Judge, and Mr. Justice Sundara Aiyar.

THE SECRETARY OF STATE FOR INDIA IN COUNCIL, REPRESENTED BY THE COLLECTOR OF KISTNA—APPELLANT

versus

PENUMACHA VENKATAPATHA RAJU AND ANOTHER—RESPONDENTS.

Jurisdiction of Civil Court—Suit for refund of land revenue—Land revenue, nature of—Madras Rent Recovery Act II of 1864), s. 58.

Land revenue is a tax imposed on lands by virtue of the prerogative of the State. The liabilty to pay land revenue does not rest on contract or some relation resembling contract.

It is entirely a matter for Government to decide what amount of revenue should be levied on any land and Civil Courts have no jurisdiction to try any question relating to it.

A suit for refund of land revenue on the ground that as the Government failed to supply water for raising wet crops, it was not entitled to levy the revenue assessed on it, does not lie in a Civil Court.

Second appeal from the decree of the Subordinate Judge of Kistna at Ellore, in Appeal Suit No. 45 of 1910, presented against that of the Additional District Munsif of Tanuku, in Original Suit No. 304 of 1903.

The *Government Pleader*, for the Appellant.

Mr. *P. Narayana Murti*, for the Respondents.

JUDGMENT.—The decrees of the lower Courts are altogether unsupportable. The land is admittedly classed as wet land, and no cess was levied from the plaintiffs under Act VII of 1865. The suit is, therefore, one for refund of land revenue on the ground that as the Government failed to supply water for raising wet crops, it was not entitled to levy the revenue assessed on the land. It is entirely a matter for Government to decide what amount of revenue should be levied on any land and Civil Courts have no jurisdiction to try any question relating to it. (Section 58 of the Madras Revenue Recovery Act, II of 1864). The lower Courts are quite wrong in supposing that the liability to pay land revenue rests on contract or some relation resembling contract. Land revenue is a tax imposed on lands by virtue of the prerogative of the State. The plaintiffs were bound to pay it whether water was available or not for wet cultivation. If they regarded the tax as excessive, their proper and only remedy was

to appeal to Government for the reduction of the tax. The decrees of the lower Courts are reversed and the suit is dismissed with costs throughout.

Decree reversed: Suit dismissed.

LOWER BURMA CHIEF COURT.

FIRST CIVIL APPEAL No. 86 OF 1910.

May 20, 1912.

Present:—Sir Charles Fox, KT, Chief Judge, and Mr. Justice Hartnoll.

MG SAN U AND ANOTHER—APPELLANTS

versus

MA HMYIN AND ANOTHER—RESPONDENTS.

Sale of interest in land in Rangoon—Verbal sale in 1890—Validity of sale—Transfer of Property Act (IV of 1882)—Law applicable prior to such extension—Burma Laws Act (XIII of 1898), s. 13.

The Transfer of Property Act was first extended to the local limits of the ordinary Civil jurisdiction of the Recorder of Rangoon from the 1st January 1893.

Under sub-section 2, section 13 of the Burma Laws Act, all questions arising in Civil cases instituted in the Courts of Rangoon were to be dealt with and determined according to the law for the time being administered by the High Court of Judicature at Fort William in Bengal in the exercise of its ordinary Civil jurisdiction.

A verbal sale for Rs. 350 of a share in immoveable property at Rangoon in 1890, after the Transfer of Property Act was applied to the whole of Bengal from the first July 1882, though prior to the extension of the Act to Rangoon, is invalid inasmuch as it would have been invalid if it had taken place in Calcutta in that year.

Mr. *Ginwala*, for the Appellants.

Mr. *Dantra*, for the Respondents.

JUDGMENT.

FOX, C. J.—The suit was for a declaration of ownership of a share in land within the limits of Rangoon Municipality, and for an injunction restraining the defendants from interfering with the plaintiffs and their tenants in the possession of the land and from trespassing on it.

The plaintiffs relied on a verbal sale for Rs. 350 by the defendant's father to their parents of his share in the land, effected in the year 1890 before the Transfer of Property Act had been extended to Rangoon.

That Act was first extended to Rangoon or more correctly to the area within the local limits of the ordinary Civil Jurisdiction of the Recorder of Rangoon as from the 1st January 1893 by Judicial Department Notification No. 236 of 1892, dated the 20th June in that year.

The first question which arises is whether a verbal sale of land or of an interest in land within the then Municipal limits of Rangoon which were within the Civil Jurisdiction of the Recorder was valid or not.

Section 13 of the Burma Laws Act, 1898, states the law to be applied to the question. Since no question of succession, inheritance, marriage or caste or any religious usage or institution is concerned, Buddhist Law is not applicable to the case although the parties are Buddhists.

Sub-section 2 of the section enacts that subject to the provisions of sub-section 1, which declares what laws are to be applied when questions regarding succession, etc., arise, and subject to provisions of any enactment for the time being in force, all questions arising in civil cases instituted in the Courts of Rangoon shall be dealt with and determined according to the law for the time being administered by the High Court of Judicature at Fort William in Bengal in the exercise of its ordinary Civil Jurisdiction.

Taking it that the law to be applied was that in force at the time of the verbal sale, the Calcutta High Court then administered the Transfer of Property Act, since the Act applied to the whole of Bengal from the date (the 1st July 1882) on which it came into force. Consequently, a verbal sale of an interest in land for over Rs. 100 being invalid in Calcutta in 1890, it must be held that a verbal sale of an interest in land for over Rs. 100 in Rangoon was also invalid at that time, although the Transfer of Property Act had not been then extended by the Local Government to Rangoon.

I do not think it necessary to consider what law was applicable in Calcutta to transfers of land in it before the Transfer of Property Act was passed. A very interesting note by Mr. Whitley Stokes printed in the preface to the Government Collection of Statutes relating to India issued in 1881 contains much information on the subject as does Chapter IV of Sir Courtenay Ilbert's Government of India. It may be noted that sections 1, 2, 3 and 17 of the Statute of Frauds were not repealed until 1872, when they were

repealed by the Indian Contract Act as from the 1st September 1872.

The basis of the plaintiffs' suit not having given them a title to what they claimed, I would allow the appeal, reverse the decree of the original Court and dismiss the suit with costs. I do not see any sufficient ground for departing from the ordinary rule and would order the plaintiffs to pay the defendant's costs of this appeal.

HARTNOLL, J.—I concur.

Appeal allowed.

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL No. 584 OF 1908.

October 7, 1912.

Present:—Mr. Justice Batchelor and Mr. Justice Rao.

JAGU BABAJI VARANG—PLAINTIFFS—APPELLANTS

versus

BALU LAXMAN VARANG—RESPONDENTS.

Civil Procedure Code (Act XIV of 1882), ss. 13, 244—Res judicata—*Partition suit—Decree declaring right to partition—Actual partition not effected—Execution of decree barred - Subsequent suit for partition.*

Where a decree declaring a right to partition has not been given effect to by the parties proceeding to partition in accordance with it, it is competent to the parties or any of them, if they still continue to be interested in the joint property, to bring another suit for partition in case their right to partition is called in question at a time when, by reason of limitation or otherwise, they cannot put into effect the decree first obtained.

Such a decree amounts to nothing more than an inchoate partition insufficient to change the character of the property, which continues a joint estate until there has been an actual partition by metes or bounds, or a division of title.

Nasratullah v. *Mujibullah*, 13 A. 309; A.W.N. (1891) 117 and *Babaji Parshram* v. *Kashibai*, 3 B. 157, relied upon.

Second appeal from the decision of the Assistant Judge of Ratnagiri, in Appeal No. 344 of 1905, confirming that passed by the Subordinate Judge of Deoghad, in Civil Suit No. 198 of 1904.

Mr. *A. G. Desai*, for the Plaintiff.

Mr. *K. N. Koyajee*, for Respondents Nos. 1, 4, 5, 7, 12, 18 and 30.

Mr. *P. D. Bhide*, for Respondents Nos. 43 and 44

JUDGMENT.—The plaintiff brought this suit to obtain by partition his 1/84th share in the Khoti village of Savdav. Some of the defendants also prayed for a partition of their shares. The plaintiff and the defendants Nos. 1 to 78 belong to one family whose surname is Varang. The defendants Nos. 79 to 97 are members of another family named Desai. With the other defendants, we are not now concerned. The present appellants were defendants Nos. 11 to 26, and are some of the Varang family. Of the various contentions raised by the present appellants in the Court below, the learned Pleader, Mr. Desai, has selected a single contention as the basis of this appeal. That contention is that the Desai defendants were not entitled in this suit to ask for a partition of any share in the village as belonging to them, because they had filed a previous suit for partition in 1854 and in that suit had been awarded a one-half share in the village. This position was taken by the appellants-defendants in both the Courts below, and both the Courts have disallowed it; and the only question before us is whether the Courts were wrong in the view which they took in this matter.

Mr. Desai has urged that the defendants Desais, although occupying the position of defendants on the record, ought to be considered as plaintiffs, in so far as they assert a claim on their own behalf. But, argues the learned Pleader, by the operation of section 13 and section 244 of the old Civil Procedure Code, the Desais would be barred from bringing the present suit to obtain their share in the village, inasmuch as they had obtained a decree in the 1854 suit and that decree had remained unexecuted. If, then, they would be unable to urge their present claim in a suit of their own, it is argued that they are equally unable to assert their claim while occupying the position of defendants on the record. It appears to us, however, that the point is really decided by the character of the decree of 854. As we read that decree, it is merely a declaratory decree pronouncing that the then Desai plaintiffs were entitled to one-half of the village on a general partition being made. Such a decree as that takes this case out of the scope of the authority of this Court's judgment in *Soni Maganlal* v. *Munshi Himatbhai* (1), where Mr. Justice Ranade, in dis-

(1) 3 Bom. L. R. 94.

CHAN THA U *v.* NAW BI.

tinguishing *Nasratullah* v. *Mujibullah* (2), is careful to point out that in the case before him, there was a decree not merely declaring the parties' rights to partition, but awarding the northern half of the property in suit to one party and the southern half to the other. In the learned Judge's own words, that was a decree "actually making the partition," by metes and bounds. Here since we have nothing more than a declaratory decree, the case resembles *Nasratullah* v. *Mujibullah* (2), where the learned Judges in considering the effect of such a decree observe: "It appears to us that when a decree declaring a right to partition has not been given effect to by the parties proceeding to partition in accordance with it, it is competent for the parties, or any of them, if they still continue to be interested in the joint property, to bring another suit for a declaration of a right to a partition in case their right to partition is called in question at a time when, by reason of limitation or otherwise, they cannot put into effect the decree first obtained. In this respect, suits for declaration of right to partition differ from most other suits. So long as the property is jointly held, so long does a right to partition continue." Reference may also be made to *Babaji Parshram* v. *Kashibai* (3), where this Court held that such a decree amounted to nothing more than an inchoate partition insufficient to change the character of the property, which continues a joint estate until there has been an actual partition by metes and bounds, or a division of title In our opinion, this is a correct statement of the law applicable to such a case as this. Not only was the decree merely a declaratory decree but it was never executed, and the lower Court has found that after the decree, the old arrangement concerning the holding of the lands by various members of the family continued as before, and was unaffected by the passing of the decree. We are, therefore, of opinion that the argument upon this point for the appellants fails and we must dismiss the appeal with costs.

The cross-objections which are not pressed are dismissed with costs.

Appeal dismissed.

(2) 13 A. 309 at p. 313; A. W. N. (1891) 117.
(3) 4 B. 157.

LOWER BURMA CHIEF COURT.

SECOND CIVIL APPEAL NO. 39 OF 1911.
May 23, 1912.
Present:—Mr. Justice Young.

CHAN THA U AND OTHERS—DEFENDANTS—APPELLANTS

versus

NAW BI—PLAINTIFFS—RESPONDENTS.

Buddhist Law—Hnapazon *property*—*Widow's right to alienate*—*Burden of proving necessity lies on mortgagee.*

A widow's interest in *hnapazone* property is one half with a life-interest in the remainder

Mo Thi v. *Tha Kwe*, 4 L. B. R. 128, followed.

Any mortgage by a widow of such property will be valid to the extent of half of it unless there is evidence to show that the mortgage was for the necessities of the family and the burden of proof of such necessity lies on the mortgagee.

Shwe Yo v. *Shan Bu*, S. J. 108; *Ma Shwe* v. *Ma Kyu*, 3 L. B. R. 66, relied upon.

Appeal against the judgment and decree of the Divisional Judge of Arakan confirming that of the Township Court of Myebin.

Mr. *Halkar*, for the Appellants.

Mr. *Israil Khan*, for the Respondents.

JUDGMENT —This is a suit on a mortgage by a widow of what was admittedly *hnapazon* property.

In the Court of first instance, it was alleged that the widow was in her dotage and that the property was *hnapazon* and the Court held that she was not in her dotage and that she had full power to mortgage.

In appeal, it was urged that as the property was *hnapazon*, she had no right to alienate the whole but it was found by the learned Judge that as it was managed for the joint benefit of herself and the children, she could validly mortgage it.

There does not seem any evidence that the mortgage was for the necessities of the family. In the absence of proof of such necessity, the *onus* of which lies on the mortgagor, a Buddhist widow cannot alienate the whole of the *hnapazon* property. She can only alienate her share. Vide *Shwe Yo* v. *San Bu* (1), and *Ma Shwe* v. *Ma Kyu* (2).

There is no such proof in the present case: the widow's interest in the property is half with a life-interest in the remainder, *Mo Thi* v. *Tha Kwe* (3).

The mortgage was valid to that extent. [Vide *Ma Shwe* v. *Ma Kyu* (2)]. Her life-

(1) S. J. P 108.
(2) 3 L. B. R. 66.
(3) 4 L. B. R. 128.

interest has lapsed with her death and the mortgage is valid to the extent of half the property. The appeal, therefore, succeeds and the decree of the original Court must be varied with costs.

Appeal allowed.

CALCUTTA HIGH COURT.

REGULAR CIVIL APPEAL No. 431 OF 1903.

August 27, 1912.

Present:—Sir Ashutosh Mookerjee, Kt., Judge, and Mr. Justice Beachcroft.

BHICHA RAM SAHU—PLAINTIFF—APPELLANT

versus

BISHAMBHAR NATH SAHI—DEFENDANT—RESPONDENT.

Chota Nagpur Encumbered Estates Act (VI of 1876 B. C.), whether applicable to land outside Chota Nagpur—Scope and effect of Act.

The Chota Nagpur Encumbered Estates Act has no application to land lying outside of Chota Nagpur; and, consequently, the privilege enjoyed by a mortgagee from the proprietor in respect of such land to enforce his rights in a Court of ordinary Civil Jurisdiction, has not been abrogated or struck at by any of the provisions of the statute.

Per *Mookerjee, J.*—The scope of the Act is limited by political or administrative considerations which underlie it. The effect of the statute is to confer special privileges upon a particular class of persons, who are described as holders of land in Chota Nagpur. One of these privileges is that the question of liability for their debts and the mode of their satisfaction is determined not by the regular Courts, but by the Manager. A statute of this description, which abridges the jurisdiction of the Civil Courts, must be strictly construed, and in the absence of a statutory provision, which expressly or by necessary implication, lays down that the Act applies to all lands in British India owned by holders of land in Chota Nagpur, the statute should not be given such extensive an application.

Appeal from the decree of the Sub-Judge of Arrah, dated June 10th, 1908.

Dr. *Rash Behary Ghose*, Babus *Lachmi Narain Singh* and *Sarat Chandra Mukerji*, for the Appellant.

Mr. *G. H. B Kenrick, K. C.*, Advocate-General, Babus *Ram Charan Mitra*, Senior Government Pleader, *Umakali Mukerji* and *Srish Chandra Chowdhry*, Junior Government Pleader, for the Respondent.

JUDGMENT.

MOOKERJEE, J.—This appeal is directed against the decree of dismissal in a suit to enforce a mortgage security executed by the first defendant in favour of the plaintiff on the 21st October 1902 On the 17th August 1905, the first defendant was declared a disqualified proprietor under the Chota Nagpur Encumbered Estates Act, 1876, and his estate was vested in a Manager appointed under section 2 of that Act. In answer to a notification issued by the Manager, the plaintiff preferred his claim before him on the 4th January 1906. On the 16th August 1906, the Manager determined that he was entitled to realise Rs. 6,343 on the bond and stated that an effort would be made to pay off his dues. The plaintiff, however, objected that Act VI of 1876 could not affect his claim under the bond, as the mortgaged property lay in the District of Shahabad beyond the limits of Chota Nagpur. The Deputy Commissioner, on the 24th October 1906, referred the plaintiff to the Civil Court for the determination of this objection. The plaintiff thereupon commenced the present action on the 19th September 1907 in the Court of the Subordinate Judge of Arrah to realise his dues by sale of the mortgaged properties. The defendant, represented by the Manager, disputed the amount due and urged that the suit was barred by the provisions of Act VI of 1876. The Subordinate Judge has given effect to the latter objection and has dismissed the suit. On the present appeal, the question in controversy is, whether under Act VI of 1876, a vesting order can be made in respect of land lying beyond the limits of Chota Nagpur. On behalf of the appellant, reliance has been placed upon the case of *Ajodhya Nath Chowdhury* v. *Keshub Chandra Mukerjee* (1), but it has not been disputed that the weight of that decision as a binding authority is diminished by the fact that the Court based its conclusion upon admission of Counsel. Reference has also been made to the view taken by the Board of Revenue as to the scope of the Chota Nagpur Encumbered Estates Act. But even if it be assumed that the interpretation placed upon the statute by the Board of Revenue is admissible on the question of its true construction, no assistance is derivable from that quarter, because the Board of Revenue has held contrary views on the subject at different times; the earlier view was in favour of

(1) 11 C. W. N. 1127.

BHICHA RAM v. BISHAMBHAR NATH.

the contention of the plaintiff; its later pronouncement supports the contention of the defendant. Under these circumstances, the scope of the Chota Nagpur Encumbered Estates Act must be determined from an examination of its provisions.

It is well-known that the Chota Nagpur Encumbered Estates Act was modelled on the Oudh Talukdars Relief Act 1870. The preamble states that the object of the statute was to provide for the relief of holders of land in Chota Nagpur, who may be in debt and whose immoveable property may be subject to mortgages, charges and liens. This is further emphasised by the provision in section 2 that where a holder, who has entered upon a course of wasteful extravagance likely to dissipate his property, seeks the protection of the statute, the Lieutenant-Governor shall not assent to the application of the Act in his case, unless such holder belongs to a family of political or social importance or the Lieutenant Governor is satisfied that it is desirable in the interests of the tenants of such holder that his consent should be given. The scope of the statute, therefore, is limited by political or administrative considerations which underlie it, and it must be clearly made out that the statute was intended to have operation not only in respect of land in Chota Nagpur but in respect of all land wherever situated in British India, provided it was owned by a holder of land in Chota Nagpur of the class mentioned. It may be conceded that the introductory words of section 2, namely, "any holder of immoveable property" are of great generality, but the application of these words is obviously limited by the preamble and also by the expression which follows, namely, "the Deputy Commissioner within whose jurisdiction any such property belonging to such holder is situate." This latter expression plainly indicates that the statute was intended to apply to immoveable property in Chota Nagpur, because there is no Deputy Commissioner in a Regulation District. Much stress was laid on the provision in section 2, whereby the Commissioner is authorised to vest in the Manager the management of the whole or any portion of the immoveable property of the holder of or to which the holder is then possessed or entitled, in his own right, or which he is entitled to redeem. This provision, it was contended with much force, had an absolutely unrestricted scope, and was comprehensive enough to include land in any part of British India. Reference was made in this connection to the first clause of section 3 which describes the effect of a vesting order, namely, that all proceedings pending at the time of the publication of the order in any Civil Court in British India or in any Revenue Court in Bengal in respect of the debts or liabilities to which the holder is subject shall be barred. The first clause of section 3 does not, in my opinion, assist the contention of the respondent; what is barred is a proceeding in respect of the debts or liabilities to which the holder is subject, which, as is plain from section 2, are differentiated from the debts and liabilities with which his immoveable property is charged. Nor does the third clause of section 3, upon which reliance was placed, really avail the respondent; it exempts the immoveable property of the holder from attachment or sale under process of any Civil Court in British India or any Revenue Court in Bengal, for or in respect of the debts and liabilities to which the holder was personally subject before the publication of the vesting order. This exemption clearly applies only to property vested in the Manager and does not throw any light upon the question now in controversy, namely, what property can be validly vested in the Manager under the statute; on the other hand, there are provisions in the statute which plainly indicate its limited scope. Sections 6, 7, 8, and 9, which find a place in the fourth part of the Act, on settlement of debts, deal with the procedure to be followed by the Manager in the determination of debts and inquiry into consideration for leases and grants. Section 10 provides for an appeal from the decision of the Manager to the Deputy Commissioner within whose jurisdiction the property is situated If we were to accept the contention of the respondent, the Manager might be called upon to decide a question under section 9 in respect of property situated in any part of British India not within the jurisdiction of a Deputy Commissioner; in such a contingency, the provision for appeal in section 10 would be obviously illusory. Again, section 16 which confers on the Manager the powers possessed by the holder for the purpose of realising and recovering the rents and profits,

also entitles him to recover property in the possession of a mortgagee or conditional vendee by an application to the Court of the Deputy Commissioner within whose jurisdiction such property is situated. Here again, if the contention of the respondent is well founded, the summary remedy provided must prove entirely unavailing in respect of land situated in Regulation Districts. In my opinion, sections 10 and 16 plainly indicate that the framers of the statute had in view its application to land situated in Chota Nagpur and not in any other part of British India. Reference may also be made to section 23 which saves the jurisdiction of Courts in Chota Nagpur in respect of suits relating to the succession to or claims of maintenance from land brought under the operation of the statute. Here, again, it is difficult to appreciate why the jurisdiction of Courts in Chota Nagpur alone should be saved in this manner; if the view maintained by the respondent is well-founded, the questions mentioned may arise in respect of land situated in any part of British India; and if the framers of the statute had this contingency in view, they would have inserted a saving clause of a more comprehensive character, applicable in terms to all Civil Courts in British India. It may be observed incidentally that the Act contemplates in various places, for instance, in sections 9 and 10, that the Deputy Commissioner himself may be appointed the Manager; to say the least, it seems improbable that the Legislature should have considered it likely that an official of the rank of Deputy Commissioner should undertake the management of an encumbered estate scattered in different parts of British India. In my opinion, the internal evidence furnished by the provisions of the statute points unmistakeably to its restricted scope. As Mr. Justice Richardson observed in *Mathewson* v. *Ram Kanai Singha* (2), the Act is not scientifically drawn, but is a rough and ready measure applicable to a backward part of the country. Its provisions, as Mr. Justice Pigot pointed out in *Kameshar Prasad* v. *Bhikhan Narain* (3), were intended to afford relief to holders of land in Chota Nagpur who might be in debt and whose land might be subject to charges; it created, therefore, a sort of administration of the immoveable estate of the debtor, in some respects resembling that pursued in an administration suit, but with this material difference that whereas in an administration suit, the satisfaction of the claims of the creditors is primarily in view, in proceedings under this statute, the protection of the debtor and the preservation of his estate as far as practicable inspite of its encumbered condition, is the main solicitude of the authorities concerned. In view of this fundamental difference, I am unable to accept the analogy suggested by the learned Advocate-General between a proceeding under the statute, and a proceeding for administration where the property to be administered may lie outside the jurisdiction of the administering Court. As Mr Justice Pigot observed, the Act is so framed as to render it not easy to construe. But an examination of its various provisions, furnishes, to my mind, ample indication that the Legislature had in view their application only to lands in Chota Nagpur. The wider application claimed by the respondent would lead us into obvious difficulties and would be contrary to the well-settled canon that statutes which confer exceptional exemption and privileges, correlatively trenching on general rights, are subject to the principle of strict construction: *R.* v. *Hull Dock Co.*, (4), *Brunskill* v. *Watson* (5). The effect of the statute is to confer special privileges upon a particular class of persons who are described as holders of land in Chota Nagpur. One of these privileges is that the question of liability for their debts and the mode of their satisfaction is determined not by the regular Courts but by the Manager. A statute of this description, which abridges the jurisdiction of the Civil Courts, must be strictly construed; and in the absence of a statutory provision, which expressly or by necessary implication, lays down that the Act applies to all lands in British India owned by holders of land in Chota Nagpur, I must decline to give the statute so extensive an application. I am not impressed by the difficulties which, it has been suggested,

(2) 36 C. 675 at p. 710; 9 C. L. J. 523; 1 Ind. Cas. 626.

(3) 20 C. 609 at p. 623.

(4) (1824) 3 B. & C. 516; 5 D. & R. 359.

(5) (1868) 3 Q. B. 418; 37 L. M. C. 103; 18 L. T. 432; 16 W. R. 1009.

may follow the view I propose to take; the question of management of the property, if any, of the disqualified proprietor beyond the limits of Chota Nagpur certainly does not present any formidable difficulty; nor, so far as I can see, is any special embarrassment likely to be created by the cessation of the power of the proprietor to enter into contracts which involve a pecuniary liability. To my mind, it is a sound and reasonable interpretation of the statute to hold that it has no application to land outside Chota Nagpur and that the privilege enjoyed by a mortgagee from the proprietor in respect of such land to enforce his rights in a Court of ordinary Civil Jurisdiction, has not been abrogated or struck at by any of the provisions of the statute.

The result is that this appeal must be allowed, the decree of the Subordinate Judge discharged and the case remanded to him for trial on the merits. The appellant is entitled to his costs in this Court; and under section 13 of the Court Fees Act, we direct that the amount of Court-fee paid on the memorandum of appeal to this Court be refunded to him.

BEACHCROFT, J.—The only question for consideration in this appeal is, whether the Chota Nagpur Encumbered Estates Act VI of 1876 applies to land lying outside of Chota Nagpur or whether its operation is limited to land lying within that area.

The question is practically one of first impression, for though it has once been considered by this Court in the case of *Ajodhya Nath Chowdhury* v. *Keshub Chandra Mukerjee* (1), the decision in that case appears to have been based on the admission of learned Vakils who appeared for the respondents and on a note in the Encumbered Estates Manual of the Board of Revenue, a note which no longer finds a place in that Manual. The case must, therefore, be considered entirely on the provisions of the Act itself. But before proceeding to a consideration of those provisions, it may be observed that the Act is political in its origin and exceptional in its nature, the object of it apparently being to preserve the old families and estates of Chota Nagpur.

The Act is described as "an Act to relieve certain land-holders in Chota Nagpur" and the preamble begins "whereas it is expedient to provide for the relief of holders of land in Chota Nagpur." With section 2 begins Chapter 11 and the effective part of the Act. This Chapter deals with a vesting order and the effect of such an order. Section 2 provides that "whenever any holder of immoveable property or, when any such property belonging to such holder has been attached in execution of a decree of a Civil Court, the Deputy Commissioner within whose jurisdiction such property is situate applies in writing to the Commissioner requesting that the provisions of the Act be applied to his case, the Commissioner may appoint an officer (hereinafter called the Manager) and vest in him the management of the whole or any portion of the immoveable property of or to which the said holder is then possessed or entitled in his own right." Section 3 provides that on the publication of an order under section 2, (1) all proceedings pending in any Civil Court in British India in respect to the debts and liabilities stated in the application shall be barred and all processes, executions and attachments for or in respect of such debts and liabilities shall become null and void, (2) the holder of the said property shall not be liable to arrest for the debts and liabilities and his moveable property shall not be liable to attachment or sale under process of any Civil Court in British India, and (3) the holder of the said immoveable property shall be incompetent to deal with the immoveable property and incapable of entering into any contract which may involve him in pecuniary liability. It is obvious that the opening words of section 2 "whenever any holder of immoveable property" cannot be of universal application, but can refer only to such holders of property as are described in the preamble, *viz.*, holders in Chota Nagpur. It is also obvious that the word "property" in the clause referring to the application to be made by the Deputy Commissioner can only refer to land in Chota Nagpur. It, therefore, follows that the application for a vesting order can originate only when made by a holder of land in Chota Nagpur, or when land in Chota Nagpur has been attached in execution of a decree of a civil suit.

Any difficulty that is to be felt in a

consideration of the question before us arises from the words....."the Commissioner may vest in him (*i. e.*, the Manager) the management of the whole or any portion of the immoveable property of or to which the said holder is then possessed or entitled." The words as they stand appear to be subject to no limitation, nor is any clause to be found in the Act which in terms limits the vesting order to property in Chota Nagpur. And if the vesting order covers all immoveable property of the holder whether lying within or without Chota Nagpur, proceedings in the Civil Courts to enforce liabilities with which any of the property is charged are barred.

The learned Advocate General, who appears for the respondent, supports his contention that the words above quoted in regard to the vesting order are of unlimited application, by drawing a parallel between proceedings under this Act and a scheme for the administration of an insolvent's estate and he endeavours to support the parallel by reference to the cessation of contractual power or power to alienate the property, in the holder, which is one of the consequences of a vesting order. Now there is a fundamental difference between a scheme for the management of an estate under this Act and a scheme of administration in insolvency. A scheme of the latter class is for the benefit of the insolvent's creditors, while proceedings under the Act are for the benefit of the disqualified proprietor and can by no stretch of imagination be considered to be for the benefit of creditors. In the next place, if the vesting order can apply only to property within Chota Nagpur, it follows as a necessary consequence that the cessation of power to alienate can also apply only to such property. And so far as there is an absolute cessation of contractual power, it is to be noticed that the disability applies only to contracts which may involve the holder in pecuniary liability. The contracts referred to cannot include transactions of the nature of mortgages, for such are included in clause (*a*) of sub-section 3. The practical effect then is that if land outside Chota Nagpur cannot be included in the vesting order, there is no disability imposed on the holder to deal with such land and the basis of the argument of the learned Advocate-General is removed.

Though there is no clause limiting in express terms the application of the vesting order to property lying within Chota Nagpur, there are two sections in the Act which indicate that only such property is to be dealt with under the Act. Section 10, which provides for appeals against orders passed under sections 6, 7, 8 or 9, provides that they shall lie to the Deputy Commissioner "within whose jurisdiction the property is situate," the same phrase which occurs in section 2. This section clearly contemplates the possibility of land of a disqualified proprietor lying in more districts than one, but the words "Deputy Commissioner" can apply only to the principal Revenue Officer of the Non-Regulation Districts of Chota Nagpur, and not to officials in the Regulation Districts. The same words occur in section 16, the section which enables the Manager to obtain possession of property in the possession of a mortgagee or conditional vendee, by application to the Deputy Commissioner. It is evidently intended that the Manager should be enabled by this section to obtain possession of any property the management of which has been vested in him, yet the section provides a procedure for doing so, which is applicable to Chota Nagpur alone. The language in these two sections seems to exclude the idea that it was ever contemplated that the provisions of the Act should be applied to land lying outside Chota Nagpur, and in the case of an Act of such exceptional nature as the Act under consideration, an Act the provisions of which are framed solely in the interest of a small class in derogation of all the ordinary rights of creditors, its provisions must be construed strictly, and the ordinary rights of creditors must not be interfered with unless the Act provides in plain and unequivocal terms that they shall be.

Finally, section 23 seems to point to the same conclusion. It saves the jurisdiction of the Courts in Chota Nagpur in respect of suits relating to the succession to or claims of maintenance from any immoveable property "brought under the operation of this Act." If it was intended that land outside Chota Nagpur should be brought under the operation of the Act, it is not clear why the jurisdiction of Courts in Chota Nagpur alone should be saved.

A question of practical difficulty might

perhaps arise in connection with section 2 in so far as it bars pending suits in respect of the holders of debts and liabilities. For though in so far as such liabilities were a charge on property outside Chota Nagpur, the section might not bar the enforcement of the charge in the property, the holder's personal liability could not be enforced in any Civil Court. No such question, however, arises in the present case for the suit was not pending at the time of the publication of the vesting order. Nor will any difficulty arise under sub section 3 (*b*) for the words "such property" in that clause must refer to the property in the vesting order.

I would, therefore, allow this appeal with costs and remand the case to the Subordinate Judge for decision on the merits, on the footing that no property outside Chota Nagpur is affected by the provisions of the Act.

Case remanded: Appeal allowed.

LOWER BURMA CHIEF COURT.

SECOND CIVIL APPEAL NO. 18 OF 1911.

May 1, 1912.

Present:—Mr. Justice Parlett.

MA THET AND ANOTHER—DEFENDANTS—APPELLANTS

versus

MG PO TUN—PLAINTIFF—RESPONDENT.

Minor—Custody—Father's right—Adoption without father's consent not valid—Acquiescence.

A. sued *B.* for custody of his child. It was found that *A.* had deserted the mother of the child; the latter had given it in adoption to *B.* to save its life and *B.* had brought it up. It was contended that the plaintiff had relinquished his right of custody or had lost it by acquiescence in adoption:

Held, (1) that the plaintiff could not be said to have relinquished his right inasmuch as there was nothing to show that he was in a position to look after the child at the time of the alleged adoption and that such adoption being without his consent was not valid;

(2) that even if he had acquiesced, he would have been entitled to cancel the adoption.

Mg Sein v. *Ma Mon*, U. B. R. (1902-03), II, Budh. Law, Adoption 1, relied upon.

Appeal against the order of the District Court of Myaugmya to restore the child to the respondent setting aside the order of the Township Court of Wakema.

Mr. *Patker*, for the Appellants.

Mr. *Ba Saing*, for the Respondent.

JUDGMENT.—Plaintiff sued to obtain custody of his infant son who, in his absence and without his consent, had been given by the mother to the defendants. The mother died shortly afterwards, and when the child was about a year and eight months old, this suit was brought. Defendants put plaintiff to proof that the child was his son and stated that the mother, who was too ill and poor to maintain the child and was deserted by the plaintiff, gave the child to them outright and they adopted it with a view to saving its life, and that they have incurred expenses to the extent of some Rs. 30 a month over its maintenance. The Township Court found that the child was plaintiff's son, but held that he had surrendered his rights over it and dismissed his suit. The District Court reversed this decree and gave plaintiff custody of the child. Defendants now appeal on the grounds that the District Court erred in holding the child to be plaintiff's son, that they validly adopted it, and plaintiff relinquished his rights. At the hearing, it could not be contended that section 112 of the Evidence Act had been misapplied and the first ground was not pressed and is untenable. The other two grounds may be treated together. It appears that plaintiff was sent to Jail for six months and was released almost the time the child was born. Its mother was his lesser wife and lived in a separate house from his chief wife and on his release he did not return to his lesser wife but appears to have left her to find for herself, and as she had got into a state of great weakness and almost of destitution, she was unable to suckle the child or maintain it and so prevailed on defendants to take charge of it to save its life and this they did. There is, moreover, no doubt that, despite the conflict of evidence, the plaintiff never acquiesced in this arrangement but on the contrary resented it strongly. It is true that he took no steps for some time to recover the child and though his plea of having no funds to bring a suit may not be very convincing, there are other obvious explanations of his delay. A child of such tender age could not be taken charge of without proper arrangements being made for suckling it, and there is nothing to show that his chief wife or anyone else connected with him could or would undertake the duty then. But it cannot be held that he has

relinquished his rights over the child. Nor can it be held that he acquiesced in the adoption or that it was valid without his consent. Even if he had acquiesced, he would have been entitled to cancel the adoption [*Mg Sein* v. *Ma Mon* (1)]. He is, therefore, entitled to succeed but in view of his undoubtedly bad behaviour bordering on cruelty towards the child's mother, he might well have been ordered to pay the defendant's costs.

The appeal is dismissed.

Appeal dismissed.

(1) U. B. R. (1902-03) II, Budh. Law, Adoption 1.]

CALCUTTA HIGH COURT.

CIVIL RULE No. 591 OF 1912.

August 9, 1912

Present:—Sir Ashutosh Mookerjee, KT., Judge and Mr. Justice Beachcroft.

ERA APENA AND ANOTHER—DEFENDANTS Nos. 4 AND 5—PETITIONERS

versus

ERA SWAMI—PLAINTIFF—OPPOSITE PARTY.

Sale of goods—Goods sold on credit and delivered to purchaser—Vesting of title—Goods taken away from custody of purchaser by third party—Liability of third party to vendor for purchase money.

Where goods have been sold on credit and possession has been delivered to the purchaser, the title vests completely in him and the vendor has no lien on the goods sold. If thereafter the goods are unlawfully taken away from the custody of the purchaser by a third party, the vendor is not entitled to hold that party directly responsible for his claim.

Rule against the decree of the Small Cause Court Judge of Cuttack, dated January 22nd, 1912.

Babu *Shiba Prosanna Bhattacharyya*, for the Petitioner.

Babu *Girish Chandra Pal*, for the Opposite Party.

JUDGMENT.—We are invited by the petitioners in this Rule to set aside a decree, so far as it affects them, in a suit brought against them and other persons for the balance of price of cloth sold. The allegation of the plaintiff is that on various dates between the 3rd June and the 21st August 1911, he sold goods on credit to one Gour Basna, the father of the second and son of the first defendant; that Gour Basna did not pay for those goods in full and that the plaintiff was, consequently, entitled to recover the balance of price due. Gour Basna died on the 11th September 1911, and, the plaintiff commenced this action eight days later, not merely against the first two defendants, who are the representatives of Gour Basna, but also against three other persons on the allegation that the latter had fraudulently and wrongfully taken possession of the goods while Gour Basna was on his death-bed. The claim was resisted by these three defendants on the ground that as against them there was no cause of action. The Small Cause Court Judge has overruled this objection and made a decree against not only the first two but also the fourth and fifth defendants. There is no decree against the third defendant, because he died during the pendency of the suit, and his representatives were not brought on the record. The question in controversy is, whether the suit as framed is maintainable against the fourth and fifth defendants. It is clear that as against the first two defendants, the claim is founded on a breach of contract; as representatives of the original purchaser, they are liable for the balance of price due to the extent of the assets in their hands. In so far as the fourth and fifth defendants are concerned, the claim is founded on the allegation, and the allegation has been found true by the Small Cause Court Judge, that while Gour Basna was still alive, they fraudulently took possession of his goods, in collusion with the first defendant, in satisfaction of a pretended claim against Gour. On behalf of the plaintiff, this claim has been sought to be supported on the analogy of the principle whereby executors *de son tort* are made liable when they interfere with the estate of a deceased person, and reference has been made to the decision of the Madras High Court in the case of *Mugaluri Gurudiah* v. *Narayana Rungiah* (1). In our opinion, the principle invoked, of which application may be found in *Nathuram* v. *Kutti Hasi* (2), *Jogender Narain* v. *Temple* (3), and *Kshitish Chandra* v. *Radhica Mohan* (4), is of no possible assistance to the plaintiff; the fourth and fifth defendants cannot, by any stretch of language, be deemed executors in anticipa-

(1) 3 M. 339.
(2) 20 M. 446.
(3) 2 Ind. Jur. (N. S.) 234.
(4) 35 C. 276; 3 M. L. T. 147; 12 C. W. N. 237.

tion. The plaintiff cannot, further, succeed on the footing that there was privity of contract between him and these defendants; nor can he succeed on the theory that in the events which have happened, he had a lien on the goods sold. Under section 95 of the Indian Contract Act, unless a contrary intention appears by the contract, a seller has a lien on sold goods as long as they remain in his possession and the price or any part of it remains unpaid. Under section 96, where, by the contract, the payment is to be made at a future date, but no time is fixed for the delivery of the goods, the seller has no lien and the buyer is entitled to a present delivery of the goods without payment; but if the buyer becomes insolvent before delivery of the goods, or if the time appointed for payment arrives before the delivery of the goods, the seller may retain the goods for the price. It is clear, therefore, as was explained by Mr. Justice Bayley in *Bloxam* v. *Sanders* (5) and *New* v. *Swain* (6), where goods have been sold on credit and possession has been delivered to the purchaser, the title vests completely in him and the vendor has no lien on the goods sold. In the case before us, the goods were sold on credit; so far as we can gather, no time was fixed for payment of the price; the purchaser obtained possession of the goods. If thereafter the goods were unlawfully taken away from the custody of the purchaser by the fourth and fifth defendants, the plaintiff is not entitled to hold these defendants directly responsible for his claim. Whether after he has obtained a personal decree against the representatives of the purchaser, he may be in a position to pursue the goods in the hands of the fourth and fifth defendants in a proceeding properly framed for the purpose, on the allegation that they really constitute part of the estate of the deceased purchaser, is a question which obviously does not arise for consideration in the suit as framed; nor indeed can a declaration in that behalf be granted by a Court of Small Causes.

The result is that this Rule is made absolute and the decree of the Small Cause Court Judge against the petitioners set aside. The petitioners are entitled to their costs both here and in the Court below. We assess the hearing fee in this Court at one gold *mohur*.

Rule made absolute.

(5) 7 D. & R. 396; (1825)4 B. & C. 941; 23 R.R. 525.
(6) (1828) D. & L. 193; 34 R. R. 767.

BOMBAY HIGH COURT.

FIRST CIVIL APPEAL No. 154 OF 1911.

October 4, 1912.

Present:—Mr. Justice Batchelor and Mr. Justice Rao.

MANOHAR RAMCHANDRA HINGE—APPELLANT

versus

THE COLLECTOR OF NASIK—RESPONDENT.

Pleader's fee—Preliminary decree adjudicating a party as agriculturist—Appeal to High Court—Regulation II of 1827, s. 52 —Pleaders Act (I of 1846), ss. 6, 7 (2)†—Bombay High Court Appellate Side Rules, r. 65.‡*

*(1) Section 52 *First.*—Each Pleader employed in prosecuting or defending an original suit shall be entitled to a percentage on the amount sued for, according to the rates specified in Appendix (L), as a remuneration for his trouble in acting in behalf of his client, until the decree in the suit is passed, and thereafter until such decree is fulfilled.

Second.—The remuneration to a Pleader employed in prosecuting or defending an appeal, regular or special, shall be the same as is above prescribed in the case of an original suit.

†(2) Section 6. And it is hereby enacted that section 25, Regulation XXVII of 1814 of the Bengal Code, section 25, Regulation XIV of 1816 of the Madras Code, and section 52, Regulation II of 1827 of the Bombay Code, shall cease to be enforced, excepting for the purpose specified in section 7 of this Act.

Section 7. And it is hereby enacted that parties employing authorised Pleaders in the said Courts shall be at liberty to settle with them by private agreement of the remuneration to be paid for their professional services, and that it shall not be necessary to specify such agreement in the *vakalutnama*: Provided that when costs are awarded to a party in any regular suit, original or appeal, decided, on the merits, against another party, the amount to be paid on account of fees of Pleaders shall be calculated according to the Rules contained in the sections of Regulations specified in section 6 of this Act; and that when costs are awarded in other cases, the amount to be paid on account of such fees shall be one-fourth of what it would have been in a regular suit decided on its merits.

‡(3) Rule 65. When a Vakil is employed in any reference made under section 113 (Order XLVI, rule 1) of the Code of Civil Procedure, or any application for the exercise of the Court's Extraordinary Jurisdiction in civil matters under section 115 or in any application under section 25 of the Pro-

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For the purposes of assessing the Pleader's fees, an appeal to the High Court from a preliminary decree adjudicating the status of a party as an agriculturist, is governed, neither by section 52 of Regulation II of 1827 nor by section 6 of Act I of 1846, but by rule 65 of the Appellate Side Rules of the Bombay High Court, under which the fee to be allowed is the sum of Rs. 30.

Mr. *K. H. Kelkar*, for the Appellants.

Mr. *L. A. Shah*, Acting Government Pleader, for the Respondent.

JUDGMENT.—A suit was filed by the Collector of Nasik, representing the Court of Wards, and on behalf of a certain ward, for redemption of certain lands under the Dekkhan Agriculturists' Relief Act. Preliminary issues were framed as to whether the plaintiff, the ward, was an agriculturist within the meaning of the Dekkhan Agriculturists' Relief Act; and whether he was otherwise entitled to the benefit of that Act. These issues were determined in the plaintiff's favour by the learned first class Subordinate Judge. The defendant appealed to this Court contending that it should have been held that the plaintiff was not an agriculturist. We, however, were of opinion, that the learned Judge below was right, and we affirmed his finding that the plaintiff is an agriculturist within the meaning of the Act.*

The question now involved is as to the basis upon which Pleader's fees should be calculated in the defendant's appeal. The learned Government Pleader on behalf of the plaintiff has contended for the application of the second clause of section 52 of Regulation II of 1827, while the Taxing Officer has taken the view that that Regulation does not apply, and that the fees must be assessed under Rule 65 of the Appellate Side Rules of this Court. That Rule provides for the allowance of a sum of Rs. 30 in appeals where the provisions of section 6 of Act I of 1846 and section 52 of Regulation II of 1827 do not apply.

The question, therefore, first to be considered is, whether the case falls within the scope of section 52 of the Regulation. That section consists of two clauses, whereof the first deals with the costs allowable in a suit, and the second with the costs allowable in an appeal. It is provided that in regard to the costs in a suit, the Pleader is to be entitled "to a percentage on the amount sued for, according to the Rules specified in Appendix L, as a remuneration for his trouble in acting in behalf of his client, until the decree in the suit is passed, and thereafter until such decree is fulfilled". The second clause lays down that the remuneration in respect of an appeal "shall be the same as is above prescribed in the case of an original suit". It is admitted that in the case of an appeal, those words must be read as meaning not a percentage on the amount sued for, but a percentage on the amount forming the subject-matter of the appeal.

This then being the scope of section 52, can it be said to govern such an appeal as the present? We think not. In the first place, the only question raised in this appeal was as to the status of the plaintiff, whether he was or was not an agriculturist within the meaning of the Dekkhan Agriculturists' Relief Act; and we are of opinion that it cannot be said that any amount of money whatever could be allocated or described as the subject-matter of such an appeal. Secondly section 52 clearly contemplates the case of a decree which terminates the suit, for the remuneration is to be for the Pleader's trouble in acting, not only until the decree in suit is passed, but also thereafter, until such decree is fulfilled. This, however, is a decree which did not and could not terminate the suit. Lastly, this particular kind of appeal is a creature of the recent Civil Procedure Code of 1908, as interpreted by this Court which has held that an order that a party is or is not an agriculturist within the meaning of the Act amounts to a preliminary decree, and so requires the party aggrieved to appeal from it if he wishes to contest it. No such appeal as the present was possible when the Regulation was enacted, and in our judgment the words of the Regulation cannot, without undue straining, be held to cover the case of such an appeal or such a decree as we have here. But if section 52 of Regulation II of 1827 has no application to this decree, then section 7 of Act I of 1846 is equally inapplicable, and in these circumstances, the case must inevitably be governed by Rule 65 of the Appellate Side Rules. It may be that

vincial Small Cause Courts Act, IX of 1887, or any appeal, in regard to which the provisions of section 6 of Act I of 1846 and section 52 of Regulation II of 1827 do not apply and costs are awarded, a sum of Rs. 30 shall be allowed as Vakil's fee in the Bill of Costs.

*14 Bom L. R. 943; 17 Ind. Cas. 670.

this result is in some respect anomalous as furnishing inadequate remuneration for the labour and trouble which Pleaders must incur in a particular class of cases. Our duty, however, is limited to administering the law as we find it, and if our decision leads to the anomaly which I have suggested, it will by no means be the only or the most serious anomaly of its class now existing.

We must, therefore, affirm the order of the Taxing Officer.

Order affirmed.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL NO. 911 OF 1911.

September 5, 1912.

Present:—Sir Ashutosh Mookerjee, Kt., Judge, and Mr. Justice Holmwood.

C. H. CROWDY—DEFENDANT—APPELLANT

versus

L. O'REILLY—PLAINTIFF—RESPONDENT.

Easement—Easement of necessity, what is—Grant of part of land by owner—Easements implied in favour of part granted—No reservation by implication in favour of grantor except in case of easement of necessity.

An easement of necessity is an easement which is not merely necessary for the reasonable enjoyment of the dominant tenement, but one without which that tenement cannot be used at all.

Sukh Dei v. *Kedar Nath*, 33 A. 467; 8 A. L. J. 280; 9 Ind. Cas. 628; *Wutzler* v. *Sharpe*, 15 A. 270, *Esubai* v. *Damodar*, 16 B. 552; *Chunilal* v. *Manishankar*, 18 B. 616 and *Krishnamarazu* v. *Marrazu*, 28 M. 495; 15 M. L. J. 255, referred to.

Where an owner of land grants part of the land and retains other parts himself, all easements necessary for reasonable enjoyment are usually implied in favour of the part so granted, but such easements are not raised by implication in favour of the part retained, unless they are easements of necessity. Or, in other words, there is ordinarily no reservation by implication in favour of the grantor except in the case of an easement of necessity.

Purnendra Narain v. *Dwijendra Narain*, 8 C. L. J. 289 relied upon.

Appeal from the decree of the District Judge of Bhagalpore, dated March 18th, 1911, reversing that of the Munsif of Beguserai, dated June 27th, 1910.

Dr. *Rash Behary Ghose*, Babu *Umakali Mukherji* and Moulvi *Syed Mohammad Tahir*, for the Appellant.

Mr. *B. Chakravarti* and Babu *Biraj Mohan Majumdar*, for the Respondent.

JUDGMENT.—The plaintiff-respondent, as the owner of the Masnadpur Indigo Factory, commenced this action for enforcement of a right of way against the defendant appellant, the owner of an adjoining property known as the Hajipur Bungalow. The Court of first instance dismissed the suit; upon appeal, that decree has been reversed by the District Judge. The antecedent history of the dominant and servient tenements may be briefly stated. The Masnadpur Indigo Factory was built between the years 1870 and 1879. In 1891, one Meares purchased land towards the north of the factory, and in 1895 he built thereon the Hajipur Bungalow. In the latter year, one Holloway purchased the factory, and on the 20th April 1897, he also purchased the Hajipur Bungalow from the widow of Meares. The position at that time was that Holloway became the owner of both the properties. On the 31st January 1901, Holloway sold both the factory and the bungalow to C. H. Crowdy and his brother H. E. Crowdy. The District Judge has found upon the evidence that the disputed thoroughfare came into existence during the period that Holloway was the owner of the two properties, possibly immediately after the acquisition of the bungalow by Holloway in 1897. The thoroughfare, it has been found, was a formed road, and was used as a passage by Holloway, his servants, his tenants, carts, bullocks and cattle to pass from the factory across the land of the bungalow and in front thereof, to the public road towards the north. This condition of things continued during the time that the Crowdys were owners of the two properties. On the 3rd September 1906, the Crowdy brothers sold the factory as also the bungalow to the plaintiff-respondent O'Reilly; it appears that the agreement for transfer had been made as early as the 26th May 1906, and O'Reilly had been put in possession; this, however is not material for the purposes of this suit. On the same date, the 3rd September 1906, O'Reilly transferred back the bungalow to the defendant-appellant C. H. Crowdy, who was one of the vendors. After this, O'Reilly for about two years used the disputed thoroughfare as a passage for himself, his men, his wheeled vehicles, and he never asked permission of Crowdy nor did he meet with any resistance or obstruction from him. In October 1908, however, the defend-

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ant stopped a servant of the plaintiff; this led to criminal proceedings, and, ultimately on the 26th November 1908, the Sub-Divisional Officer directed O'Reilly not to use the thoroughfare till he had established his right of way in a Civil Court. O'Reilly thereupon commenced the present action on the 15th January 1909. As already stated, the suit was dismissed by the Court of first instance, but has been decreed on appeal. The District Judge has found that the thoroughfare was a formed road and was a way of necessity, and that the plaintiff has a title thereto by implied reservation. This view has been assailed before us as unsound in law. The questions, therefore, which arise for examination are, *first*, is the thoroughfare an easement of necessity, and, *secondly*, can the plaintiff claim title thereto by implied reservation?

In so far as the first question is concerned it has been contended that there can be an easement of necessity, only when an absolute necessity is established. This may be conceded, because the expression of opinion in *Watts* v *Kelson* (1), which tends the other way, as also a similar opinion of Mansfield, C. J., in *Morris* v. *Edgington* (2), cannot be treated as good law, in view of the later decisions in *Holmes* v. *Goring* (3), *Proctor* v. *Hodgson* (4), *Union Lighterage Co.* v *London Graving Dock Co.* (5), *Ray* v. *Hazeldine* (6). We take it, therefore, as stated in the Laws of England, edited by Halsbury, Vol. II, section 487, that an easement of necessity is an easement which is not merely necessary for the reasonable enjoyment of the dominant tenement but one without which that tenement cannot be used at all. A similar view was taken in *Sukhdei* v. *Kedar Nath* (7): see also *Wutzler* v. *Sharpe* (8), *Esubai* v. *Damodar* (9), *Chunilal* v. *Manishankar* (10), *Krishnamarazu* v. *Marrazu* (11). Tested in the light of these principles, the plaintiff has completely established that the disputed thoroughfare is a way of necessity. The defendant sought to make out that there was a pathway towards the west of the factory, through which it might be possible to get out of the land; but the District Judge has found that the path in question was so narrow, a foot in width, that it could not be used for the ingress and egress of carts, bullocks and cattle, and that if the plaintiff was confined to the use of that way and had no way for wheeled traffic, the factory must be immediately abandoned. Under these circumstances, we must hold that the thoroughfare in question is a way of necessity properly so called: *Dodd* v. *Burchall* (12), *Brown* v *Alabaster* (13).

In so far as the second question is concerned, it has been argued that a way of necessity may be acquired by implied grant, only by a grantee and not by a grantor, and reliance has been placed upon the observation of Lord Westbury in *Suffield* v. *Brown* (14). It has not been disputed, however, that under the law of England it is well settled that where an owner of land grants part of the land and retains other parts himself, all easements necessary for reasonable enjoyment are usually implied in favour of the part so granted, but such easements are not raised by implication in favour of the part retained, unless they are easements of a much more restricted class, namely, easements of necessity. In support of this proposition, reference may be made to the exposition of the law by Thesiger, L. J., in *Wheeldon* v. *Burrows* (15), where it was pointed out that the distinction had existed almost as far back as the law could be traced on the subject. *Union Lighterage Co.* v. *London Graving Dock Co.* (5), *Ray* v. *Hazeldine* (6), *Gordon* v. *Ogilvie* (16).

(1) (1870) 6 Ch. Ap. 166 at p. 175; 40 L. J. Ch. 126; 24 L. T. 209; 19 W. R. 833.
(2) (1810) 3 Taunt 24 at p. 31; 12 R. R. 579.
(3) (1824) 2 Bing. 76; 9 Moore 166.
(4) (1855) 10 Ex. 824; 3 C. L. R. 755; 24 L. J. Ex. 195.
(5) (1902) 2 Ch. 557 at p. 572; 87 L. T. 381; 71 L. J. Ch. 791; 18 T. L. R. 754.
(6) (1904) 2 Ch. 17; 73 L. J. Ch. 537; 90 L. T. 703.
(7) 33 A. 437; 8 A. L. J. 280; 9 Ind. Cas. 628.
(8) 15 A. 270.
(9) 16 B. 552.
(10) 18 B. 616.
(11) 28 M. 495; 15 M. L. J. 255.
(12) (1862) 1 H. & C. 113; 31 L. J. Ex. 364; 8 Jur. (N. S.) 1180.
(13) (1887) 37 Ch. D. 490; 57 L. J. Ch. 255; 58 L. T. 265; 36 W. R. 155.
(14) (1864) 4 De G. J. & S. 185; 3 N. R. 340; 33 L. J. Ch. 249; 10 Jur. (N. S.) 111; 9 L. T. 627; 12 W. R. 356
(15) (1879) 12 Ch. D. 31; 48 L. J. Ch. 853; 41 L. T. 327; 28 W. R. 196.
(16) (1899) 15 T. L. R. 239.

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The tendency of the law to favour easements against the common owner rather than easements for his benefit, arises from the two-fold principle, that a man shall not derogate from his grant, *Cable* v. *Bryant* (17), and that a grant is always construed most strictly against the grantor: *Neill* v. *Devonshire* (18). The reason for this rule of construction is, that were it otherwise, grantors would always affect ambiguous expressions, if they were afterwards at liberty to put their own construction on them (Shep. Touchstone 87). It may be conceded that if the grantor intends to reserve any right over the tenement granted, it is his duty to reserve it expressly in the grant; to say that a grantor reserves to himself in entirety that which may be beneficial to him, but which may be most injurious to the grantee, is quite contrary to the principle upon which an implied grant depends, which is that a grantor shall not derogate from or render less effectual his grant, or render that which he has granted less beneficial to his grantee. Consequently, there is ordinarily no reservation by implication in favour of the grantor; to this, however, there is an exception, namely, where the easement is one of necessity properly so called, a reservation will be implied in favour of the grantor. It is true that the operation of a plain grant, not pretended to be otherwise than in conformity with the contract between the parties, should not be limited and cut down by the fiction of an implied reservation in favour of the grantor; the reason, however, does not apply, if the easement claimed by the grantor is strictly one of necessity; the grantee could never have imagined that the grantor intended to make valueless what he retained. At any rate, the exception is so firmly imbedded in the law that it cannot be swept away by the assertion that it is not defensible on logical principles, for as Lord Halsbury said in *Quinn* v. *Leathem* (19), the law is not necessarily a logical Code and is not always logical at all. We must hold, therefore, that as the thoroughfare in question has been proved to be a way of necessity, the plaintiff is entitled to claim it on the principle of implied reservation. We arrive at this conclusion without hesitation because upon facts established beyond controversy, there cannot be the remotest doubt as to the true intention of the parties. The conveyance and re-conveyance of the 3rd September 1906 were part of the same transaction, and the parties as reasonable men could only have intended that the owner of the factory should use it in the same manner and with the same amenities as previously. The view we take is supported by the decision in *Purnendu Narain* v. *Dwijendra Narain* (20).

A subordinate point was urged by the appellant to the effect that if the plaintiff has a right of way of necessity, its measure must depend upon the circumstances as they existed at the time of the grant and implied reservation: *London Corporation* v. *Riggs* (21). This doctrine need not be disputed, and, as we understand the decree of the District Judge, he has kept this principle in view, because he states explicitly that the road is to be used for the benefit of the factory. We are of opinion, therefore, that the appellant has no substantial grievance in this matter.

The result is that all the points urged by the appellant, fail. But we are of opinion that as the easement claimed by the plaintiff is one of necessity and in derogation of the rights of the grantee, it should be enjoyed subject to the amenities of the property of the defendant, that is to say, with as little disturbance as possible to the peaceful occupation of his premises; to secure this, we direct that the alignment of the thoroughfare through the compound of the appellant be modified by carrying it (at the expense of the appellant) along the western boundary of the compound and thence from the north-west corner in an easterly direction to the northern gate of the same compound Subject to this modification, the decree of the District Judge must be affirmed and this appeal dismissed with costs.

Appeal dismissed; Decree modified.

(17) (1908) 1 Ch. 259; 77 L. J. Ch. 78; 98 L. T. 98.
(18) (1882) 8 A. C. 135 at p. 149; 31 W. R. 622.
(19) (1901) A. C. 495 at p. 506; 70 L. J. P. C. 76; 85 L. T. 289; 50 W. R. 139; 65 J.P. 708; 17 T.L.R. 749.
(20) 8 C. L. J. 289.
(21) (1880) 13 Ch. D. 798; 49 L. J. Ch. 297; 42 L. T. 580; 28 W. R. 610; 44 J. P. 345.

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL No. 459 OF 1912.

October 15, 1912.

Present:—Mr. Justice Batchelor and Mr. Justice Rao.

SHESHDASACHARYA—APPELLANT

versus

BHIMACHARYA BAPACHARYA—RESPONDENT.

Limitation Act (XV of 1877), Sch. II, Art. 179—Step-in-aid of execution—Application for extension of time to file extract from Collector's record—Civil Procedure Code (Act XIV of 1882), s. 238.

An application by a decree-holder for an extension of time within which to produce an extract from the Collector's record to be filed with a pending *darkhast* for execution, is a *step-in-aid* of execution.

Haridas Nanabhai v. *Vithaldas Kishendas*, 14 Bom. L. R. 765; 36 B. 638; 17 Ind. Cas. 30, followed.

Such an application is not the less a step-in-aid of execution, because its immediate effect may be to defer the satisfaction of the decree. It is not necessary that it should be a step in expedition or acceleration of the execution as against its retardation.

The law requires only that it should be a step-in aid and if the decree cannot be executed at all otherwise than by means of a temporary delay, a step which ensures the ultimate execution, though at the expense of a temporary delay, may well be described as a step-in-aid of execution.

Second appeal from the decision of the District Judge of Bijapur, in Appeal No. 27 of 1911, reversing that passed by the first class Subordinate Judge of Bijapur, in *Darkhast* No. 216 of 1910.

Mr. *Setlur*, (with him Mr. *N. V. Gokhale*), for the Appellant.

Mr. *K. H. Kelkar*, for the Respondent.

JUDGMENT.—The only question involved in this appeal is whether a certain application, made by the decree-holder on the 29th July 1907, is to be considered as a step-in-aid of the execution of the decree. If it is to be so considered, then undoubtedly the *darkhast* is in time. On the 8th of April 1907, the first *darkhast* was made by the decree-holder and the Court acting under section 238 of the then Code of Civil Procedure, called upon the decree holder to supply, on or before the 20th July following, a certified extract from the Collector's record. As the decree-holder was unable to furnish the requisite copy within the time prescribed, he made this application of the 29th July upon which the present appeal turns. This application was for an extension of time within which to produce the extract from the Collector's record; and it was granted by the Court.

Since the learned District Judge delivered his judgment in the matter, a somewhat similar case has been decided by this Bench in *Haridas Nanabhai* v. *Vithaldas Kisandas* (1), and Mr. Kelkar admits that this appeal must be decided in accordance with that case. We may add in now, following *Haridas Nanabhai* v. *Vithaldas Kisandas* (1), that it appears to us that such an application as this is not the less a step-in-aid of execution, because its immediate effect may be to defer the satisfaction of the decree. It is not necessary that it should be a step in expedition or acceleration of the execution as against its retardation. The Act requires only that it should be a step-in-aid, and if the decree could not be executed at all otherwise than by means of a temporary delay, a step which ensures the ultimate execution, though at the expense of a temporary delay, may well be described as a step-in-aid of execution. Following *Haridas Nanabhai* v. *Vithaldas Kisandas* (1), we reverse the decree and remand the *darkhast* to be decided on its merits with costs throughout.

Decree reversed.

(1) 14 Bom. L. R. 765; 36 B. 638; 17 Ind. Cas. 30.

CALCUTTA HIGH COURT.

CIVIL RULE No. 4367 OF 1912.

September 5, 1912.

Present:—Sir Ashutosh Mookerjee, KT., Judge, and Mr. Justice Holmwood.

UMESHANANDA DUT JHA—OPPOSITE PARTY—PETITIONER

versus

Sir RAVANESWAR PROSAD SINGH AND OTHERS—PETITIONERS—OPPOSITE PARTY.

Civil Procedure Code (Act XIV of 1882), s. 539—Public Charity—Endowment—Scheme confirmed by High Court—Amendment of scheme—Jurisdiction of District Court—Directions necessary to carry out scheme—Income of endowment uncertain—Audit to be frequent—Committee of management—Person having pecuniary interest in endowment properties or creditor of endowment, whether should serve on Committee.

Where in a suit under section 539 of the Civil Procedure Code of 1882, a scheme for the administration of a public charity has been framed by the District Court and confirmed by the High Court, an application for modification of the scheme can be entertained only by the High Court, but the District Court is at liberty

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to give such directions as may be necessary to carry out the modified scheme.

Where the income of a public endowment is of an uncertain and variable character, it is extremely desirable that audits should be fairly frequent and searching.

No one, who has any pecuniary interest in the endowment properties or is a creditor of the endowment, should serve on the Committee of management of the endowment.

Rule against the order of the District Judge of Burdwan, dated the 11th June 1912.

Mr. *B. Chakrabarti*, Babus *Dwarka Nath Chakrabarti*, *Biraj Mohan Mojumdar* and *Mohini Mohan Chatterjee*, for the Petitioner.

Dr. *Rash Behary Ghose* and Babu *Kulwant Sahay*, for the Opposite Party.

JUDGMENT.—This Rule was granted upon an application by the high priest of the temple of Baidya Nath, who was elected to that office in execution of a decree of this Court, made in affirmance of the decree of the Court below in a suit under section 539 of Code of Civil Procedure of 1882: *Shailajananda* v. *Umeshanund* (1). Under that decree, a committee of three persons was appointed, of whom one has recently died and the other two are the opposite party to this Rule. Since the appointment of the committee, there have been differences between the members and the high priest upon questions of the management of the affairs of the temple. The result was that in 1909, one of the members of the committee applied to the District Judge for a modification of the scheme. The application was dismissed on the 29th March 1910. The matter was then brought up to this Court, and on the 8th September 1910, this Court, on the authority of the decision of the Judicial Committee in *Frayag Das* v. *Tirumala* (2) and with the consent of the Counsel on both sides, directed the insertion of two clauses in the decree; by one of these clauses, liberty was reserved to any person interested to apply to the District Court with reference to the carrying out of the directions of the scheme; by the other clause, liberty was reserved to any person interested, from time to time, to apply to this Court for any modification of the scheme that might appear necessary or convenient. The members of the committee subsequently applied to the District Judge that directions might be given to the high priest to the following effect; namely, *first*, that whatever resolutions might be passed by the committee or by the majority thereof for the management and supervision of the temple and of the income and expenditure of the temple, should be acted upon by the high priest, and in case he disobeyed such direction, the resolution be made a Rule of Court with such modification or alteration as the District Judge might find necessary, *secondly*, that the high priest do allow a nominee of the committee access and ingress into the temple for keeping watch and guard over the offerings known as the *charaos*. The high priest opposed the application on the ground that it was in essence an application for modification of the scheme and could be entertained only by the High Court. The District Judge overruled this objection on the 11th June 1912, and directed that the application be heard on the merits. The high priest has obtaind this Rule on the ground that the District Judge has acted without jurisdiction. On behalf of the committee, it was faintly suggested that this Court should not interfere till the inquiry had been completed by the District Judge. It was not seriously disputed, however, that full relief could be granted to the committee only by an alteration of the scheme. In these circumstances, it is obviously undesirable to allow the proceedings to continue before the District Judge, with the inevitable result that any orders he might pass would have to be subsequently discharged as made without jurisdiction.

As regards the merits of the case, which may be gathered, with some approach to accuracy, from the petitions and affidavits filed in this Court and in the Court below, we have to observe that the allegations made by the committee against the high priest may be classified under three heads; namely, *first*, those that justify, if true, the removal of the high priest; *secondly*, those that justify, if true, a modification of the scheme, and, *thirdly*, those that justify directions for the effective enforcement of the scheme. The counter allegations of the high priest against the committee, on the

(1) 2 C. L. J. 460.

(2) 30 M. 158; 11 C. W. N. 442; 2 M. L. T. 119; 17 M. L. J. 236; 34 I. A. 78; 9 Bom. L. R. 588 (P. C.).

other hand, are to the effect that the members desire to interfere with the internal management of the temple and thus practically to supersede completely the high priest, except in the performance of religious observances and ceremonies. There is also an allegation, made by the high priest and repudiated by the committee, that one of the members advanced large sums for the purposes of the suit under section 539 of the Code of 1882 and is really in the position of a creditor of the temple funds. As we have already stated, the relation between the high priest and the committee has not been, by any means, of a friendly character; and we are clearly of opinion that the scheme has to be altered and directions given for the enforcement of the scheme.

In the first place, the committee must prepare an annual budget of the income and expenditure; the income is necessarily of a fluctuating character, but calculations can easily be based upon the average income for some years past. We consider the preparation of the budget essential, because there are heavy debts which must be discharged as early as practicable. The first charge will be the estimated current expenditure budgeted for by the high priest and sanctioned by the committee; the second, repairs to the buildings; the third, payment of debts; the fourth, improvements suggested by either the high priest or the committee; the fifth, the investment of surplus. A clause for the preparation of the annual budget will be inserted in the scheme.

In the second place, provision must be made for quarterly audits and annual inspection of the accounts. Where the income of a public endowment is of an uncertain and variable character, it is extremely desirable that audits should be fairly frequent and searching. A clause will be inserted in the scheme to the effect that it will be one of the duties of the committee to arrange for quarterly audits and annual inspections.

In the third place, provision must be made for joint control of the temple funds after they have been realised. The offerings made by the pilgrims must be collected after the worship has been finished and then placed in a receptacle with double locks of which one key should be in the hands of the high priest and another with a member of the committee. A list of the money and articles so deposited shall be prepared from day to day and signed by representatives of the committee and of the high priest. A clause to this effect will be inserted in the scheme.

In the fourth place, we must guard against undue interference on the part of the committee with the high priest in the internal management of the temple. We do not think it necessary for the committee to keep an officer to watch the offerings as they are made by the pilgrims to the deity and placed on or near the image, at the time of the worship. It has been suggested that if this precaution is not taken, the offerings may be misappropriated by the high priest or by his officers. But it is plain that some trust must be reposed upon a man in the position of the high priest of the Baidya Nath temple. We are reluctant to believe that he can misappropriate the offerings made to the deity, and it is his paramount duty to see that the offerings are not misappropriated by his officers. If it can be established that he cannot be trusted in these matters, the question would necessarily arise, whether he should continue to hold the office of high priest. We do not think that so long as he fills that office that there should be what cannot but be deemed vexatious interference with the discharge of his duties. The Court will not tolerate what the committee apparently want, namely, that the high priest shall be reduced to the position of a merely officiating priest with practically no concern in the management of the temple and its funds.

In the fifth place, it is clear that no one who has any pecuniary interest in the temple properties or is a creditor of the endowment should serve on the committee. The suggestion that any of the present members falls within this category has been vigorously repudiated, and it is not necessary for our present purpose to investigate this matter, specially as the member in respect of whom the imputation has been made, has intimated to the Court, through his Vakil, that he has no claim against the temple funds for sums advanced by him to the high priest for the purposes of the litigation under section 539. But we direct

that a clause to this effect be inserted in the decree, so that should any question of fitness for membership hereafter arise, the matter may be determined by the District Judge.

We may add that it was suggested by the opposite party that the scheme should be amended by the insertion of a clause to the effect that the high priest may be removed for good cause, without the institution of a fresh suit. This course is apparently supported by the decision in *Damodar* v. *Bhogilall* (3), followed in *Prayag* v. *Tirumala* (4). But the matter does not arise properly on the present application by the high priest, and must be considered on principle, should the committee hereafter apply for such an amendment of the scheme.

The result is that the Rule is made absolute and the decree and scheme amended as directed. The order of the District Judge will be discharged, but he will be at liberty to give such directions as may be necessary to carry out the amended decree and scheme. There will be no order as to the costs of these proceedings.

Rule made absolute.

(3) 24 B. 45.
(4) 28 M. 319; 15 M. L. J. 133.

BOMBAY HIGH COURT.
APPEAL FROM ORDER No. 33 OF 1912.
October 11, 1912.
Present:—Sir Basil Scott, KT., Chief Justice, and Sir N. G. Chandavarkar, KT., Judge.
MISS M. J. D'SILVA—APPELLANT
versus
MISS D. J. S. MINIZIS—DEFENDANT—RESPONDENT.

Bombay Civil Courts Act (XIV of 1869), s. 32—Court of Wards Act (I of 1905), s. 3 (c)—Jurisdiction—Suit against Collector as Court of Wards.

A suit brought against a Collector, appointed Court of Wards under section 3 (c) of Bombay Act I of 1905, is a suit against an officer of Government sued in his official capacity and as such is triable only by the District Court by virtue of the provisions of section 32 of Act XIV of 1869.

Appeal from an order passed by the first class Subordinate Judge at Dhulia, in Civil Suit No. 422 of 1911.

Mr. *T. R. Desai*, for the Appellant.

Mr. *L. A. Shah*, acting Government Pleader, for the Respondent.

JUDGMENT.—Accepting the view of the District Judge stated in his judgment of the 7th of October 1911, in support of his order returning the plaint for presentation to the Subordinate Judge's Court, we take it that the second defendant* was appointed Court of Wards under section 3 (c) of Bombay Act I of 1905.

The question is whether he is sued as an Officer of Government in his official capacity.

Section 3 of the Court of Wards Act of 1905 enables the Governor in Council to appoint certain Officers to be a Court of Wards for any part of the Presidency. The power of the Governor in Council is confined to the appointment of Officers and, therefore, it is only as an Officer of Government that the second defendant is a Court of Wards. We think, therefore, that he is an Officer of Government sued in his official capacity and that, therefore, under section 32 of Act XIV of 1869, the Subordinate Judge's Court cannot entertain the suit.

We, therefore, affirm the order of the Subordinate Judge.

If the plaint is not presented in the proper Court within a month, the plaintiff must pay all the costs. If it is so presented, the costs throughout will be costs in the cause.

Order accordingly.

*The second defendant was the Collector of East Khandesh.

CALCUTTA HIGH COURT.
CIVIL RULE No. 2440 OF 1912.
August 19, 1912.
Present:—Sir Ashutosh Mookerjee, KT., Judge, and Mr. Justice Beachcroft.
TOOKOOMONI DASI—JUDGMENT-DEBTOR—PETITIONER
versus
DWARKA NATH DINDA—DECREE-HOLDER—OPPOSITE PARTY.

Fraud—Execution of decree—Sale—Fraud antecedent relevant in determining whether there was fraud subse-

quent to sale—Fraud to be considered as a whole—Limitation Act (IX of 1908), s. 18.

It cannot be laid down as an inflexible rule of law that proof of fraud antecedent to an execution sale necessarily indicates continuance of that fraud subsequent to the sale. At the same time, it is clear that proof of fraud antecedent to the sale, may have an important bearing on the determination of the question whether there was fraud subsequent to the sale, sufficient for the purpose of section 18 of the Limitation Act, in other words, the question of fraud should be considered as a whole.

Rule against the order of the Sub-Judge of Midnapur, dated January 20th, 1912, affirming that of the Munsif of Danton, dated June 29th, 1911.

Babu *Biraj Mohan Majumdar*, for the Petitioner.

Babus *Mohendra Nath Roy* and *Jyotish Chandra Hazra*, for the Opposite Party.

JUDGMENT.—We are invited in this Rule to set aside an order whereby the Subordinate Judge has affirmed an order of the Court of first instance, refusing to set aside an execution sale. The sale took place on the 15th November 1910, and the decree-holder became the auction-purchaser. The application to set aside the sale was not made till the 13th March 1911, that is, after the expiry of the thirty days prescribed by Article 166 of the Limitation Act, 1908. It consequently became necessary for the judgment-debtor to bring his case within section 18. In order to do this, he alleged fraud on the part of the decree-holder both before and after the sale. The Subordinate Judge has declined to consider the question of fraud antecedent to the sale and has confined his attention to the question of fraud subsequent to the sale. In our opinion, the case has not been properly considered. No doubt, it cannot be laid down as an inflexible rule of law that proof of fraud antecedent to the sale necessarily indicates continuance of that fraud subsequent to the sale. At the same time, it is clear that proof of fraud antecedent to the sale may have an important bearing in the determination of the question whether there was fraud subsequent to the sale, sufficient for the purposes of section 18, in other words, the question of fraud should be considered as a whole. We, therefore, make the Rule absolute, set aside the order of the Court below and remand the case to it for re-consideration. We do not express any opinion upon the merits; in fact, the circumstances of the case have not been placed before us. The costs of this Rule will abide the result. We assess the hearing fee at one gold *mohur*.

Rule mode absolute.

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL CIVIL No. 58 OF 1911.

February 27, 1912.

Present:—Sir Lawrence Jenkins, KT., Chief Justice, and Mr. Justice Woodroffe.

RAMJI DAS AND OTHERS—DEFENDANTS—APPELLANTS

versus

JANKI DAS AND OTHERS—PLAINTIFFS—RESPONDENTS.

Principal and agent—Undisclosed principal—Right of suit by agent—Contract Act (IX of 1872), ss. 230 (2), 236.

An agent is entitled to sue on a contract under section 230 (2) of the Contract Act, when he is able to establish that he has an undisclosed principal behind him.

Where a contract has been entered into with a person in the character of an agent, but in fact he is acting not as agent of any principal, but on his own account, he is not entitled to sue on the contract, under the provisions of section 236 of the Contract Act.

Appeal from the following judgment of Mr. Justice Harington, dated June 29th, 1911:—

"This is an action brought by sellers against buyers for damages for breach of a contract for the sale of heavy C bags. Under the contract, deliveries were to be made by the plaintiffs to the buyers at the rate of 20,000 bags a month from December 1907 to April 1908. The December instalment was not taken, but the loss due on it was settled under a settlement contract between the plaintiffs and the defendants and the money due to the plaintiffs was paid. A similar course was taken with regard to the January instalment, and the present action is brought with reference to February instalment. The issues raised are:—(*i*) did the defendants enter into the contract stated in the plaint? (*ii*) did the plaintiffs contract as agents for an undisclosed principal, or were the plaintiffs the real principals? and (*iii*) were the plaintiffs ready and willing to deliver the goods under the contract? With regard to the first issue, the contract has been produced and proved and the witnesses called

RAMJI DAS v. JANKI DAS.

for the defendants do not deny it. The first issue, therefore, is decided in favour of the plaintiffs. With regard to the second issue, it is argued that the plaintiffs, while purporting to contract as agents for the defendants were really principals in the transaction, and the case *of Sewdutt Roy Maskara* v. *Nahapiet* (1) is relied upon as an authority for the proposition that under those circumstances, the plaintiffs are debarred from recovering. Now that was a case in which the defendant had employed the plaintiffs as agents on his behalf, and in that case when acting for the defendant who was a buyer, it was the duty of the agents to get the goods at the lowest price they could for the buyer who had employed them, and under those circumstances, it was held that they could not be principal sellers in the transaction because then the interest which they had in getting the best price as sellers of their own goods conflicted with the duty which they owed to their employer as buyer in getting the goods at the lowest price obtainable. That case went on the well recognised principle that the agent must not act as a principal so as to have an interest conflicting with the duty which he owed to his employer. But those principles do not apply to the facts of the present case, because there is no evidence that in this case the defendants employed the plaintiffs as their agents, or that they looked to the plaintiffs to obtain for them the goods at the lowest price at which the goods of the character were to be obtained. Two witnesses were called for the defendants: one of them states that he does not remember anything about the contract, and all the other witness says is he remembers the contract but does not remember whether a delivery order was tendered in respect of the goods which ought to have been taken under the contract at the end of February. The plaintiffs content themselves with merely proving the contract. There is no evidence, therefore, on the record as to the circumstances under which the contract was made, and no evidence which would justify a finding that the plaintiffs were employed by the defendants in a manner which placed them in a fiduciary relationship with regard to the defendants, as they would have been, had they been employed as agents for the purpose of getting the goods at the lowest price. Then if the relationship of principal and agent did not exist between the parties, section 236 of the Contract Act is no bar to the plaintiffs' claim, and the law, as laid down in the case relied upon by the defendants, has no application in the present action. It then becomes a case in which a broker purports to contract for an undisclosed principal, and under section 230, he is entitled to enforce that contract and to have the contract enforced against him. There is evidence that in this case there was a person behind the plaintiffs who they said was in fact a principal, whose name they did not disclose. But in my view, whether there was a real principal behind or not does not affect the case, because the relationship of principal and agent did not exist between the plaintiffs and the defendants. That being so, the rights of the defendants are not affected whether the person who is said to be an undisclosed principal was really a principal or not. The result is that the case made by the defence has not been established, because the defendants have not shown that the plaintiffs acted as agents for the defendants, and on that basis of facts the whole of that defence rested. With regard to the last issue, there is evidence that the delivery order was tendered for the goods in question, and the defendants go no further towards contradicting that evidence than to produce a witness who says that he does not remember anything about it. The result is that there must be judgment for the plaintiffs for the amount claimed with costs on scale No. 2."

The defendants appealed.

Messrs. *Knight* and *Sircar*, instructed by Messrs. *S. D. Dutt & Ghose*, Attorneys, for the Appellant.

Messrs. *Pugh* and *A. N. Chaudhuri*, instructed by Messrs. *Dey & Kshatriya*, Attorneys, for the Respondents.

JUDGMENT.

JENKINS, C. J.—This appeal arises out of a suit brought on a Contract No. 3525 of the 6th of November 1907 for the sale by the defendants of a lac of gunny-bags of the sort described in the sold-note. The terms of the contract are set out in the sold-note, and it there appears, among other things, that the price was Rs. 30-4 per 100 bags free

(1) 34 C. 628; 11 C. W. N. 609.

alongside, and that delivery of the goods was to be given and taken 20,000 monthly, from December 1907 to April 1908. That contract is signed by the plaintiffs as brokers; it purports to be addressed to the principals. The instalments of December and January were settled, and no question arises regarding them, except as to brokerage, as to which nothing has been said before us. The February instalment was not delivered; and according to the plaint, damage to the extent of Rs. 972 14-3 was thereby sustained by the plaintiffs and became due to them. The total sum claimed in this suit is thus Rs. 1,031-9. The case was instituted in the Presidency Small Cause Court, but was transferred to the High Court, and came on for hearing before Mr. Justice Harington, who has passed a decree in the plaintiffs' favour. From his judgment, the present appeal is preferred.

It is not denied that the defendants entered into a contract in the terms of the sold note; but it has throughout been denied that the defendants entered into such a contract *as is alleged*, that is to say, a contract as is set forth in the plaint, which represents the plaintiffs as *vendors* to the purchasers. When the case came before Mr. Justice Harington, the following issues were raised: (*i*) Did the defendants enter into the contract stated in the plaint? (*ii*) Did the plaintiffs contract for an undisclosed principal or for themselves? (*iii*) Were the plaintiffs ready and willing to deliver?

Objection was taken to the third issue, but not to either of the other two—no objection could be taken to either of them, because they embodied and amplified that which was set forth in the written statement from the very commencement.

The plaintiffs-respondents have been represented before us by Mr. Pugh, who very properly accepted the position that this case must turn upon whether or not the plaintiffs are able to establish that they had an undisclosed principal behind them. The plaintiffs, as I have already said, purported to sign as brokers. If the contract was with the plaintiffs, it was entered into with them in their character of agents; and as no principal was disclosed then the position must be that there was an undisclosed principal or that there was no principal at all. The plaintiffs' contention is that there was an undisclosed principal, one Bhai Kubiram, and that the existence of this undisclosed principal entitles them to sue, under the provisions of clause 2 of section 230 of the Contract Act. So that what we have now to see is whether in truth Kubiram was the undisclosed principal or whether he is an afterthought. The plaint as drawn is opposed wholly to the idea that there was an undisclosed principal. It treats the plaintiffs as themselves the vendors. In the same way, the settlements of December and January appear to me to point, if anything, not to Kubiram being the undisclosed principal, but to the plaintiffs themselves claiming to be the principals. There is no brokerage charge to Kubiram: as far as I can see there is no contract with Kubiram, and for some reason, which I am wholly unable to understand if the case is a true one, Kubiram was not put into the box, no book of his was produced, and we are told, and the statement has not been contradicted before us, Kubiram's name never came to light until the opening of the plaintiff's case. I am not satisfied that Kubiram was an undisclosed principal of the plaintiffs. If Mr. Justice Harington had held otherwise, I should have hesitated to differ from him on a question of fact like that, but as I read the judgment of the learned Judge, he is careful to avoid that conclusion. All he says is that "there is evidence that in this case there was a person behind the plaintiffs who they said was in fact a principal whose name they did not disclose". The learned Judge does not say that he believed that evidence. He does not discuss the various elements in the case which tell against the view that Kubiram was really and truly the undisclosed principal, but he goes on to say that in his view it is immaterial whether there was the relationship of principal and agent between Kubiram and the plaintiffs. But if Kubiram was not the undisclosed principal then section 233 of the Contract Act applies. In order to appreciate the true scope of that section, one must bear in mind the general scheme of Chapter X of the Contract Act, which deals with the subject of agency. The sections of that Chapter are divided into a series of groups, and of those I only need refer to two:—There is the group comprising sections 211 to 221, which deal with the agent's duty to the principal. Then there is

the group which includes sections 226 to 238, which deal with the effect of agency on contracts with third persons. Mr. Justice Harington, in accepting the view that it was immaterial whether there was an undisclosed principal or not, was influenced by the consideration that the relationship of principal and agent did not exist between the plaintiffs and the defendants. At the outset, it is difficult to see how it could be said that there was not that relationship, and defendants certainly did not accept that view. But it is unnecessary to discuss the case from that point of view. Section 236 is clear and distinct. It provides that "a person with whom a contract has been entered into in the character of agent is not entitled to require the performance of it, if he was in reality acting not as agent, but on his own account" Having negatived the theory of Bhai Kubiram being an undisclosed principal, we have a position to which section 236 of the Contract Act applies with precision. It is to no purpose to consider what the line of cases is which that section seeks to embody, or whether it is in accord with the English rule of law. Enough to say that the section as it stands is the final exposition of law in India and, in my opinion, Kubiram disappearing, section 236 governs the case. The plaintiffs, therefore, are the persons with whom a contract has been entered into in the character of agents, and so they are not entitled to require the performance of it, inasmuch as in reality they were acting not as agents, but on their own account.

For these reasons, I think the judgment of Mr. Justice Harington cannot be upheld, and we must reverse his decree and dismiss the suit with costs throughout to be paid by the plaintiffs.

WOODROFFE, J.—I agree.

Appeal allowed.

CALCUTTA HIGH COURT.

ORIGINAL CIVIL SUIT No. 53 OF 1912.

February 29, 1912.

Present:—Mr Justice Fletcher.

CHARNOCK COLLIERIES Co. LD.—PLAINTIFF

versus

BHOLANATH DHAR—DEFENDANT.

Company—Dealing with stranger—Internal management of Company, whether stranger bound to look into—Stranger whether can assume validity of acts—Loan to Company—Credited by Company—Document incomplete—Creation of charge—Lease—Landlord's arrears—Possession by liquidator—Landlord's acquiescence—Landlord, whether secured creditor.

A stranger dealing with a Joint Stock Company is not bound to look into the indoor management of the Company; and he may assume that all the acts done by the Company or on its behalf are regular and proper.

The Royal British Bank v. *Tarquand*, 6 El. & Bl. 327; 24 L. J. Q. B. 317; 1 Jur (N.S.) 663; 106 R R. 623; *County of Gloucester Bank* v. *Merthyr Colliery Co.*, (1895) 1 Ch. 629; 12 R. 183; 72 L.T. 375; 43 W. R. 486; 2 Manson 223; 64 L. J. Ch. 451; *In re Bank of Syria*, (1901) 1 Ch. 115; 70 L. J. Ch. 82; 49 W. R. 100; 83 L. T. 547; 17 T. L. R. 84; 8 Manson 105 and *In re County Life Assurance Co.*, L. R. 5 Ch. App. 288 at p. 293; 39 L. J. Ch. 471; 22 L. T. 537; 18 W R 390, followed.

A stranger lent money to a Company, which was credited by the Company or its managing agents in the loan account. A document was given to the lender, to which the seal of the Company was affixed, but it was only attested by the signature of the managing agents. It did not appear that the money had been borrowed with the approval of the Directors, and the document was not signed by any of the Directors, as required by the Company's articles of association:

Held, that the lender was entitled to assume that the managing agents had obtained the approval of the Directors to the borrowing of the sum; and that even if the signature of the managing agents was not sufficient, the lender who had advanced money to the Company upon the terms that security should be given to him, was nevertheless entitled under the rules of equity to have a charge on the property of the Company, although if the security was not complete.

In re Queensland Land and Coal Co., (1894) 3 Ch. 181; 8 W. R. 476; 71 L. T. 115; 42 W.R. 600; 1 Manson 355; 63 L. J. Ch. 810, and *Pegge* v. *Neath Tramway. Co. Ld.*, (1898) 1 Ch.183; 67 L. J. Ch. 17; 77 L. T. 550; 14 T. L. R. 62; 46 W. R. 243, relied upon.

The rule that the landlord of a Company is entitled to be paid in full for rent and royalties accruing due subsequent to liquidation should the liquidators remain in possession, cannot be applied to the case where the landlord acquiesces in the liquidator's possession. And the landlord is not entitled to claim as a secured creditor in respect of any rent and royalties which are due before or after the liquidation.

Special case stated for the opinion of the Court under Order XXXVI of the Schedule I of the Civil Procedure Code, by agreement

between the Charnock Collieries, Ld., in liquidation, and the liquidators of the one part, and Bholanath Dhar of the other part.

Mr. *P. L. Buckland*, for the Company.

Mr. *L. P. E. Pugh*, for Bholanath Dhar.

JUDGMENT.—This is a special case for the opinion of the Court under Order XXXVI of Schedule I of the Civil Procedure Code. The plaintiffs are the Charnock Collieries Co., Ltd., in liquidation and Edward William Viney and John Woodhouse Thurston, the liquidators of the Company; the defendant is Bholanath Dhar.

The matters in which the opinion of the Court is sought are under two headings. First, the defendant claims as a secured creditor in respect of a sum of Rs. 7,417-8, which is said to be due to him under a certain instrument of hypothecation, dated the 3rd January 1910, expressed to have been made between the Company of the one part and the defendant of the other part.

The second part of the claim is with reference to the right of the defendant to be a secured creditor in respect of certain royalties and rents due by the plaintiff Company to the defendant under the authority of a *kabuliat* under which the plaintiff held the colliery.

This colliery was, by an agreement made between the Company, the defendant, and the liquidators, sold, and the proceeds of the sale are now in the hands of the attorney to the liquidators.

The first point is a short one. It appears that Bholanath Dhar on the 3rd January 1910 lent to the plaintiff Company the sum of Rs. 3,995-8. On that date, there was also due to that gentleman on a promissory-note executed by the Company Rs. 2,004 8. Therefore the amount taken to be lent on the 3rd January 1910 was Rs. 6,000. That amount, it is not denied by the liquidators, went into the coffers of the Company and was credited by the Company or its managing agents in the loan account.

The liquidators do not dispute the right of the defendant to prove as an unsecured creditor, but they say that the terms of the articles of the Company were not complied with and that, therefore, the mortgage did not create a charge on the properties of the Company.

The only articles which are material to this matter are Nos. 49, 50, 84 and 112.

Article 49 authorises the managing agents with the approval of the Directors to borrow from the members or other persons, and may themselves lend any sum or sums of money for the purposes of the Company. Then follows a proviso which is not material to this case.

Article 50 says—"The Managing agents may with such approval as aforesaid raise or secure re-payment of such money in such manner and upon such terms and conditions in all respects as they think fit, and in particular by the issue of debentures or bonds of the Company or by the creation of debenture stock, or by making, drawing, accepting or endorsing on behalf of the Company, any promissory-notes or bills of exchange, or giving or issuing any other security of the Company, or by mortgage or charge of all or any part of the property of the Company including its uncalled capital."

Article 84 is material because by it a power, which in England is confined to the Board of Directors, is conferred on the managing agents. "Subject to the control and supervision of the Directors, the Managing agents are by this article authorised to sign all such contracts, and to draw, accept, endorse and negotiate on behalf of the Company all such bills of exchange, promissory-notes, *hundies*, cheques, drafts and other instruments as shall be necessary for the carrying on of the business of the Company, and to exercise all the powers, authorities and discretions of the Company except only such of them as by the Company's Acts or these presents are expressly directed to be exercised by the Board of Directors or by the shareholders in general meeting. All monies belonging to the Company shall be paid to such bankers as the managing agents, subject to the approval of the Directors, shall deem expedient, and all receipts for monies paid to the Company shall be signed by the Managing agents whose receipts shall be an effectual discharge for the monies therein stated to have been received."

Article 112 relates to the custody of the seal. It says—"The Managing agents shall provide for the safe custody of the seal. Every instrument to which the seal is affixed shall be signed at least by one Director and countersigned by the Managing agents,

provided that the signature of a Director shall not be required to documents to which the seal is affixed and which are required for use only in connection with any civil and criminal proceedings in which the Company is concerned or to documents which the managing agents are hereby expressly authorised to sign, but it shall be sufficient if such documents are signed by the Managing agents only."

Now, the facts in this case are that the document given to the defendants on the 3rd January 1910 was sealed by the Company. The seal of the Company was affixed, but it was only attested by the signature of the Managing agents.

The point really is whether, this document not having complied with the terms of the Articles of Association of the Company, has the defendant a valid charge on the property of the Company? In my opinion, he has. This case is covered by authority starting, I think, with the case of *The Royal British Bank* v. *Turquand* (1). That has been followed by a long string of cases going down to the cases cited by Mr. Pugh: *County of Gloucester Bank* v. *Rudry Merthyr Colliery Co.* (2) and *In re Bank of Syria* (3). The point is this, whether a person dealing with the Company is bound to look into what Lord Halsbury calls the "indoor management" of the Company, that is whether a person dealing with the Company is, bound to see whether the act of the Company is not *ultra vires*, or whether he may assume that all the acts done by the Company or on its behalf are regular and proper. In my opinion in this case, the lender was entitled to assume that the managing agents had the authority or approval of the Board of Directors. It seems to me that the observation of Sir G. M. Giffard in *In re County Life Assurance Co.* (4) exactly fits this case. He says:—"In the first place a stranger must be taken to have read the General Act under which the Company is incorporated and also to have read the Articles of Association; but he is not to be taken to have read anything more, and if he knows nothing to the contrary, he has a right to assume as against the Company that all matters of internal management have been duly complied with." That seems exactly to fit the case. The lender, when he advanced money to the Company, was entitled to assume that the Managing agent had obtained the approval of the Board of Directors to the borrowing of those sums. Then it is said that cannot be so in this case because on the document of hypothecation which was given to the defendant the seal of the Company was only attested by the signature of the Managing agents. With that argument I do not agree. Under article 50, Managing agents are authorised to secure money advanced to the Company by giving or issuing any security or by a mortgage or charge on all or any part of the Company including its uncalled capital. It may be that the security is not complete, but the Managing agents obviously have the power under Article 50 to give a security on behalf of the Company, and that security can be either by way of mortgage or a charge on any part of the property of the Company.

It seems to me that under Article 50 the Managing agents have ample power to give a security. That being so, the affixing of the seal on the document was not necessary. The signature of the Managing agents, in my opinion, was ample. If that was not so, I should have decided upon the well-known class of cases where a person who advanced money to a Company upon the terms that security should be given to him, even if the security be not complete, he is nevertheless entitled under the rules of equity to have a charge on the property of the Company. That class of case rests on the elementary maxim of equity, that equity looks upon that as done which is agreed to be done. If the money were borrowed on account of the Company, it is not open to the Company to say that the person who lent the money is not entitled to a charge. It is only necessary to refer to the case of *In re Queensland Land and Coal Co.* (5), in which North, J., held that a person is entitled to a charge on the property of the Company where the

(1) (1856) 6 El. & Bl. 327; 24 L. J. Q. B. 317; 1 Jur. (N. S.) 663; 106 R. R. 623.

(2) (1895) 1 Ch. 629; 12 R. 183; 72 L. T. 375; 43 W. R. 486; 2 Manson 223; 64 L. J. Ch. 451.

(3) (1901) 1 Ch. 115; 70 L. J. Ch. 82; 49 W. R. 100; 83 L. T. 547; 17 T. L. R. 84; 8 Manson 105.

(4) (1870) 5 Ch. Ap. 288 at p. 293; 39 L. J. Ch. 471; 22 L. T. 537; 18 W. R. 390.

(5) (1894) 3 Ch. 181; 8 R. 473; 71 L. T. 115; 42 W. R. 600; 1 Manson 355; 63 L. J. Ch. 810.

debenture was void. Mr. Pugh also cited *Pegge* v. *Neath Tramways Co., Ld.* (6), which decided where a person who never had a debenture was entitled to call for the security because he lent money on the footing that he was to get the security.

It seems to me on all these grounds that the defendant is entitled to a charge upon the monies in the hands of the attorney of the liquidators for the sum of Rs. 7,417-8.

The other portion of the claim set up by the defendant is, I think, not well founded. That relates to certain monies that became due to the defendant in respect of rents and royalties under the lease under which the plaintiff Company held the collieries.

The general rule is that the defendant would be entitled only to prove for the rent that became due prior to the liquidation and to claim to have the full rent paid subsequent to the liquidation if the liquidators remain in possession for the benefit of the Company; but if the liquidators remain in possession after the liquidation with the acquiescence of the landlord, then that right of the landholder to have the rent accruing due after the liquidation paid to him as a secured creditor would not stand, and he would be relegated to the position of having a right of proof as an unsecured creditor. In this case, no difficulty arises because after the liquidation the defendant was in possession and it appears quite clear from a letter set out in Exhibit E to the special case that possession was made over by the defendant to the liquidators subsequent to the liquidation.

The rule, therefore, that the landlord is entitled to be paid in full for rent accruing due subsequent to the liquidation should the liquidators remain in possession cannot be applied to this case, as the landlord acquiesced in the liquidator's possession; and, therefore, in so far as the special case asks for the opinion of the Court as to whether the defendant is entitled to claim as a secured creditor in respect of the rents which are due under the terms of the *kabuliat* either before or after the liquidation, I answer by saying he is a secured creditor in respect of no portion of that rent. Mr. Buckland has asked me not to say anything as to what the actual position of the defendant is, and I shall refrain from doing so.

The liquidators will pay the defendant's costs and retain their own costs. The liquidators' costs will be as between attorney and client.

(6) (1898) 1 Ch. 183; 67 L. J. Ch. 17; 77 L. T. 550; 14 T. L. R. 62; 46 W. R. 243.

COURT OF FINANCIAL COMMISSIONER, PUNJAB.

REVENUE REVISION No 209 OF 1911-12.

August 26, 1912.

Present:—Mr. Fenton, F. C.

GHULAM MUHAMMAD—APPELLANT

versus

Musammat ZEWARO AND OTHERS—RESPONDENTS.

Mutation entries—Object—Nature of inquiry—Possession—Title—Record of Rights, object of—Inheritance cases—Transfer cases—Summary inquiry—Customary Law considerations—Punjab Land Revenue Act (XVII of 1887), ss. 34 (4), 36 (1), 37 (a), 44—Minor, contract by, void—Contract Act (IX of 1872), s. 11—Interpretation of statutes—Intention.

In construing statutes, no matter what the intention of the Legislature may have been, the Courts are bound to follow the wording of an enactment and to disregard evidence as to intention, when inconsistent with the language actually used in the Act as passed, if the latter is clear and unambiguous.

The Record of Rights is a record of titles and not a record of possession. Mutations are not to follow possession in all disputed cases but should be based primarily on title.

The procedure of the Revenue Officer in dealing with mutations is determined by the nature of the mutation. If the proposed entries are agreed to by all the parties interested therein or are supported by a decree or order binding on these parties, possession may be disregarded. In disputed cases, the facts as to possession are relevant to the decision of the dispute, but they are relevant not for the purpose of making mutation follow possession, but for the purpose of ascertaining whether facts are proved or admitted to have occurred which would justify a variation in the existing Record of Rights.

Mian Khan v. *Alam Khan*, 1 P. R. 1891 Rev., dissented from.

Secretary of State v. *Bhagwan Das*, 7 P. R. 1895 Rev., followed.

The extent to which possession or the absence of possession should be regarded as proof, for mutation purposes, that a fact has or has not occurred, depends mainly on whether the case is one of transfer or of inheritance.

In succession cases, a mutation of some sort must be effected; there is in these cases no such thing as a rejected mutation; the dispute is between rival heirs. In disputed cases of inheritance, comparatively little

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stress should be placed on possession as it is not true evidence of right.

In disputed cases of transfer, the issue is not only what the true entry shall be, but whether a new entry shall be made at all or not. In such cases, possession counts for a very great deal.

Investigations in mutation proceedings should be of a very summary character. In transfer cases, where anything more elaborate than a summary inquiry is necessary to decide whether a fact is proved to have occurred, it will be best to refuse mutation and refer the parties to the Courts. In inheritance cases, where a new entry must be made, the scope of the inquiry must be left to the discretion of the mutation officer but it must necessarily be summary.

A minor is incompetent to enter into a contract and a contract, one of the parties to which is a minor, is not merely voidable but void and cannot be validated by the transfer of possession. A transfer by minor, even if accompanied by possession, should not be followed by mutation.

A mutation of sale should not be rejected merely because the mutation officer considers that the vendor has exercised a power of alienation opposed to his Customary Law.

When possession has taken place in pursuance of such transfer, the mutation officer should sanction mutation irrespective of Customary Law considerations.

Case reported by the Commissioner, Rawalpindi Division, dated the 9th July 1912.

JUDGMENT.—This is a mutation case. *Musammat* Zewaro, an unmarried girl, has sold 20 *kanals* of land to Ghulam Muhammad. *Musammat* Zewaro's reversioners, Gul and Ahmad, object to the mutation on the ground that *Musammat* Zewaro was not empowered to alienate. The Naib-Tahsildar found that possession of the land had been made over to the alienee and sanctioned the mutation. The Collector, to whom the reversioners appealed, set aside the Naib-Tahsildar's order and rejected the mutation. His order is as follows:—

"Zairo is the daughter of Roda. The latter entered into a mortgage in 1896 which was upset on the suit of the collaterals. There has been much litigation between the parties, sometimes against one another and sometimes in collusion with one another. Zairo is to all appearances about 15 years old and a minor. She has now married after selling all she had immediately before the marriage.

"Possession as owner has probably passed to the vendees. The whole transaction appears fraudulent, and even for mutation purposes, I cannot uphold a sale by a minor unmarried daughter immediately before her marriage. I accept the appeal and refuse mutation. Order will carry costs".

An application for revision having been made by the vendee to the Commissioner (Mr. Maynard), that officer has, under section 15 (3) of the Land Revenue Act, reported the case for the orders of the Financial Commissioner, at the same time intimating that the parties do not desire to be heard by this Court. Mr. Maynard's order of reference (dated 9th July 1912) is as follows:—

"This case raises an important question, on which I should welcome an authoritative pronouncement by the Financial Commissioners. The Collector, holding a sale to be *prima facie* void, refuses mutation though possession has actually passed to the vendee. In this, he follows Sir Lewis Tupper's judgment in *Momanda* v. *Farid* (1), though that case is possibly distinguished by the fact that, in it, the gift was an 'attempted' one. In using the expression 'has attempted to make a gift', Sir C. L. Tupper apparently implied that possession had not passed. If, in the precedent case cited, possession had passed, I venture to say that the ruling ought now to be overruled. If, in the precedent case, possession had not passed, the present case should be distinguished from it.

"The Collector has on his side of the argument the administrative rulings in paragraph 13 of Standing Order No. 23; and would naturally argue that if transfers, where possession has actually passed, are nevertheless to be ignored by an attesting officer because they are contrary to the Punjab Alienation of Land Act, other transfers which he considers to be illegal should be similarly treated. I do not think that the parallel between the two sets of cases is complete. Under the Punjab Alienation of Land Act, the Collector is, by law, the authority who disposes of the question of the propriety of a transfer. But a valid decision regarding transfers which are not alleged to contravene the Punjab Alienation of Land Act can only be given by the regular Courts.

"Apart from this distinction, it would be unusual to argue from a mere administrative instruction, which is not a judicial ruling, in order to establish, judicially, a particular

(1) 14 P. R. 1901 Rev.

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interpretation of the law. I think, therefore, that the instructions in paragraph 13 of Standing Order No. 23 ought not to enter into the present argument at all.

"The argument in Sir Lewis Tupper's judgment in *Momanda* v. *Farid* (1), appears to me defective in the following particular. While it correctly states, or implies, that the object of the mutation procedure is to bring the record into accordance with facts, that is to say, to make it a true statement of rights, and while it correctly distinguishes between a function belonging to an attesting officer and a function belonging to a regular Court, it ignores the evident intention of the Legislature that the officer making the summary inquiry shall be guided by the state of actual possession, if actual possession is ascertainable, and shall only extend his summary inquiry to the ascertainment of right if he has been unable to ascertain possession. The decision based upon possession will not be final: for it is open to the reversioner or other person aggrieved to take his claim to a regular Court. But it is the person who denies that possession represents right who should be required to seek a civil remedy. Sir Lewis Tupper was, I venture to say, in error in holding that 'in altering the record by the mutation procedure, we are bound, with due regard to the conditions of a summary inquiry, to satisfy ourselves that the altered record will be at least most probably true. Or, perhaps, I should rather say that the word 'true' is here ambiguous. If it means 'a true statement of the facts of possession, where possession is ascertainable, and a true statement of rights, where possession is not ascertainable', the sentence is correct. But if it means merely 'a true statement of rights' I venture to think that the true function of an attesting officer, as distinguished from that of a regular Court, has been misstated. Of course, the law itself is not very distinct in its use of the word 'true': and I do not know, with any certainty, whether the presumption established by section 44 in favour of the record, is a presumption that it is a true statement of the facts of possession, or a true statement of rights. However, that is by the way.

"In the present case, the facts 'proved or admitted to have occurred' are that vendor and vendee went through a form of sale which they at all events intended to be valid, and that possession passed in accordance with it. I think it is for the objector to establish by regular suit the invalidity of the sale, and for the Revenue Authorities to give effect to it on the basis of possession.

"In *Mian Khan* v. *Alim Khan* (2), Sir Denzil Ibbetson took a very strong view of the importance of the facts of possession for the purposes of the mutation procedure. And section 36 of the Land Revenue Act appears to me to leave no room for doubt on the subject. The precedent which will be established by the decision on this case will be important, because the two practices (1) of ignoring the actual state of possession in the mutation procedure and (2) of arrogating judicial or *quasi*-judicial functions to attesting officers so as to decide disputed questions of right, have become very common and are plausibly justified even by officers of considerable revenue experience.

"I have heard the parties and now I send the case for the orders of the Financial Commissioner on the revision side. The parties have been informed that they are not obliged to attend before the Financial Commissioner, and they say, they do not desire to do so".

I agree with the Commissioner as to the importance of the questions raised by a case like the present. I have for long been greatly impressed by the fact that not only the practice of different Revenue Officers in mutation cases, but also their views as to the theory or principle by which orders in such cases should be governed, have been fundamentally divergent. There is, undoubtedly, need for some examination of the rulings which have since the passing of the Land Revenue Act of 1887 been published under the authority of successive Financial Commissioners. While for reasons, which will be explained below, I propose to pass an order of revision as recommended by the Commissioner in this particular case, I am quite unable to subscribe to some of the general propositions set forth in Mr. Maynard's order of reference. But I agree with him as to the need for a clear understanding in regard to the general principles which should govern mutation procedure in a case like the present.

In enunciating any general principles or rules for the guidance of mutation officers, it

(2) 1 P. R. 1891 Rev.

is very necessary to keep in view the distinction between law and policy, between that which the Revenue Officer is in pursuance of statutory provisions legally *bound* to do and that which he *ought* to do in the wise exercise of the discretionary authority vested in him. Most Revenue Officers are familiar with the "*Title* v. *Possession*" controversy. In the opinion of some, there is a legal obligation to make mutations follow possession, while others consider that it rests entirely within the discretion of the mutation officer whether the rule of decision shall be possession or title.

In so far as the notion prevails that mutation, in virtue of the provisions of the Land Revenue Act, must, as a matter of legal necessity, be in accordance with possession, it is traceable to the pronouncement contained in the ruling of Mr. (late Sir Denzil) Ibbetson published as *Mian Khan* v. *Alim Khan* (2). In that judgment, it is declared that "*in all disputed cases mutation is to follow possession*". Now I venture to dissent from this doctrine, and I do so with the more assurance because such authorities as Sir M. Young, Mr. Thorburn, Sir James Wilson and Sir James Douie have placed on record opinions which point to the conclusion that mutations should be based primarily on title.

In the case referred to, Mr. Ibbetson did not consider the history of the mutation sections of the present Land Revenue Act. Had he done so, it is probable that he would have reached a different conclusion. An account of the genesis of these sections is contained in Sir Mackworth Young's judgment [*Secretary of State* v. *Bhagwan Das* (3).] For facility of reference, I re-produce here an extract from that ruling:—

"Fortunately I am able to test this view by referring to the opinions on the Bill before it became law. Section 36 originally ran as follows:—

"All entries in the record . . . . . shall be founded on the basis of actual possession, and all disputes regarding such entries taken up by the officer making the settlement, either of his own motion or on the complaint of any party concerned, shall be investigated and determined by him on that basis' &c. . . . 'All persons who are not in possession, but claim to be entitled to possession, shall be referred by him to the proper Court.

"This was altered to the present form in consequence of several opinions, the most important of which, that of Colonel Wace, the framer of the Bill, was to the following effect: 'I would ask for a very careful consideration of the principle of this section, which is that all disputes as to the entries to be made in a Settlement Record shall be decided on the basis of actual possession, because this appears to me to be only an incomplete statement of the existing law, and to alter it and limit it in an undesirable way.

"There are two operations to be considered—*first* the making of a Record of Rights where no such record before exists; *secondly* the revision of an existing record.

"In respect of the revision of an existing record, I solicit attention to the operation of section 79, which is a repetition of section 19 of the existing Act. Under that section, a revising officer cannot decide a question of disputed possession, so as to alter the record, except so far as may be necessitated by facts which have occurred since the previous record was made. This limitation on a Settlement Officer's power should be maintained, and I, therefore, suggest that this section 70 be qualified by stating at its commencement the following words: 'Except as otherwise provided by section 79.

"The history of the Punjab Tenancy Act affords the strongest reasons against allowing a Revenue Officer to alter the record of his predecessor on the basis of possession, except in cases in which possession has changed since the record was made. There remains the part of the subject that relates to disputes advanced when a record is being made for the first time and also to disputes advanced at the revision of record in respect of facts which have occurred since the record was made. Is a direction for the decision of these disputes, '*on the basis of actual possession*,' either just or sufficient? According to my experience, and that of all Settlement Officers with whom I am acquainted, it is not. Actual possession is the best general guide, but it is not one that can be followed without qualification. I give

(3) 7 P. R. 1895 Rev.

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the following cases in explanation:—

* * * * *

"The cases I allege are not arguments against the value of possession as a general guide to the framing of the record. All I wish to show is that the rule is not sufficient as an absolute and exclusive guide. It should be remembered that we have to frame, not a record of possession, but a Record of Rights, and that we require the Courts to presume that the rights are as stated in the record; and a careful consideration of the subject will, I think, show that the difficulty would only partially be got rid of by changing the name of the record to a '*record of possession*' I submit that the framing of the Record of Rights is a *quasi*-judicial operation, and however strongly possession may be insisted on as the main guide, the Revenue Officers who frame it ought to be allowed a certain discretion to be exercised in cases such as I have instanced, and that we ought not by a too rigid framing of the law to compel the entry of rights as belonging to persons to whom it is notorious they do not belong, nor to compel our officers to substantially support possession which is wrongful, thereby referring innocent persons unnecessarily to costly civil litigation."

No one, reading this explanation of the changes made in the Land Revenue Bill during its passage through Council, at the instance of the member who was in charge of the measure during its final stages, can entertain any doubt as to what was the *intention* of the Legislature. The Record of Rights, as its name implied, was to be a record of titles not a record of mere possession. In so far as this involved a departure from any pre existing theory as to the nature of the entries in the village records, the change was justifiable by the circumstance that the Act of 1887, for the first time, attached a presumption of truth to entries in the annual record.

But it is a maxim of interpretation in construing statutes that no matter what the intention of the Legislature may have been, the Courts are bound to follow the wording of the enactment and to disregard evidence as to intention, when inconsistent with the language actually used in the Act as passed, if the latter is clear and unambiguous. It is necessary, therefore, to examine from this point of view the grounds on which the pronouncement contained in the ruling of *Mian Khan* v. *Alim Khan* (2) is based. The process of reasoning by which Mr. Ibbetson reached his conclusion is set forth in the following passage in that judgment:—

"Section 36 prescribes the procedure in cases of dispute. The wording is not as clear on the point as it might be; but clause (2) practically amounts to a direction to the Revenue Officer to ascertain possession; and if he cannot ascertain it, to make it, by putting the person, who is apparently entitled into possession. In this latter case, the entry is to follow possession; and I think it must be held that it will do so in the former case also, *otherwise there is no object in ascertaining possession.* Thus in all disputed cases, mutation is to follow possession." Now the words in the above passage to which I think exception can be taken are those which I have italicized. The inference that the mutation must follow possession is based on the premise that there can be no other object in ascertaining possession. If the validity of this premise can be successfully assailed, the conclusion derived from it must be abandoned. Now it seems to me that there is another very distinct and definite object to be attained by ascertaining possession. The most important issue which presents itself to the mutation officer in disputed cases is whether he is at liberty to vary the previous entry in the Record of Rights. By section 37 (*a*) of the Act, he is debarred from doing so otherwise than in accordance with "facts proved or admitted to have occurred." For the purpose of determining whether an alleged alienation, for instance, is "a fact proved to have occurred", the most obviously essential step in the inquiry, which under section 34 (4) and section 35 (1) the mutation officer is bound to hold, is the ascertainment of the facts as to possession. An alleged gift, sale or mortgage, if disputed, will generally be regarded by the mutation officer, and reasonably be regarded, as a fact *not* "proved to have occurred" if the donee, vendee or mortgagee has failed to obtain possession. Possession being proverbially nine points of the law, the mutation officer is very rightly required to ascertain it, as being one of the most important incidents to be considered in determining whether an alleged transfer is a "fact proved to have occurred." In view

of the importance of possession in this connection, and not because it is the sole determining factor, the mutation officer is, in disputed cases, required to ascertain possession. For there may be in every case a tenth point of the law. There are cases in which title does not, and ought not, to follow possession. It cannot, for instance, be seriously contended that either in pursuance of the law or of any considerations of policy or expediency, the mutation officer is bound to recognise the possession of the mere trespasser, of the party who by fraud, stealth or violence gains possession of that which is the undoubted property of another and holds it without any colourable title whatsoever other than 'might is right.' To extend recognition to such a tenure would be tantamount to acknowledging the title of a burglar to the proceeds of his burglary.

It has then been shown that the history of the legislation of 1887 negatives the conclusion that it was intended by those responsible for the mutation sections of the Land Revenue Act to require mutation invariably to follow possession. It has been shown that the actual language of section 36 does not, as Mr. Ibbetson supposed, impose upon the Revenue Officer any obligation of the kind. Even when resort is had to the exceptional procedure of putting one of the disputant parties in possession of the property, it is not because he has been put in possession, but because his being put in possession is the consequence of his being "best entitled" that mutation is effected in the name of such party. But there is still another line of argument which can be brought forward against the champions of the "possession" theory. That theory rests on the general position that the Record of Rights is or should be what is described as a record of actual facts, a photograph, so to speak, of the actual situation on the spot. But it is clear that it is not and cannot be this. Section 37 authorises entries to be made in accordance with what is agreed to by the parties concerned. In such cases, possession may be disregarded entirely. It is true that a rule under the Land Revenue Act at one time required mutation officers to postpone mutation in such cases if possession had not been given.* But, as pointed out by Mr. Ibbetson in his judgment of 1891, this rule was *ultra vires*. It has since been repealed, and is now no longer in force. Accordingly to the extent that persons not in possession can by agreement have mutations sanctioned in their favour, the Record of Rights ceases to be a record of actual possession. It also fails to be a record of actual possession in another class of cases for which section 37 of the Land Revenue Act makes provision, cases in which entries are made in pursuance of a decree or order binding on the parties interested. There is not in the Land Revenue Act any warrant for the view, sometimes entertained and acted upon by Revenue Officers, that mutation cannot in such cases be sanctioned until the decree or order has been executed. Of course, a decree or order cannot, in mutation proceedings based on clause (*b*), and not on clause (*a*), of section 37, prejudicially affect a person upon whom it is not binding.

The conclusion of the foregoing arguments is that the Record of Rights is a record of titles and not a record of possession. The procedure of the Revenue Officer in dealing with mutations is determined by the nature of the mutation. If the case is one in which the proposed entries "are agreed to by all the parties interested therein or are supported by a decree or order binding on those parties", possession may be disregarded. In other cases, that is to say, in disputed cases, section 36 makes it clear that the facts as to possession are relevant to the decision of the dispute, but they are relevant not for the purpose of making mutation follow possession, but for the purpose of ascertaining whether facts are "proved or admitted to have occurred," which would justify a variation in the existing Record of Rights. Clause (4) of section 34 authorises the Revenue Officer to make "such order as he thinks fit". His discretion is, of course, governed by section 37, as above explained, and before passing orders an inquiry is necessary. But subject to these limitations, the mutation officer has under the Act a very wide discretion to pass "such order as he thinks fit".

The mutation officer is, however, apart from such statutory limitations, bound by the various rulings of Financial Commissioners which are still in force, and by the rules,

* No, 45 p. 2119 Vol. III Rattigan's Acts.

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circulars and instructions from time to time issued by competent authority to guide his discretion. Such rulings, rules, circulars and instructions have generally been concerned with two main questions, *viz.*, (1), the foregoing question of "title *versus* possession", which, however, is transferred to a lower plane of controversy, and ought rather to be described as the question of how far possession is to be treated as evidence or proof of title; (2) the extent, nature and scope of the inquiry into title which the mutation officer should make before passing orders.

The extent to which possession or the absence of possession should be regarded as proof, for mutation purposes, that a fact has or has not occurred, depends mainly on whether the case is one of transfer or of inheritance. There are certain fundamental differences between the two classes of cases. In succession cases, a mutation of some sort must be effected. There is in these cases no such thing as a rejected mutation. A right-holder has died, and the old entry must be varied by the omission of the name of the deceased. The rights in devolution, must be recorded as belonging to somebody else. A particular claim may be rejected but mutation must be sanctioned in favour of some heir or heirs. In transfer cases, on the other hand, and especially in disputed cases, which constitute the test of the whole system, the issue is not only what the new entry shall be, but whether a new entry shall be made at all or not. In succession cases, there is seldom any dispute as to what property shall be mutated. It is the totality of the rights of the deceased right-holder. In transfer cases, not only may there be a dispute as to the area or extent of the right transferred, but also as to the nature of the interest alienated. Such questions arise as to whether the transfer is of a share or of specific fields; whether *shamilat* rights are or are not also conveyed; whether a mortgage is with or without possession, whether redemption money has or has not been paid. In succession cases the dispute is between rival heirs. In transfer cases it is generally between the transferor and transferee. Possession as evidence of title has a different value in the two classes of cases. The possession* of the active and alert heir who is on the spot and makes the most of his opportunities to circumvent the claims of his rivals by seizing the property of the deceased right-holder as soon as the breath leaves his body, does not count for very much as evidence of title. On the other hand, the possession of the right holder who all along has been in possession and whose title is impugned by a transferee under an alleged contract counts for a very great deal. Mutation officers are very chary of deciding against possession in the latter class of cases, and rightly so. They decide in favour of possession† because an alleged contract of sale, mortgage, exchange, gift or the like, not followed by possession, when disputed by the alienor who remains in possession, is not regarded as a "fact proved to have occurred" within the meaning of section 37 (*a*) of the Land Revenue Act, or, to adopt the language of Barkley's Directions, "*the truth of the transfer*" has not been proved. In some cases and especially in inheritance cases, as above explained, it is often not feasible or not equitable to decide on the basis of possession without some inquiry into title. As to what the general rule should be in disputed inheritance cases, I cannot do better than quote from the recorded opinions of two distinguished Revenue Officer. Sir James Wilson says :—

"In disputed cases of inheritance, comparatively little stress should be placed upon possession, as it often is not true evidence of right. The relatives living with the deceased naturally take possession on his death, and there may be others who have obviously an equal or superior right; for instance, when one of the sons is absent on service or when the deceased has a resident son-in-law, who cannot by custom exclude the collaterals, I would not require the Assistant Collector to alter the record merely in accordance with the facts of possession (often difficult to ascertain) when they are obviously contrary to right. I would here also give him some discretion, and would

*Under sections 88, 90 and 91 of Act II of 1882, such possession may often be legitimately treated as possession on behalf of all the heirs. (M. W. F.)

†Possession, of course, does not always mean physical possession. Often the mutation officer has to decide against physical possession because it is not the particular kind of possession that affects the question in issue. Thus when a mortgagor who holds as tenant under his mortgagee asserts that he has redeemed and the mortgagee denies it, the mutation officer would be in error if he treated the mortgagor's possession alone as proving that redemption had occurred. (M.W.F.).

instruct him to record the facts of possession so far as he can ascertain them by summary inquiry, but to make the new entry in accordance with what he finds to be the rights of the claimants, if they seem free from reasonable doubt."

Sir James Douie expresses his views as follows:—"In disputed cases of inheritance, apparent right should be the rule of decision. A strict application of the possession rule would in some cases land us in manifest injustice."

In the foregoing opinions, I concur. But the obligation to investigate in mutation proceedings disputed questions of title will not commend itself to some officers. Such officers should, however, note that there is ample authority for the view that investigations of the kind should be of a very summary character. In this connection, the *dicta* of Sir Lewis Tupper in *Harnand* v. *Jamna* (4) and *Momanda* v. *Farid* (1) may be referred to. In transfer cases, where anything more elaborate than a summary inquiry is necessary to decide whether a fact is "proved to have occurred," it will be best to refuse mutation and refer the parties to the Courts. But as above explained, in inheritance cases a new entry must be made. The scope of the inquiry must be left to the discretion of the mutation officer, but it must necessarily be summary. It will generally be preferable in doubtful cases to follow the rule of possession rather than embark upon an elaborate inquiry into titles, especially when the issues are those which depend upon the application and interpretation of controversial points of Customary Law. But for reasons above explained care should be taken to recognise fiduciary, constructive and vicarious possession as well as physical possession when the situation justifies such recognition.

Such being the general considerations by which, in my opinion, mutation officers should be guided, I now proceed to deal with the particular case with which the present revision reference is concerned. The Collector has rejected the mutation because he holds that the vendor, *Mussmmat* Zewaro, is a minor. The Commissioner does not traverse this finding but apparently takes the view that the question of the invalidity of the sale-contract in consequence of the minority of the vendor is not a question with which the mutation officer is concerned, in view of the fact that possession in pursuance of the sale-contract has passed to the vendee. In this, I do not agree. A minor is incompetent to enter into a contract (section 11, Act IX of 1872) and a contract, one of the parties to which is a minor, is not merely voidable but is void. It is not validated by the transfer of possession Accordingly, if the minority of *Musammat* Zewaro in the present case be established, the sale which she effected must be treated as void and may not be followed by mutation. But *Musammat* Zewaro's minority has not been established. On the contrary, it has been ascertained by an inquiry which I caused to be made that *Musammat* Zewaro was born on 3rd August 1892. The sale-deed in the present case is dated 8th September 1911. Accordingly, the age of majority being 18 years (Act IX of 1875), *Musammat* Zewaro was not a minor when she sold her land to Ghulam Muhammad, and the ground on which the Collector has rejected the mutation thus disappears. There remains the question whether a mutation of sale should be rejected, if or because the mutation officer considers that the vendor has exercised a power of alienation opposed to the Customary Law of the alienor. For three reasons, one of convenience, one of law and one of policy, I consider that in such cases when possession has taken place in pursuance of the contract, the mutation officer should sanction mutation irrespective of Customary Law considerations. *Firstly*, the ascertainment of the Customary Law entails an inquiry exceeding in its scope the limits of the summary inquiry which alone is appropriate in mutation cases. *Secondly*, the transfer though it may be a contract *voidable* at the instance of a reversioner, is not, as between the contracting parties, in itself void. *Thirdly*, as a matter of policy, it is not desirable that Executive Officers should by action in mutation cases interpose obstacles to the development of custom. The tendency of such development is towards the enlargement of the powers of the individual to dispose of his property and the restriction of the veto of the tribe, the clan, and the agnatic group. It is a recognised principle that by a multiplicity of precedents and instances departing from an ancient custom, a new

(4) 1 P. R. 1901 Rev.

custom opposed to that previously prevailing may be established. Such instances of innovation, if unchallenged, will in time become so numerous as to justify recognition by the Civil Courts. But the challenge should be before tribunals competent to decide the issues invloved. Mutation officers are not competent to decide these issues and they should not take any action prejudicing their decision. A refusal to sanction a transfer-mutation based on possession would operate prejudicially while, on the other hand, sanction to the mutation would in no way be binding on a person who was not a party to the transfer and would not prejudge the issue of Customary Law. For the foregoing reasons, I see no sufficient ground for rejecting the transfer in the present case. Accordingly under section 16 (4) of Land Revenue Act, I set aside the order of the Collector and restore the order of the Naib-Tahsildar, dated 21st January 1912.

Revision accepted.

MADRAS HIGH COURT.

CIVIL APPEALS NOS. 209 OF 1908 AND 46 OF 1909.

September 23, 1912.

Present:—Mr. Justice Miller and Mr. Justice Abdur Rahim.

IN APPEAL NO. 209 OF 1908

MUTTA VENKATACHALAPATHY (DIED) AND OTHERS—PLAINTIFF AND HIS LEGAL REPRESENTATIVES—APPELLANTS

versus

Rao Sahib PYINDA VENKATACHALAPATHY GARU AND OTHERS—DEFENDANTS—RESPONDENTS.

IN APPEAL NO. 46 OF 1909

Rao Sahib PYINDA VENKATACHALAPATHY GARU AND OTHERS—DEFENDANTS—APPELLANTS

versus

MUTTA VENKATACHALAPATHY (DIED) AND OTHERS—PLAINTIFFS AND HIS LEGAL REPRESENTATIVES—RESPONDENTS.

Registration Act (III of 1877), s. 49—Suit for possession of immoveable property—Power of Court to grant restitution—Unregistered document—Admissibility for collateral purpose — Practice — Restitution — Court's power to grant conditional decree—Contract Act (IX of 1872), s. 65.

A Court in India has power to pass a conditional decree as it is perfectly within its competence to impose a condition which will do complete justice to the parties and there is nothing in section 65 of the Contract Act which suggests that the Court has no such power.

Even in suits in which the relief sought is not an equitable relief, the Court has the power, in a proper case, to refuse to grant a relief to the plaintiff except on terms indicated by the obvious consideration of justice.

Per *Abdur Rahim, J.* (affirming the decree of the lower Court).—The main object of the Registration Act is to prevent documents of certain classes having any effect unless they are registered and not to deal with questions of evidence, pure and simple. That a document of sale was not intended to be a real transaction, can be proved by a contemporaneous document, which was intended to be a mortgage but failed to have that effect for want of registration, as the evidence is adduced not to enforce the mortgage, but to show that the so-called deed of sale was not intended to operate as a transaction affecting immoveable property.

An unregistered document is admissible to prove the circumstances in which the property came to be in defendant's possession.

Per *Miller, J.*—An unregistered document is inadmissible in evidence to prove the nature of the possession of the defendant or the circumstances in which defendant came into possession of the property so as to enable a plaintiff to disturb defendant's possession and re-place it by its own.

Appeal against the decree of the Court of the Subordinate Judge of Cocanada, in O. S. No. 22 of 1907.

IN APPEAL NO. 209 OF 1908.

Mr. *P. Narayanamurthi*, for the Appellants.

Mr. *T. R. Ramachandra Iyer*, for the Respondents.

IN APPEAL NO. 46 OF 1909.

Mr. *T. R. Ramachandra Iyer*, for the Appellants.

Mr. *P. Narayanamurthi*, for the Respondents.

JUDGMENT.

ABDUR RAHIM, J.—These two appeals arise in a suit to recover certain immoveable property. The suit was instituted by the appellant in Appeal Suit No. 209 of 1908. He is the respondent in the other Appeal No. 46 of 1909. The facts that led to the institution of the suit, so far as they are relevent to these appeals, are these:—The plaintiff executed a deed of mortgage in favour of the defendant in November 1894. In 1896, he executed a deed of sale with respect to the same property for Rs. 8,000 and odd, made up of the amount of the previous mortgage and Rs. 4,000 then paid to the plaintiff by

the defendant. The sale-deed is marked as Exhibit A in this case. On the same day as Exhibit A, a document was written, which showed that the transaction between the parties was intended to be a usufructuary mortgage and not a sale. This document, which is in the shape of a letter, was not registered. Then in 1900 the defendant in the present suit tried to enforce what was intended to be a usufructuary mortgage, but it was ultimately held by the High Court that the mortgage could not be enforced as the document on which reliance was placed for the purpose was not registered as required by the law. The present suit is for the recovery of the same property and the plaintiff's case is that as the parties did not intend that Exhibit A should be treated as an effective deed of sale, the property never passed to the defendant. The Subordinate Judge has decreed the suit but has made it a condition of the decree that the plaintiff should make over to the defendant whatever money he received under the deed.

The main question in Appeal No. 209 is whether the Subordinate Judge was right in passing such a conditional decree. I am of opinion that he was; taking the transaction to be void on the ground that the so-called deed of sale was never intended to be given effect to, there can be no doubt that under section 65 of the Contract Act the defendant will be entitled to the restitution of whatever advantage the plaintiffs derived by the abortive transaction.

The contention on behalf of the appellant is, that the Court, while giving the plaintiff a decree for possession to which he is entitled, cannot make it a condition precedent to recovery of possession, that he should make restitution because section 65 of the Contract Act does not give such a power to the Court. But the fact that this section does not give the power in so many words, is not to my mind conclusive. There is nothing in section 65 which suggests that the Court has no such power and, in my opinion, independently of the Contract Act, it lies perfectly within the competence of the Court, in a case of this nature, to impose a condition which would do complete justice between the parties. There is no reason why the defendant should be driven to a fresh suit to recover the money which he paid for the property, which the plaintiff seeks to recover, on the ground that the intended transaction proved infructuous and it is for the plaintiff to show that we cannot in this suit restore both the parties to their original position. No doubt this suit is one in ejectment and cannot, therefore, be called a suit in which an equitable relief is sought, and the learned Pleader for the appellant contends that we have got the power to attach such a condition to the decree, only in cases where the relief sought is a relief in equity. But I agree with the ruling in *Girraj Baksh* v. *Kazi Hamad Ali* (1), that even in suits in which the relief sought is not, strictly speaking, an equitable relief, the Court has the power in a proper case to refuse to grant a decree to the plaintiff except on terms indicated by obvious considerations of justice and this view also finds support from Lord Blackburn's dictum in 7 Exchequer, page 37. In this country, there has never been any distinction between equitable and legal jurisdictions and the same Court has the power in a proper case to take note of the equities of the parties although the action may be strictly one at law. The principle upon which I think we ought to act in this case is similar to that embodied in several statutes of the Indian Legislature, for instance, section 41 of the Specific Relief Act, section 55, sub-section 6, clause(*b*) of the Transfer of Property Act and section 86 of the Trusts Act. I do not propose to consider whether we could declare a charge or a lien on the property in the circumstances of the case as was done in *Angadipeldi Koyil Erath Kunhamina Ummai* v *Valluntakath Ibrahim Haji* (2), and *Padammah* v. *Themana Ammah* (3), as we are not called upon to do either.

I would, therefore, hold that before the plaintiff recovers the property, he must restore to the defendant whatever advantage he has derived under the so called sale. The parties agree that there should be no claim

(1) 9 A. 340 at p. 345.
(2) 12 M. L. T. 264; 16 Ind. Cas. 405; (1912) 1 M. W. N. 993.
(3) 17 M. 232.

for mesne profits or interest on the amount paid by the defendants. The decree of the Subordinate Judge will, therefore, be modified accordingly, that is to say, the decree in favour of the plaintiff should contain a condition that the plaintiff do pay back to the defendant Rs. 8,250, the amount paid by the defendant to the plaintiff. With this modification, the Appeal No. 209 will be dismissed with costs.

The other appeal raises the question whether certain evidence has been rightly admitted to show that the transaction evidenced by Exhibit A was not intended to be given effect to as a sale. The evidence objected to on this point is that which is adduced to show that what the parties really intended was that there should be a usufructuary mortgage and not a sale, and I can hardly doubt that that was what the parties intended. This evidence is practically a reproduction of the recitals of the letter witten contemporaneously with Exhibit A, already alluded to. The document was not produced at the trial, but no objection was taken to the reception of its contents by secondary evidence. Mr. Ramachandra Aiyar, the learned Vakil for the appellant, however, contends relying upon section 49 of the Registration Act that the document itself could not be used in evidence at all. Section 49 says: "No document required by section 17 to be registered shall (*a*) affect any immoveable property comprised therein, or (*b*) confer any power to adopt, or (*c*) be received as evidence of any transaction affecting such property or conferring such power unless it has been registered." The question is whether any such document has been received as evidence of a transaction affecting immoveable property. I take it, what is meant is, that a document which is required to be registered by the law cannot be received as evidence in support of a transaction affecting immoveable property. What was, then, the object with which the evidence in question in this case was given? As I understand it, it was adduced in order to show that the so-called deed of sale was not intended to operate as a transaction affecting certain immoveable property. It was not adduced to show that the parties entered into a valid transaction in the nature of a usufructuary mortgage. There is no question in this case of enforcing any such mortgage. The plaintiff relied upon his title which does not depend upon that mortgage in order to recover the property. What he says is that Exhibit A cannot stand in the way because it was never intended to be an operative transaction. No doubt, in order to prove that he has got to show that the transaction which was intended was something else, that is, a mortgage transaction. But, though it may be necessary to prove that, in order to prove that Exhibit A was not intended to create an effective sale, the object was not to prove that there was an effective mortgage. Section 49 does not say that a document which requires registration shall not be received in evidence for any purpose if it is unregistered. Now, I think there can be little doubt that it would be permissible for the plaintiff to prove that there was no valid sale by adducing evidence to the effect that Exhibit A was not intended to be given effect to. Section 92 of the Evidence, Act which prohibits the admission of any oral evidence varying or contradicting the terms of certain documents, has no application. As regards the provision of the Registration Act, it has to be borne in mind that the main object of the Act is to prevent documents of a certain class having any effect unless they are registered. The primary object of that Act is not to deal with the questions of evidence pure and simple. If the question whether Exhibit A, the document of sale, was intended to be a real transaction of sale or not, could be proved by other evidence, it appears to me, there is no good reason for holding that it could not be proved by a document which was intended to be a mortgage but which would fail to have that effect by reason of its not being registered, unless, of course, the language of section 49 is clear enough to that effect. As I read it, it only shows that you cannot prove a document which requires to be registered, in order to support a transaction affecting immoveable property. But this is not what is intended in this case. In my opinion, the Full Bench decision in *Rajah of Venkatagiri* v. *Narayana Reddi* (4), bears out this view of section 49. There, what was sought to be proved, was the terms of an agreement to lease, which was not registered in order to show that the plaintiff was entitled

(4) 17 M. 456.

to damages for breach of the contract. Now the contract, as evidenced by the unregistered agreement, was certainly a transaction affecting immoveable property. But, nevertheless, it was held that its terms could be proved for the purpose, not of enforcing the contract but for proving the existence of the contract and showing the damages sustained by the plaintiff by the non-performance of the contract. But it is argued that that was not a suit affecting immoveable property, but I do not see how that makes any essential difference except in cases where the suit is brought to enforce the terms of a document, of which the law requires registration but which has not been registered. No doubt, there is a sentence in the Full Bench case referred to, which, if it stood alone, might to some extent countenance the contention of Mr. Ramachandra Iyer, but the decision itself supports the view which I have stated. The ruling in *Kanuparti Subbayya* v *Maddulletiah* (5) has no application to this case. I am, therefore, of opinion that section 49 of the Registration Act does not apply nor does section 92 of the Evidence Act. There is no force in the contention that the suit is barred by *res judicata* by reason of previous proceedings. I would, therefore, dismiss the appeal.

MILLER, J.—I have asked my learned brother to deliver the first judgment in this case because his judgment covers the whole field, whereas mine is confined to one point. I regret to say that I have come to a different conclusion from him on the question, whether this alleged mortgage, this letter which converted Exhibit A into a mortgage and of which secondary evidence has been given, is admissible in evidence or not. In my opinion, it is not admissible because section 49 of the Registration Act forbids its admission. If it is not admissible, then it is not denied that no admission of the defendant can be admitted to prove its contents and the result would be, if it is not admissible, as I understand it, that all we have is Exhibit A and the plaintiff's suit must be dismissed. Now section 49 of the Registration Act says that no document required by section 17 to be registered is to be received as evidence of any transaction affecting immoveable property. Now it is not denied that this letter, which is not before us, is a document which required registration under section 17. If the Court is asked to receive it as evidence of a transaction affecting immoveable property, the Court must refuse so to receive it. As I understand the plaintiff's case, it is possible he might simply have placed his case thus:—"This is my land. There was no sale to the defendant. Defendant is in possession. I asked him, but he didn't give up possession." The answer to that would, no doubt, be:—The land was sold by Exhibit A. Plaintiff would have to show that the sale was something other than a sale and probably the result would have been the same as it is now. But the plaintiff did not so frame his plaint, he based his claim on a mortgage transaction. He says:—"There was what was intended to be a usufructuary mortgage which has failed for want of registration, and I am entitled to possession on account of the failure." What then, did he mean to prove by this document of which he tendered secondary evidence? He wanted to prove, as I understand it, that this possession of the defendant was under a mortgage which was no mortgage. That is to say, he wanted to prove a transaction which affected immoveable property, though the actual document would not, of course, have any effect upon the title in the particular case for want of registration. The transaction he wanted to prove was a mortgage and that is a transaction affecting immoveable property though the document for want of registration did not have any effect. Now, according to the Full Bench case of *Rajah of Venkatagiri* v. *Narayana Reddy* (4), it does not matter that the document may have the effect of proving a transaction affecting immoveable property, if it is used—that is how I understand it—for the purpose of proving a transaction which does not affect immoveable property in any way, then it may be received in evidence. That, it seems to me, is not so here. Not only was the purpose to prove a transaction which does affect immoveable property but the purpose of proving it was to affect immoveable property to enable the plaintiff to disturb the possession and re-place it by his own. The case is nearer to that in *Kanuparti Subbayya* v. *Kurnam Maddulletiah* (5), where Benson and Wallis, JJ., refused to admit an unregistered per-

(5) 17 M. L. J. 469.

manent lease which was put forward not to prove, that is, not in order to enforce the lease, but to prove the nature of the adverse possession which was set up by the defendant. The Judges said:—"No, the transaction to be proved is the nature of adverse possession, that is a transaction which affected immoveable property. This document is put in to prove that transaction and that cannot be allowed." So here, it seems to me, though the case is not exactly the same as in that case, the document is put forward to prove that there was a mortgage and not a sale. Because there was a mortgage and not a sale, the defendant is not entitled to retain possession and, therefore, the document is in this case put forward not only in order to prove a transaction affecting immoveable property, but, further, if that makes any difference, in order that the result of the suit may be a decree affecting immoveable property based on this transaction.

I hold that the document is not admissible in evidence according to the decisions in this Court as I understand them. The plaintiffs' suit for possession will have to be dismissed and I would dismiss it without costs, but as the effect of my learned brother's decision is that both the appeals should be dismissed with costs, that will be the order of the Court.

Appeals dismissed.

COURT OF FINANCIAL COMMISSIONER, PUNJAB.

REVENUE REVISION No. 162 OF 1911-12.

August 30, 1912.

Present:—Mr. Fenton, F. C.

AZIZ-UD-DIN AND OTHERS—DEFENDANTS—APPLICANTS

versus

Guru BHAGWAN DAS AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Landlord and tenant—Lease for long term of years—Leased land planted up as garden—Forfeiture condition on non-payment of rent—Relief against forfeiture—Deposit of rent in Court—Discretion—Revision—Failure to exercise jurisdiction—Transfer of Property Act (IV of 1882), s. 114—Punjab Tenancy Act (XVI of 1887), ss. 48, 84.

A. took from *B.* certain land on 20-year lease at a rent of Rs. 400 payable in half-yearly instalments. The lease contained a condition providing that *A.* would be liable to ejectment should at any time the rent for one year be in arrears.

The area leased was planted up by *A.* as a garden and contained many fruit trees which were about to reach their prime. *B.*, alleging default in payment of rent in respect of two half-yearly instalments, sued for ejectment. *A.* pleaded tender of rent and further paid into Court the amount of rent then due. The first Court declined to grant ejectment, but the Collector on appeal, finding that the tender was not valid, held that he was bound to enforce the forfeiture condition of the lease;

Held, (1) that section 48 of the Tenancy Act did not bar or exclude relief against forfeiture for non-payment of rent, if under the general law governing lease contracts, such relief was claimable by lessees;

(2) that the case called for the exercise of the discretion, conferred by section 114 of the Transfer of Property Act, to give relief against forfeiture under the condition of the lease, which was objectionable and unconscionable;

(3) that as the Collector failed to exercise the jurisdiction to grant relief against forfeiture for non-payment of rent, his order was liable to revision.

Such of the sections of the Transfer of Property Act as lay down principles of law which are in consonance with the principles of equity, good conscience and justice should be followed by the Courts of the Punjab. Section 114 of the Act embodies such a provision of law.

Musammat Bhagwan Devi v. *Musammat Bunyad Khanum*, 85 P. R 1902, followed.

Case reported by the Commissioner, Lahore Division, dated the 21st June 1912.

Messrs. *Muhammad Umar* and *Miraj Din*, for the Applicants.

Mr. *Jai Lal*, for the Respondents.

ORDER.—The plaint alleged that the defendants took from plaintiffs the land in dispute on a 20-year lease from 1905 at a rent of Rs. 400 payable in half-yearly instalments. The lease contained a condition providing that the lessees would be liable to ejectment, should at any time the rent for one year be in arrears. The plaintiffs claimed that the defendants, having fallen into arrears in respect of two half-yearly instalments, had incurred liability in accordance with this provision and asked for a decree accordingly. The first Court held that there was evidence that the rent had been tendered to the plaintiffs, and, in view of this and of the circumstances that the defendants had paid into Court the rent then due, declined to grant a decree for ejectment but gave a decree for Rs. 400 being the amount of rent paid into Court by the defendants.

AZIZ-UD-DIN v. BHAGWAN DAS.

On appeal by the plaintiffs, the Collector, (Mr. Lumsden) found that the tender of the rent by the defendants to the plaintiffs, was made after the last day on which it fell due. He, therefore, considered that notwithstanding the payment of the rent into Court, he was bound to enforce the forfeiture condition of the lease, and, accepting the appeal, he held that the defendants should, subject to further consideration of the question of payment of compensation for improvements, be ejected from the leasehold.

Further proceedings then ensued with reference to the question of compensation and it is in connection with this question that the Commissioner has referred the case to this Court on the revision side.

I do dot consider it necessary to deal with the question of compensation because I must hold that the Collector's order decreeing the ejectment of the defendants, was wrong, and that it is liable to revision, inasmuch as the Collector failed to exercise a jurisdiction vested in him by law, *viz.*, the jurisdiction to grant relief against forfeiture for non-payment of rent. It is true that the relief against the forfeiture section (section 48) of the Punjab Tenancy Act does not specifically provide for relief against forfeiture for non-payment of rent. In the case of an occupancy-tenant, mere non-payment of rent is not a ground for ejectment. There must be a decree for arrears of rent which remains unsatisfied. As regards tenants holding under contract, section 48 of the Tenancy Act gives relief against forfeiture for certain defaults, not including default in payment of rent, but it does not bar or exclude relief against forfeiture for non-payment of rent, if under the general law governing lease contracts, such relief is claimable by lessees. The law of contract governing contracts of lease is contained in the Transfer of Property Act, 1882, section 114 of which runs as follows:—

"Where a lease of immoveable property has determined by forfeiture for non-payment of rent, and the lessor sues to eject the lessee, if, at the hearing of the suit, the lessee pays or tenders to the lessor the rent in arrear, together with interest thereon and his full costs of the suit, or gives such security as the Court thinks sufficient for making such payment within 15 days, the Court may, in lieu of making a decree for ejectment, pass an order relieving the lessee against the forfeiture; and thereupon the lessee shall hold the property leased as if the forfeiture had not occurred."

Now the case under consideration was one in which the Court should have exercised the discretion so conferred to give relief against forfeiture under the condition of the lease which is rightly described by the first Court as objectionable and unconscionable. The area leased was planted up as a garden and contained many fruit trees which were about to reach their prime, and ejectment under such circumstances was a very harsh proceeding. It is true that the Transfer of Property Act has no statutory operation in the Punjab (outside Cantonments), but as laid down, by the Chief Court in its ruling *Musammat Bhagwam Devi* v. *Musammat Bunyadi Khanum* (1), such of the sections as laid down principles of law which are in consonance with the principles of equity, good conscience and justice should be followed by the Courts. For foregoing reasons, I now direct under section 84 (5) of the Tenancy Act that the defendants, who have been ejected from their lease-hold, in pursuance of Mr. Lumsden's order, be restored thereto. It is not necessary to pass any decree for rent in favour of plaintiffs, who have taken delivery of the sum paid into Court by the defendants. Any claim for rent for any period subsequent to that covered by the Rs 400 paid into Court can be made the subject of a claim hereafter, if necessary. In any such adjustment of accounts, I may note that the plaintiffs should, in accordance with section 114 of the Transfer of Property Act, receive interest which may be put at 6 per cent. per annum on the sum of Rs. 400 from the date on which it fell due as rent until the date on which it was paid into Court. I do not interfere with any orders already passed as to costs. In this Court, each party will pay his own costs.

Revision accepted.

(1) 85 P. R. 1902.

RAM PROSAD *v.* EMPEROR.

CALCUTTA HIGH COURT.

CRIMINAL REVISION PETITION No. 855 OF 1912.

September 12, 1912.

Present:—Sir Ashutosh Mookerjee, KT., Judge, Mr. Justice Carnduff and Mr. Justice Imam.

RAM PROSAD—PETITIONER

versus

EMPEROR—OPPOSITE PARTY.

Revision—Criminal case—Findings of fact—Jurisdiction of High Court to interfere—Penal Code (Act XLV of 1860), *s.* 211*—Principles to be kept in view in case under section* 211.

Applications for revision in criminal cases stand on a fundamentally different footing from appeals against appellate decrees in civil suits. In cases of the latter description, the High Court is bound by the rigid provisions of section 100 of the Code of Civil Procedure, 1908, to act on findings of fact embodied in the judgment of the lower Appellate Court. In criminal cases, on the other hand, there is no such statutory restriction to the exercise of the High Court's jurisdiction. As a matter of practice, the High Court does not ordinarily interfere with the conclusions of the lower Appellate Court on questions of fact, but there cannot be any question as to the competency of the High Court to interfere with a finding of fact when the occasion requires it, and the High Court will not hesitate to do so when satisfied that the finding is manifestly erroneous and a miscarriage of justice would result from it if left uncorrected.

In a case under section 211 of the Penal Code, two principles must be kept in view: (1) that failure on the part of a complainant to establish the truth of his allegation does not by any means justify the inference that the complaint was false, and (2) that to secure a conviction it must be established beyond reasonable doubt that the circumstances are not merely consistent with the guilt of the accused but entirely inconsistent with his innocence.

Criminal revision against the order of the Sessions Judge of Shahabad, dated June 1st, 1912, affirming that of the Deputy Magistrate of Arrah, dated May 4th, 1912, convicting the petitioner under section 211, Indian Penal Code, and sentencing him to six weeks' rigorous imprisonment.

The application came on for hearing originally on August 5th, 1912, before Mr. Justice Carnduff and Mr. Justice Imam who differed in their opinion.

CARNDUFF, J.—The petitioner Ram Prosad charged one Padam Kunjra with assault and theft. The charge of theft was declared to be false, and the petitioner was prosecuted in respect of it under section 211 of the Indian Penal Code. The trial Magistrate convicted and sentenced him to six weeks' rigorous imprisonment, and his appeal to the Sessions Judge was dismissed. He then moved this Court in revision and obtained a Rule on two grounds.

The first ground is that "the findings of the learned Judge are very doubtful." As to this, it is true that the Judge has indicated doubts as to whether the petitioner was ever assaulted; but his findings regarding the alleged theft—and it is with these that we are concerned—appear to me to be the reverse of doubtful. He thinks "there can be no doubt" as to a Munsif having been present at the time of the occurrence, whatever it was; and the fact that the Munsif heard nothing of any such "serious affair" as the theft charged, he considers "an extremely strong reason for holding that no theft took place." He records the opinion that, apart from the denial of the persons accused by the petitioner, "the other circumstances of the case to his mind show clearly that no theft took place" and there cannot be the slightest doubt that the charge of theft was absolutely false"; and he concludes with the observation that, "even if the accusation of assault be true, it is clear that the present accused has committed an offence under section 211 for bringing the accusation of theft." In the face of these unequivocally expressed conclusions, the first ground must, I think, be held to fail.

The second of the grounds upon which the Rule was obtained, is that the Sessions Judge "could not, on the finding that the defence evidence was suspicious, hold that the evidence of prosecution, which he before held not sufficient, thereby became sufficient." Now, if the first half of the judgment be ignored and the second half (beginning with the words "The three persons accused by Ram Prosad") be treated as if it were the whole, the criticism here suggested would be fair; although, even then, it would be open to the counter-criticism that the "defence evidence" referred to, that is to say, the obviously interpolated entry in the account book of Jagan Ram, was produced by Jagan Ram, who was called by the prosecution for the purpose, and not by the defence. The investigating Police officer had examined the account book and noticed the suspicious entry, and, according to him, Jagan Ram then admitted that he had been told to add it. In these circumstances, Jagan Ram was

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very properly called as a witness by the prosecution; and, although he in Court denied that he had altered his book, the interpolation is there, and it cannot, in my opinion, be held that its existence is a matter to which the Courts below were not entitled to refer.

Returning, however, to the judgment, I need scarcely say that it is impossible to ignore what precedes the passage on which evidently the entire judgment is assailed. "The three persons accused by Ram Prosad," so runs the condemned passage, "have all given their evidence and denied that Padam snatched away any money from Ram Prosad. Their mere denial in itself does not count for much, but the other circumstances of the case to my mind show clearly that no theft took place." The rest of the judgment is then devoted to the circumstance connected with the interpolation in the account book. But that is only one circumstance; the passage refers to "the other circumstances" (in the plural); and in the paragraph preceding it, the learned Sessions Judge had just dealt with the circumstance of the Munsif's ignorance which seemed to him to "be an extremely strong reason for holding that no theft took place." And his reasoning in this connection commends itself to me. A trifling assault might easily have taken place without the Munsif's hearing anything about it; but not so a theft with violence. If the petitioner's story be accepted, he was robbed of the substantial sum of Rs. 101 in cash in a public place where there were a number of people collected; he raised no hue and cry, and persons on the spot, like the Munsif, knew nothing of it; he let the robber escape; and he contented himself by going off and laying a charge at the *thana*. The trial Magistrate could not believe this story, which he characterised as "palpably false;" the lower Appellate Court was of the same decided opinion; and I am not only not prepared to say that they were wrong, but ready to go further than is necessary or usual in revision by expressing my concurrence with their findings of fact. I would add that it should be remembered that what we are criticising is an appellate judgment of affirmance and that there are other circumstances appearing from the record and the Magistrate's judgment, which the learned Sessions Judge doubtless had in mind, though he has not referred to them. Thus it would seem that the supposed thief Padam himself went to the *thana* after the occurrence and complained of having been assaulted by the petitioner. Then the appellant's cousin, who was with him at the time, had to admit in cross-examination, that he had not seen the actual seizure, and there were a Mukhtar and several shop-keepers, who witnessed the occurrence and appear to have been as ignorant as the Munsif of anything like the theft of a hundred rupees having been committed. And the mere denials of Padam and his two alleged accomplices, although they may not in themselves "count for much," count for something, and, if not displaced by credible evidence to the contrary, should, I venture to say, count for a great deal. As has recently been observed by the Judicial Committee in the case of *Mirza Sajjad Husain* v. *Nawab Wazir Ali Khan* (1), Judges in India must not have "impliedly the duty laid upon them of making their narrative of the circumstances minutely and completely exhaustive, under the penalty that, if they failed to do so, the absence from their minds of elementary considerations might be presumed." Their Lordships were, of course, there dealing with a civil appeal, but I venture to think that the observation, which I have quoted, may well be given a wider application, and is especially relevant in respect of judgments of affirmance even in criminal cases.

I would, therefore, discharge the Rule.

IMAM, J.—This is a Rule calling on the District Magistrate of Shahabad to show cause why the conviction and sentence passed on the petitioner should not be set aside or the sentence reduced or such other order made as to this Court may seem fit, on the ground that the findings of the learned Judge are very doubtful and that on the finding that the defence evidence was suspicious, he could not hold that the evidence of prosecution which he before held not sufficient thereby became sufficient.

On the terms of the Rule, it would appear that there are two points for consideration, *viz.*, (1) whether the learned Judge's findings are doubtful, (2) whether the suspicious

(1) 16 C. W. N. 889; 10 A. L. J. 364; 16 C. L. J. 613; 14 Bom L. R. 1055; 23 M. L. J. 210; 34 A. 455; 12 M.L. T. 361; (1912) 1 M. W. N. 976; 15 O. C. 271; 16 Ind. Cas. 197.

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nature of defence evidence can supply the deficiency of the prosecution.

I have no hesitation in answering these points in favour of the petitioner, but I shall deal with them, as also with the whole case, after I have stated the case that has resulted in his conviction.

The petitioner has been convicted under section 211 of the Indian Penal Code and sentenced to two months' rigorous imprisonment on the charge that he laid a false complaint at Arrah Police Station, accusing three men, namely, Padam Kunjra, Ghani Kunjra, Bally Kunjra of having committed theft of cash contained in a *gamchha* knowing that there was no just or lawful ground for such a charge.

The incident that led to the lodging of this information arose out of a civil suit between some Hindus and Muhammadans of Arrah in connection with a mosque in that town. The case had been pending before one of the Munsifs who found it necessary to make a local inspection which, it is common ground, was held on the 17th March last year at or about 5-30 P. M. That some disturbance between the parties took place at or about the time of the Munsif's local inspection is the case of either party. The prosecution aver that the incident was a mere assault on Padam Kunjra's party and in the presence of the Munsif. On the other hand, the defence contends that the assault—which was by the party of Padam Kunjra on the accused and his party—was followed by the snatching away of a sum of Rs. 101 tied in a *gamchha* from the petitioner Ram Prosad Das, by Padam Kunjra.

Whatever the incident, both parties went to the Police Station and made their respective complaints by 6 P M. The information of Padam Kunjra was in respect of assault alone and thus not cognizable by the Police. The petitioner's information, on the other hand, comprised the charge of theft in consequence whereof an information in the prescribed form was drawn up by the Sub-Inspector who, it happened, was a Muhammadan. This Police Officer, believing the charge of theft to be an exaggeration, refused investigation and referred the petitioner, as also Padam Kunjra, to the Magistrate. Accordingly on the next day, *i.e.*, 18th March, Ram Prosad laid his complaint before the Magistrate substantially to the same effect as what he had stated in his first information of the previous day, with two exceptions as to the hour of occurrence and the presence of the Munsif.

In the body of the first information, purporting to be the statement of the informant, the time of the occurrence is not mentioned, but in the column that has to be filled up by the Police Officer, the time stated is 4-30 P. M. In the complaint before the Magistrate, however, the petitioner fixes the time at 5-30 P. M. It being from the beginning the case of either party that the occurrence—whatever it was—took place at 5-30 P. M., and the unimpeachable testimony of the Munsif establishes beyond doubt that his inspection was at 5 30 P. M., it is difficult to believe that the petitioner in his information to the Police stated the time of occurrence at 4-30 P. M. In respect of this question of time, the circumstance is emphasised by, what appears in the body of the informant's statement, an explanation of the supposed delay in lodging the first information, *viz.*, that the delay was due to "the presence of a great crowd and to the Muhammadans abusing the Hindus." Considering the undoubted fact that the occurrence could not have taken place earlier than 5 30 P.M. and, consequently, there was no delay whatsoever in laying the first information, the fact of the explanation of delay cannot but cast a serious doubt on the integrity of the Sub-Inspector in making a faithful record of what had been stated to him by the informant. The next point of difference between the first information and the complaint in Court is in respect of the presence of the Munsif at the time of the occurrence. Were it not for the importance attached by the Magistrate and the learned Judge to the presence of the Munsif at the time of the occurrence, I should have felt inclined to take no notice of the discrepancy. In the first information, it is stated thus: "First stated that Munsif Saheb was on the side of the *garry*, again said Munsif Saheb's *garry* had gone up to *chowraha*, therefore, I could not give its information to the Munsif Saheb." On the complaint to the Magistrate, the statement on oath stands thus; "The occurrence took place while the Munsif was not present," Considering that the discrepancy in respect of time cannot be reasonably, in the circumstances, attributed

to the informant, who it has not been shown, had any motive to set back the occurrence to an hour earlier than it really took place, nor has it been suggested that he had anything to gain by inventing in the first information a delay which was contrary to the facts of the case, I have no hesitation in declaring that the discrepancy concerning the Munsif's presence must also be ascribed to the Sub-Inspector.

Whatever the demerit of the first information in respect of the above-mentioned incident may be, the petitioner, however, is entitled to the advantges for his defence of such statements as appear therein to be his. One important statement affecting the present charge of laying a false complaint of theft stands out in bold relief in the first information. That statement is that the Rs. 101 of which the petitioner had been robbed had been received by him from one Jaggan Ram. The prosecution in this case has examined that Jaggan Ram as its witness. Jaggan Ram has, at the instance of the prosecution, produced his account book and proves, if he is to be believed, that he had handed to the petitioner the said amount a very short time before the time of the alleged occurrence. The reason for this witness's examination and the production of his book is to be found in the fact that originally he had been the petitioner's witness and the prosecution discovering in the book an interpolation, showing the payment as having been made to the petitioner, in the entry regarding this transaction, it forestalled the accused by citing him (Jaggan Ram) as its own witness, thereby inviting the Courts below, from the fact of the interpolation, to draw an inference adverse to the accused. The entry in the account book appears to be genuine in all respects, except a very small portion which may be translated into "paid through Pershady." This portion, from the appearance of the space into which it has been pressed, appears to have been written after the item of Rs. 101 had been entered in the book. But for this interpolated passage, the entry does not show how or through whom the payment had been made.

In respect of the transaction leading to the entry, the learned Judge holds that it is likely that it did take place but Ram Prosad did not take the money himself. The learned Judge in his judgment remarks:—"The rest of the entry seems genuine enough, but I think there can be no doubt that these words were added subsequently. From this I think there can be no doubt that Ram Prosad did not take the money himself and he induced Jaggan Ram to add these words subsequently, in order to corroborate the charge of theft. I think, therefore, there cannot be the slightest doubt that the charge of theft is absolutely false." This certainty in the finding that the charge of theft was false is attained by the learned Judge by a reference to the account book. I confess, I am unable to appreciate his conclusion when based on the interpolation, for the interpolation is in no wise inconsistent with the petitioner's assertion of receipt, and Jaggan Ram's statement of payment, of the money.

Examining the judgment of the lower Appellate Court, I find that the finding in respect of the falsity of the charge is based on two circumstances only, *first*, that the Munsif though present did not hear of the theft, and *second*, that there is the interpolation in Jaggan Ram's book.

As I have already expressed, Jaggan Ram was in reality a witness for the defence, and the fact that he has been examined by the prosecution does not alter the character of his evidence. To my mind, the circumstance of interpolation does not give the inference that no payment was made to Ram Prosad. It may be that Ram Prosad received the money as is sworn to by Jaggan Ram and yet the fact that it was paid into his hands might not have been originally entered in the account book. From the circumstance of interpolation, the learned Judge has deduced that there could be no doubt that Ram Prosad did not receive the money himself. To the learned Judge the interpolation renders payment to Ram Prosad impossible, and it is on such a view that he records an emphatic finding that "there cannot be the slightest doubt that the charge of theft is absolutely false" If this incident of the account book is eliminated, there then remains the other circumstance, *viz.*, the Munsif not hearing of the theft. In respect of this, the learned Judge says that it is an extremely strong reason for holding that no theft took place. Apart from the fact that the learned Judge has not correctly appreciated

the evidence regarding the presence of the Munsif, the question to my mind is, whether a finding based on a very doubtful circumstance can warrant a conviction of the accused for instituting a false charge. Had Padam Kunjra and others been on their trial, this circumstance might have been urged in their defence and found sufficient for their acquittal, but for the conviction of the petitioner for laying a false charge, it fails to be sufficient proof. The lower Appellate Court in holding that the Munsif was present at the occurrence, specially refers to the evidence of the D. W. No. 1, Ram Narayan, cousin of the accused, who said, in answer to a Court question, that the Munsif was present when the *marpit* took place, and also to the hesitation of the petitioner in his first information as to whether the Munsif was present or not. I have already expressed my reasons for doubting the fidelity of the first information as recorded by the Sub-Inspector in this respect. Referring to the statement of Ram Narayan, it appears to me that the learned Judge took up only one passage from his deposition and failed to notice the other statements that explained the witness's evidence. Ram Narayan in his deposition states that Ram Prosad arrived when the *takrar* was going on and joined in it; then, he says that the *takrar* commenced when the Munsif was present but he (Munsif) left while the *takrar* was continuing. The witness further says that the Munsif had already left the place when Padam ran away with Ram Prosad's bundle of money. In this deposition, there is nothing that can be construed to mean that the Munsif should have heard of the theft, if a theft had occurred. The Munsif's own statement is that there was a general "*hulla*," that he could not make out what they were talking, and that he did not see any one assaulted nor did any one complain to him about the assault. He further says that the *hulla* had subsided a little but the crowd was still there when he left the place. Judging from the Munsit's deposition, it appears to me impossible to hold that the Munsif was present to the end of the occurrence. In fact, it appears to support Ram Narayan's version that the Munsif left the place while the *takrar* was still going on. Padam Kunjra, who is also known as Ramzan Kunjra, states:—"I was pointing him (Munsif) out the drain and the house when Narayan ordered *maro, maro,* and I was assaulted and beaten. The Munsif was present at the time."—"Narayan and Munsif were inside the enclosure."—"The *marpit* took place for about 10 minutes." The evidence of Abdul Ghani is still more graphic. He says:—"Padam was showing the land to the Munsif, Lachmi dragged Padam by his *kurta*, Padam fell down, whereupon Lachmi, Babu Lal and Lal Chand beat him and Narayan incited them by saying *maro*..... The Munsif was inside the *tatti* at the distance of 3 to 4 paces." Another witness, Dahari Teli, admits that both parties assaulted each other, while the fifth witness states that Padam complained to the Munsif that he had been beaten These statements are not supported by the Munsif at all, and, indeed, relying on his statement, we have to reject the statements of these witnesses as untrue. We have the prosecution case that the *marpit* between two excited factions took place at a distance of 3 to 4 paces only from the Munsif and in his presence, the *marpit* lasting for 10 minutes, the order for the assault having been given by a man who had been standing with the Munsif within the enclosure. It can mean only one of two things, *i. e.*, the story of the Munsif's presence is false, or, the Munsif failed to notice what was a mere trivial assault because of the crowd. It is on the latter view that the petitioner has been convicted. We have definite statements of witnesses on which we have to proceed, and from their evidence it would be neither just nor judicious to belittle the incident, but even if I were so disposed, it would compel the rejection of their evidence. There, then will remain the only reliable evidence of the Munsif. I see nothing in his evidence on which I could uphold this conviction. On the other hand, if the incident was as is spoken to by the witnesses, no inference adverse to the accused could be drawn from the fact of the Munsif not hearing of the theft, for if the Munsif failed to notice a *marpit* between two excited parties within 3 to 4 paces of him, it is much less likely that he should have noticed the theft. The learned Judge seems to think that the theft, if true, was a serious affair and would have been bound to have been brought to the notice of the Munsif, but in respect of the

assault, he remarks that "the fact that the Munsif did not notice it is most likely due to there being a large number of persons present." The explanation in respect of the assault does not commend itself to me as, if the prosecution case is true, it is inconsistent with the alleged facts. As for his not hearing of the theft, his own statement explains it away, for he says "he could not make out what they were talking."

Besides the Munsif and other witnesses that I have mentioned above, the evidence of the sixth witness for the prosecution requires to be noticed. He is a Mukhtar and was engaged on the side of the mosque. It is true that he supports the prosecution, but I place no reliance on his testimony as he positively asserts that the accused was present on the spot but took no part in the *marpit*. This statement is unworthy of credit, as the petitioner, when at the Police Station, was found to have injuries on him. Furthermore, this witness, though claiming to have seen the fight, is discreetly silent as to whether the fight was one-sided or mutual, by saying that he did not notice who assaulted whom.

Reverting to the charge of theft, the possession of 101 rupees by the petitioner is an important point in the case, and the learned Judge, relying on his finding that the man had not the money, has held that the charge in respect of it must be false. I have already pointed out that the learned Judge's conclusions are erroneously drawn. On the other hand, there is one important circumstance in the first information which ought not to be overlooked and which gives me the conviction that the petitioner had the money with him. In the first information, it is stated that he had been carrying Rs. 101 that he had received from Jaggan Ram. On behalf of the prosecution, it has been contended that the petitioner never got the money as "Jaggan Ram had been unable to say whether he had ever paid any money to Lal Chand on any previous occasion through the petitioner." Granting force to this argument, the question naturally strikes one as to how the petitioner came to mention Rs. 101 and Jagan Ram's name in the first information which, undoubtedly, was laid without delay. The statement and the stage at which it was made, leave no room for doubt that the petitioner was in some form or other connected with this transaction of Jagan Ram's. It thus renders the story of the petitioner in respect of his possessing 101 rupees very probable.

For the reasons I have stated above, I would set aside the conviction of the petitioner and make this Rule absolute.

It is not usual for us, in revision, to discuss a case on its facts, though it is open to us to do so. As I have the misfortune to be in disagreement with my learned brother in this instance, I have felt I owe it to him to explain at length my reasons for differing from him.

On account of this difference of opinion, the case was heard by Sir Asutosh Mookerjee.

Mr. *C. R. Dass*, Babus *Chandra Sekhar Prasad Singh* and *Rajendra Prasad*, for the Petitioner.

Babu *Srish Chandra Chaudhuri*, Junior Government Pleader, for the Crown.

JUDGMENT.—The substantial question in controversy in this Rule is whether the conviction of the petitioner for an offence under section 211 of the Indian Penal Code can be sustained. The Magistrate convicted the accused and sentenced him to rigorous imprisonment for six weeks Upon appeal, that conviction has been affirmed by the Sessions Judge. On the present Rule, issued by Mr. Justice Holmwood and Mr. Justice Hassan Imam at the instance of the petitioner, Mr. Justice Carnduff has recorded the opinion that the conviction should be affirmed, while Mr. Justice Hassan Imam has recorded the opinion that the conviction ought to be set aside. The matter has now been placed before me under section 439, sub-section 1 of the Criminal Procedure Code, read with section 429 and has been fully argued on behalf of the accused as also on behalf of the Crown.

There has been some discussion before me as to the meaning and effect of the judgment of the Sessions Judge in this case, and so far as I am able to gather from the opinions recorded by my learned colleagues, that judgment appears to have been minutely analysed and criticised before them. To me it seems a fruitless task to submit the judgment of the Sessions Judge to a searching psychological analysis as appears to have

been attempted at the Bar. I am not prepared to extend the application of the observations of their Lordships of the Judicial Committee in *Mirza Sajjad Husain* v. *Nawab Wazir Ali Khan* (1) to criminal cases. Applications for revision in criminal cases stand on a fundamentally different footing from appeals against appellate decrees in civil suits. In cases of the latter description, this Court is bound by the rigid provisions of section 100 of the Code of Civil Procedure, 1908, to act on findings of fact embodied in the judgment of the lower Appellate Court. In criminal cases, on the other hand, there is no such statutory restriction to the exercise of our jurisdiction. It is not disputed that, as a matter of practice, the Court does not ordinarily interfere with the conclusions of the lower Appellate Court on questions of fact: *Belilios* v. *Queen* (2); but although it is unusual in revision to interfere with a finding of fact, there can be no question as to the competency of the High Court so to interfere with a finding of fact when the occasion requires it, and the Court will not hesitate to do so when satisfied that the finding is manifestly erroneous and a miscarriage of justice would result from it if left uncorrected. *King-Emperor* v. *Buransaheb* (3). In this connection, reference may be made to the exposition of the law on the subject by Sir Lawrence Jenkins in *King-Emperor* v. *Bankatram* (4): "If we have been entrusted with the responsibility of a wide discretion, we should be the last to attempt to fetter that discretion, and whenever it is argued that judicial decision has deprived us of the power that the Legislature has given us, I recall the words of an eminent English Judge: 'I desire to repeat,' he said, 'what I have said before, that this controlling power of the Court is a discretionary power, and it must be exercised with regard to all the circumstances of each particular case, anxious attention being given to the said circumstances, which vary greatly. For myself I say emphatically that this discretion ought not to be crystallised, as it would become in course of time by one Judge attempting to prescribe definite rules with a view to bind other Judges in the exercise of the discretion, which the Legislature has committed to them. This discretion, like all other judicial discretions, ought, as far as practicable, to be left untrammelled and free, so as to be fairly exercised, according to the exigencies of each case.' These weighty words appear to me to breathe the spirit that should guide us in the exercise of our discretionary powers of revision. This may, perhaps, increase our responsibilities and add to our labours, but no one would shirk the one or grudge the other." In view of the unfettered and unrestricted jurisdiction of this Court in cases for revision, I am not prepared to apply to such cases, rules and principles rightly recognised in appeals from appellate decrees. As I have already stated, no useful result can be achieved by a critical examination of the judgments of the subordinate Courts; it is a much safer course to obtain a broad and comprehensive view of the facts of the case and then to ascertain whether there has been a failure of justice. This was the course pursued in the case of *Ramanath Kalapahar* v. *King-Emperor* (5) and will be followed in the present instance.

The circumstances under which the petitioner has been convicted lie in a very narrow compass. On the 17th March 1911, the third Munsif of Arrah held a local inquiry in connection with a suit about some land near Chowk Masjid. The case for the petitioner is that either while the Munsif was there or immediately after his departure, an altercation took place between the persons present. The petitioner asserts that he had with him Rs. 101 in a bag which was stolen from him by one Padam Kunjra. The petitioner Ram Prosad went to the Police Station at once and lodged information; his opponent at the same time lodged a counter charge of assault. The Sub-Inspector refused to inquire into the case of Ram Prosad as he thought the charge of theft was an exaggeration. On the next day, the petitioner lodged a complaint before the Magistrate; inquiry was held later on and the case found to be false. Eventually, on the 31st August, the petitioner was ordered to be prosecuted for an offence under section 211 of the Indian Penal Code. The petitioner has been prosecuted and convicted

(2) 12 B. L. R. 249; 20 W. R. 61 Cr.
(3) 6 Bom. L. R. 1096; 1 Cr. L. J. 1114.
(4) 28 B. 533 at p. 566.
(5) 2 C. L. J. 524; 3 Cr. L. J. 160.

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as already stated. It is conclusively established on the evidence that there was an altercation amongst the persons present at the local inquiry; whether this took place before or after the Munsif had left the place, is by no means clear, and the witnesses who speak to the presence of the Munsif are, as might be anticipated, not agreed as to the precise spot where the Munsif was at the time. The vital point of the case, however, is whether the petitioner was deprived, as he alleged, of the sum of Rs. 101. I see no reason to distrust the evidence that the petitioner had, as a matter of fact, with him the sum in question. This is supported by the evidence of the banker from whom the money was obtained and the entry in his account book. That entry, upon careful examination, does not appear to me to be suspicious, and there is no reasonable ground for the theory that Jagan Ram added words to the entry to corroborate the charge of theft. It is remarkable that no plausible hypothesis has been established by evidence as to why a wholly unfounded charge of this description should be brought. The failure of the Police Officer to investigate the matter promptly, has, unquestionably, prejudiced the petitioner; evidence which might have been available, if an inquiry had been set on foot at once, would naturally be difficult, if not impossible, to obtain when the investigation was taken up later on. Nor can I attach any weight, in the circumstances, to the evidence of the Munsif, who, it is plain from his deposition, did not particularly observe the incidents which took place at some distance from him. In my opinion, the Courts below have failed to keep in view two elementary principles, namely, *first* that failure on the part of a complainant to establish the truth of his allegation does not by any means justify the inference that the complaint was false, and, *secondly*, that to secure a conviction in this class of cases, it must be established beyond reasonable doubt that the circumstances are not merely consistent with the guilt of the accused but entirely inconsistent with his innocence. Upon a careful examination of the entire evidence on the record and the circumstances of the case, I have arrived at the conclusion that the conviction of the petitioner cannot be supported. The Rule is made absolute and the conviction and sentence set aside; the petitioner will accordingly be discharged from his bail.

Rule made absolute.

BOMBAY HIGH COURT.

CRIMINAL REVISION PETITION No. 263 OF 1912.

October 3, 1912

Present:—Mr. Justice Batchelor and Mr. Justice Rao.

EMPEROR—PROSECUTOR

versus

CHANDABHAI AMAR-ANG—ACCUSED.

Criminal Procedure Code (Act V of 1898), *s.* 195, *cl. (b)—Penal Code (Act XLV of* 1860), *s.* 211—*Making false report to Police—Grant of B summary not sanction—Sanction not required—Jurisdiction.*

A Magistrate gave to the Police what is called a B summary in regard to the accusation made by a complainant. The complainant was thereupon prosecuted under section 211, Indian Penal Code, before the same Magistrate for giving a false report constituting the said accusation. The Magistrate inquired into the offence and convicted him.

Held, (1) that the Magistrate was competent to try the accused. The giving of a B summary was by no means tantamount to the grant of a Magisterial sanction for the prosecution of the original complainant, inasmuch as a B summary was not an order passed under the Code of Criminal Procedure at all, but was a mere administrative order made by the Magistrate for the purpose of facilitating Police work and Police statistics;

(2) that the offence in this case was constituted by the maliciously false report which the accused submitted to the Police, and that offence was not committed in, or in relation to, any proceeding in any Court, and, therefore, no sanction was needed for the prosecution of the accused.

Application for revision from the order passed in appeal by the Sessions Judge of Broach, confirming the conviction, but varying the sentence, passed by the first class Magistrate of Godhra.

Mr. *Ratanlal Ranchhoddas*, for the Accused.

Mr. *L. A. Shah*, acting Government Pleader, for the Crown.

JUDGMENT.—The only point, which we need notice, taken on behalf of the applicant, was that the learned Magistrate had no jurisdiction to inquire into the offence, and the reason why it is argued that he had no such jurisdiction is that he had already given to the Police what is called a B summary in regard to the accusation by the accused man. But the learned Magistrate, it seems to us, is perfectly right in saying that a B sum-

mary is not an order passed under the Code at all, but is a mere administrative order made by the Magistrate for the purpose of facilitating Police work and Police statistics. It is in our view quite clear that the giving of this B summary is by no means tantamount to the grant of a Magisterial sanction for the prosecution of the original complainant.

Then it was said that if such an order does not amount to a sanction, there was not in this case any sanction at all for the prosecution of the accused. That, no doubt, is so, but the prosecution is, notwithstanding, valid and good, because the law does not require that any sanction should be accorded in such a case. The law on the subject is to be found in section 195, clause (*b*) of the Criminal Procedure Code, and that requires a sanction only where an offence under section 211 is committed in, or in relation to, any proceeding in any Court. Here the offence was constituted by the maliciously false report which the accused submitted to the Police, and that offence was not committed in, or in relation to, any proceeding in any Court; no sanction, therefore, was needed for the accused's prosecution.

On the merits, we agree with the view taken by the learned Sessions Judge and discharge the Rule. The effect of this order will be that the accused, who is now on bail, must be re-arrested and committed to prison to serve out his sentence.

Rule discharged.

CALCUTTA HIGH COURT.

CRIMINAL APPEAL No. 172 OF 1912.

June 18, 1912.

Present:—Sir Ashutosh Mookerjee, Kt., Judge, Mr. Justice Carnduff and Mr. Justice Imam.

JHAKRI CHAMAR AND OTHERS—ACCUSED APPELLANTS—

versus

EMPEROR—OPPOSITE PARTY.

Private defence, right of—Burden of proof—Assault by accused when deceased was violating woman—No proof that accused assaulted deceased afterwards—Penal Code (Act XLV of 1860), ss 34, 99, 100, 148, 304.

The right of private defence is a restricted right, and section 100 of the Penal Code has to be read subject to the provisions of section 99.

Javiram Mahton v. *Emperor*, 35 C. 103; 7 Cr. L. J. 123, relied upon.

When one man takes away the life of another man, the *onus* is on him to show the circumstances which justify his act in law. But where the deceased was assaulted, while he was in the very act of violating a woman, by her relations, no question of burden of proof arises, and the case falls within section 100 even as qualified by section 99.

The accused assaulted the deceased while the latter was in the very act of violating a woman related to the accused. The deceased escaped out of the room; in the corridor he was assaulted by persons other than the accused. The deceased finally got into the court-yard where he was beaten to death by a large body of persons. There was no common intention between the accused and the persons assembled outside the house.

The accused were not shown to have taken any part in the assault upon the deceased after he had escaped from the room and come to the corridor and finally to the court-yard:

Held, that the accused could not be convicted under sections 304 and 148, Penal Code.

Appeal against the order of the Sessions Judge of Bhagalpur, dated February 2nd, 1912.

The appeal was originally heard by Mr. Justice Carnduff and Mr. Justice Imam, on April 29th, 1912. No one appeared for either the appellants or the Crown. The opinions of their Lordships were as follows:—

CARNDUFF, J.—On the night of the 18th November last, one Raj Kumar Singh was killed in the village of Nurpur, of which he was a proprietor, and the Sessions Judge, agreeing in the main with both the assessors, has found that the appellants, among others, are responsible for having caused his death. Raj Kumar was apparently a man of dissolute habits and licentious tendencies, and he, undoubtedly, met his fate when visiting a house in which a young Chamar woman, Sarbatia, and her sister-in-law, Jogia, were sleeping alone together at the time. The assessors evidently were satisfied that Raj Kumar had an assignation with Sarbatia, that the Chamars of the village had become aware of the fact, and that they deliberately assembled, seized Raj Kumar, and beat him to death. They, therefore, thought the appellants guilty of murder and rioting. The learned Sessions Judge took a less serious, and, perhaps, safer view of the case, holding that no pre-concerted action on the part of the villagers had been proved, but that they had proceeded under the stress of grave and sudden provocation. In these circumstances, he convicted them under sections 304 and 148 of the Indian Penal Code and he sentenced each to only three years' rigorous imprisonment.

JHAKRI CHAMAR v. EMPEROR.

I think that the learned Sessions Judge has weighed the evidence with ability, care and discrimination, that he has arrived at as near the truth as is possible, that he has shown a due appreciation of the facts, and that he has taken a reasonable and proper view of the case. I would, consequently, dismiss the appeal.

My learned brother, however, informs me that he is unable to agree and considers that the appellants are not guilty of any offence and ought to be acquitted. I understand that he feels no doubt as to Raj Kumar's having been killed by the Chamars of the village in connection with his visit to the house in which Sarbatia was; but he is of opinion, *first*, that the evidence is insufficient to prove that the appellants were among the assailants, and *secondly*, that if they were, they were acting in the exercise of the right of private defence and were justified in killing Raj Kumar, inasmuch as the object of the latter was rape.

As to the identity of the appellants, there is ample evidence, if believed, to establish it; and the Judge and assessors, who were in a much better position than ourselves, seem to have had no hesitation in accepting it. It does not, in the circumstances, surprise me to find it possible to pick holes in the record. The principal witnesses are all Chamars, if not also near relations of the appellants, and a perusal of their depositions makes it very obvious that they were only too willing to respond to any suggestion of the defence and to modify in cross-examination their statements in chief so as to save the accused as far as possible. The result is that there is a good deal of worthless evidence and a certain amount of contradiction: but while this presents some difficulty at the outset to one who has nothing but the record before him, the difficulty is here by no means insurmountable, and it may well be imagined that none was felt by those who had to deal with the matter at first hand. On the record itself, it seems to me that the evidence of Sarbatia alone is sufficient to prove beyond all doubts that the appellants, who are her husband, her father-in-law and brother-in-law, were, as she asserts, present and took part in the attack on Raj Kumar. She at least must have been able to recognise them by their voices, and it cannot be that she would have mentioned them thoughtlessly or carelessly.

On the second point, I would first observe that, where the right of private defence is set up, the *onus* is on the accused to show both that it existed and that it was not exceeded: *Asiruddi Ahmed* v. *King-Emperor* (1). It rested, therefore, on the appellants in this case to prove affirmatively, whether by cross-examination or otherwise, that the intention of Raj Kumar was to commit rape and also that they killed him not by way of revenge but because it was in the circumstances necessary to go that length in order to prevent his accomplishing his object. That they entirely failed, if it can be said that they attempted to prove anything of the kind, and that they at most succeeded in raising a mere suggestion of outrage, is to my mind clear. It is indeed a question whether the plea was ever properly taken: for the defence of the persons before the Court was that they knew nothing of the occurrence, and it was not till the end of the trial that a written statement was filed on behalf of all of them, which concluded with the remark that if any other persons had committed the offences charged, then, on the prosecution's own showing, they were protected by section 100 of the Penal Code. But let that pass, and let us now see what is the evidence of the prosecution thus relied upon to prove that Raj Kumar intended, or might reasonably have been thought to have intended, to ravish Sarbatia. There is, of course, Sarbatia's statement that Raj Kumar "began to dishonour her whilst she was sleeping" and so on; but that is just such a statement as she was almost certain to make, and it is, read as a whole, a statement which strikes me as, on the face of it, incredible. Then there is the evidence of Jogia (which is on this point quite inconsistent with Sarbatia's and equally incredible) to the effect that Raj Kumar forced an entrance into the room, turned her out and then proceeded to deal with the helpless and protesting Sarbatia. And there remain conflicting statements as to the alarm raised by the women, some witnesses saying that they cried out "thief, thief," and others that they proclaimed

(1) 8 C. W. N. 714; 1 Cr. L. J. 708.

the fact of Sarbatia's dishonour. At the utmost, as I have indicated, the defence succeeded, with the aid of not unfriendly witnesses, in drawing the red herring of outrage across the trail: but they certainly fell very far short of establishing the theory of attempted rape, and they would, I think, have found it extraordinarily difficult to do that. Raj Kumar may have been a successful libertine of the first water, for that is what I take to be all that is really meant by the palpably exaggerated statements of the witnesses who declare that he had for some time been busy "dishonouring" their female relations. But that is one thing, and rape is another: and, like the Sessions Judge, I find it difficult to believe that, whether there was an assignation or not, Raj Kumar contemplated more than seduction and adultery. I have tried many cases of rape, but never one like this in which the suggestion is that the offender visited the prosecutrix at night with the idea of ravishing her in the midst of her homestead and with a sister-in-law almost looking on. The whole truth is known only to Raj Kumar who is dead, and two persons who could hardly be expected to disclose what reflected on the honour of the women concerned. The Sessions Judge was, therefore, here driven to surmise, but his surmises are in favour of the appellants, and I am myself by no means sure that the assessors were wrong. Be that, however, as it may, I can see no reason whatever for discarding the opinions of the Judge and the assessors in so far as they coincide and I believe that, as the matter stands, substantial justice has been done.

As we are divided in opinion, the case must, under the orders of the learned Chief Justice, be laid before another Judge for disposal under section 429 of the Code of Criminal Procedure, 1898.

IMAM, J.—The evidence in this case is far from satisfactory to support the conviction of the appellants. What appears to have happened was that one Raj Kumar Singh, a *zemindar* of dissolute habits, was caught in the house of Lungi, the third appellant, at night and beaten to death by a number of Chamars. It is said that on the night of 18th November last, he left his home at about 10 or 11 P. M. and went in company with Kouleshwar Chamar to the Chamar Toli of *Mouza* Nurpur. There he entered the house of Lungi Chamar, where there was a young Chamar girl named Sarbatia, wife of Jhakri, the first appellant, for the purpose of sexual connection with her. A cry of "thief, thief," raised by the girl, roused the whole neighbourhood and drew to the spot a number of Chamars who caught Raj Kumar there and beat him to death. Medical examination shows some wounds caused by a cutting weapon of dull edge such as a blunt axe, three fractures of the 8th, 9th and 10th ribs and many bruises and *lathi* marks all over the body. The Civil Surgeon, who has been examined as a witness, stated his opinion that death had been due to shock as the result of the infliction of the injuries noted by him. It is to be noted that medical evidence does not ascribe the death of Raj Kumar to any particular injury as its cause. There appears to be no doubt that the nocturnal excursions of this losel had become too frequent and too unbearable for the inhabitants of the hamlets in the neighbourhood of Nurpur. Whatever may be said of the evidence of the approver, Botha Chamar, in this case, we may safely accept the certificate of character that he gives in his deposition to the deceased. He says:—"In my house he dishonoured my wife, my sister, and my *bhojai*," "if a husband and wife were sleeping together, he would threaten the man with a *phalsa*." "Raj Kumar Sing used to dishonour women by force. He had done so for about two years.....He used to go out at night to dishonour women. He outraged many women of those *bustis* forcibly. The women used to cry out that their honour and their lives were being taken.....when the women cried out we used to assemble there. Many of us had *lathis* in our hands." "The villagers of 4 *bustis* used to collect whenever there was a cry." All this may be more or less exaggerated, but on a consideration of all the evidence and circumstances in this case, I am satisfied that the libidinous character of the deceased had harried the humble villagers, and none felt secure against an invasion from this foul libertine.

The case for the prosecution, though not clearly defined as to whether the deceased had gone there to commit rape or adultery, admits that he was in the house

with the object of sexual intercourse with the wife of the first appellant. The learned Sessions Judge holds that adultery and not rape was the motive of the deceased, and, therefore, the provisions of section 100 of the Indian Penal Code do not apply to the case in justification of the alleged conduct of the appellant. This finding of the Judge is not supported by the statement of any of the witnesses for the prosecution, and, in my judgment, is based on surmise. Looking at the general probabilities, he says, there was some previous arrangement which brought Raj Kumar to the house to meet the woman Sarbatia. The learned Judge has further shown his inclination to hold that the woman Jogia had acted as procuress for Raj Kumar. On the record, there is not a shred of evidence that Sarbatia had an assignation with Raj Kumar or that she was a girl of bad character or that the woman Jogia was a procuress. In fact, the probabilities of the case rebut any such conclusion, or, correctly speaking, assumption, for it is too obvious that had Jogia been Raj Kumar's procuress and Sarbatia [illegible]n a consenting party to an assignation, [illegible]ey would not have raised their shouts [illegible] "thief, thief" to draw the entire neighbourhood to the scene. The evidence is all [illegible] favour of a rape or forcible ravishment. [illegible]t, granting that Raj Kumar was in the house by reason of prior arrangement with Jogia or Sarbatia or both, there is no evidence, and, indeed, not even a suggestion by the prosecution, that these three appellants had any knowledge of the presence of Raj Kumar with the consent of the women. Even if, there were such evidence, its patent improbability would justify its rejection. It, therefore, follows, on the cry of "thief, thief," and the declaration then and there of Sarbatia that she was being outraged, coupled with the notoriety for lewd character that the libertine had achieved, it was but a most natural impression at that moment on the minds of these men that the girl was being ravished against her will. The husband, his brother, and his father, *i.e.*, the three appellants were entitled, and, indeed, nature dictated it, to save a girl of their house from the hands of the ravisher, and if in saving her they caused no more injury than was necessary for the occasion, their action would be protected by the provisions of section 100 of the Indian Penal Code. In this case, there is no evidence as to what injury was caused by which of the assailants, but even if such evidence were present, death not being due to any particular injury, they could not be held guilty of an offence under section 304 of the Indian Penal Code by itself or read with section 34 of the Indian Penal Code.

The appellants had been committed to the Court of Session to stand their trial for an offence under section 302 read with section 34 of the Indian Penal Code; at the trial, the learned Sessions Judge framed an additional charge of rioting under section 148, Indian Penal Code, with the common object of beating Raj Kumar Sing, being armed with deadly weapons. If in the view of the learned Judge a charge under section 148 of the Indian Penal Code was warranted, there should then have been a consequent amendment of the charge under section 302 read with section 34 by altering it to be read with section 149.

Reading the evidence, I do not agree with the learned Judge in thinking that the record discloses, at least on the part of these appellants, any offence of rioting by them. I cannot but remark here that the Deputy Magistrate who committed this case to the Court of Session correctly appreciated the facts of the case and the law bearing on the same in not framing a charge under the rioting section.

There can be no doubt that Raj Kumar was a vile intruder in the home of these appellants, and their conduct in striking him was a just vindication of their home, and if the neighbours, who were attracted to the spot by the cries of the women, finding it was Raj Kumar, began to beat him, I am unable to hold that these three appellants were members of an assembly whose common object was to commit an offence, while the neighbours could be said to be committing an offence in striking Raj Kumar; the action of these appellants is very much distinguishable from the conduct of the others, for these men were in their own home, defending one of their women and resisting a disgraceful aggression on their sacred rights by an abandoned character. I hold that the conviction of

these appellants under section 148 is bad and should be set aside.

Referring to the conviction under section 304, it has to be noticed that the learned Judge holds that the cries of the two women, Sarbatia and Jogia, brought many Chamars, including these three appellants, to the scene, and, indeed, the evidence leaves no room for doubt that the frequent misconduct of Raj Kumar had roused the neighbourhood against him, and the gathering together of a large crowd would be put a natural sequence to past incidents. The learned Judge correctly holds that "clearly many persons did join in the beating, but whether a particular individual was amongst them is difficult to say." From this finding of the Judge, it is apparent, it is impossible to hold on the record what was the extent of bodily injury caused by these appellants to Raj Kumar. Sarbatia says that these appellants began to beat Raj Kumar when they asked him to leave her and he would not—under the circumstances, the appellants did what was most natural and acted in the exercise of their right of private defence. In order that an accused person may be called upon to prove that he has not exceeded his right of private defence and that he has caused only such injury as was in the circumstances necessary, the *onus* is on the prosecution to establish what injuries had been caused by the accused. In the present case, there is no evidence as to what injuries had been caused by these appellants in order to enable me to say that the right had been exceeded; unfortunately while these appellants were engaged in defending their own rights, a number of outsiders, actuated by their own wrongs, beat Raj Kumar, and it is impossible to distinguish the injuries. There is no evidence in this case that injuries caused by the appellants were such as by themselves to have brought about the death of the deceased.

Turning to the implication of individual accused, I find that the witnesses whose evidence bears directly on the occurrence are Botha Chamar, Sarbatia Chamarin, Jogia Chamarin, Mankia Chamarin, Kowleshar Chamar, Darogi Chamar and Rajan Chamar. In respect of Botha, Jogia, Mankia and Kowleshar, the learned Judge does not hesitate to say that their evidence is worthless—some reliance, however, is placed on the evidence of Sarbatia, Darogi and Rajan. I place no reliance on the evidence of Darogi, as it appears he had not been examined as a witness during the Police investigation. The only evidence that is worth anything at all in this case is that of Sarbatia, and on her statement I am unable to uphold the conviction of these appellants.

For the above reasons, these appellants are entitled, in my view of the case, to an acquittal in respect of both charges.

I observe that the learned Judge in his judgment has referred to the statement of Kowleshar in the Police diaries, from which, the Judge says, it appears that Kowleshar, who is Sarbatia's cousin, was sent to fetch Sarbatia to Lungi's house. It is hardly necessary for me to say that the Judge has acted wrongly in relying on that statement, as facts and statements within the Police diaries cannot be used as materials to help the Court in a criminal trial to come to a finding on the evidence in the case.

On account of this difference of opinion, the appeal was heard by Justice Sir Asutosh Mookerjee.

Mr. *J. N. Roy* with him Babu *Sarat Chandra Lahiri* appeared for the Accused as *amicus curiæ*.

Mr. *G. H. B. Kenrick*, *K. C.*, Advocate-General and Mr. *Orr*, Deputy Legal Remembrancer, for the Crown.

JUDGMENT.—This is an appeal on behalf of three persons, Jhakri Chamar, Jhonti Chamar and Lungi Chamar, who have been convicted by the Sessions Judge of Bhagalpur under sections 304 and 148 of the Indian Penal Code and sentenced to rigorous imprisonment for a term of three years under each section, the sentences to run concurrently. The appeal was heard in the first instance by Mr. Justice Carnduff and Mr. Justice Imam. There was no appearance on behalf of the accused or of the Crown before the learned Judges; upon an examination of the record, Mr. Justice Carnduff came to the conclusion that the convictions and sentences ought to be affirmed; Mr. Justice Imam took the contrary view and held that the appellants ought to be acquitted. The appeal has been placed before me under section 429 of the Criminal Procedure Code. I have had the advantage of full and able arguments, both

from Mr. Roy who appeared as *amicus curiæ* on behalf of the accused and from the learned Advocate-General who appeared in support of the conviction. Since the close of the argument, I have minutely scrutinised every paper on the record, and I shall now proceed to set out the conclusions at which I have arrived.

There is no room for doubt on the evidence that on the night of the 18th November 1911, Raj Kumar Singh, one of the proprietors of village Nurpur, was assaulted by a large number of men and was so severely beaten that he was killed on the spot. The evidence makes it plain that Raj Kumar Singh was a man of dissolute habits, and that he took advantage of the position of influence he occupied in the village, to visit the houses of the residents, and, in many instances, to ravish their women. It is also incontestable on the evidence that on the night on which he met with his death, he had visited a house in which a young Chamar woman Sarbatia and her sister-in-law Jogia were sleeping. The question has been raised in these proceedings, whether Raj Kumar had an assignation with Sarbatia or whether he had gone to the house to violate her according to his accustomed mode. There is no foundation, in my opinion, for the theory of assignation. Sarbatia, who was examined on behalf of the prosecution, asserted that she had never met or known the deceased and Jogia substantially supported her statement in the Court of first instance. I see no reason to disbelieve these statements. The theory, moreover, is inconsistent with what is conclusively proved to have happened; as soon as the women saw the man enter the house, they cried out "thief, thief," which brought to the spot the neighbours in large numbers. If his visit was pre-arranged, he would be expected and would be received in a very different manner by the women concerned. I must take it, therefore, as conclusively established on the evidence that on the night of the 18th November 1911, Raj Kumar Singh sallied forth on one of his usual nocturnal expeditions of debauchery and licentiousness, and went to the house where Sarbatia and Jogia slept. Their shouts attracted the notice of the male members of the household and also the neighbours in the surrounding houses; the result was that a large number of men collected on the spot. The question which next requires consideration is, whether the three appellants, one of whom is the husband of Sarbatia, another her brother-in-law and the third her father-in-law, were in the assembly. I think it is proved beyond reasonable doubt that they were on the spot; but before they could render any effective help, Raj Kumar Singh had entered the room and was violating the girl Sarbatia. I think it is further established that the three appellants went inside the room and assaulted Raj Kumar Singh while he was on the bed. The evidence of Sarbatia indicates that at this stage she escaped from the room. What followed subsequently is involved in some obscurity, but this much is clear that Raj Kumar Singh came out of the room. He was assaulted by the people who had collected on the corridor, and, subsequently beaten to death in the court-yard by the villagers who had in the interval collected in large numbers. The evidence, in my opinion, does not indicate the nature of the injuries inflicted by the appellants upon the deceased while he was on the bed. The evidence also fails to indicate, with any approach to certainty, that the appellants took part in the assault upon the deceased either in the corridor or in the court-yard. The statements of the witnesses as to what happened at this stage are vague and uncertain. Three of these, Kowleswar, Darogi and Rajan, are of little value, even according to the Sessions Judge, and I see no reason to differ from him in his estimate of the weight to be attached to their assertions. Sarbatia herself has been regarded by the Sessions Judge, as not wholly trustworthy; at any rate, after she had escaped from the room from the hands of her ravisher, she did not see what happened in the corridor and in the court-yard. The evidence of the approver, Botha Chamar, is obviously unreliable, and, in the course of his examination, he had to be warned that if he did not tell the whole truth, he would find himself in trouble. He gave a long string of names of persons whom he saw in the assembled crowd; as to several of these, his statement has not been accepted by the Sessions Judge. The witness Mankia also is unreliable, and I am unable to say that the approver has been corroborated,

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